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JUDICIAL DECISIONS

OF THE

STATE SUPERINTENDENT OF COMMON SCHOOLS

STATE SUPERINTENDENT OF PUBLIC INSTRUCTION

STATE COMMISSIONER OF EDUCATION

FROM

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BY

THOMAS E. FINEGAN M.A. Pd.D. LL.D.

Of the Albany County Bar

Assistant Commissioner for Elementary Education of the State of New York

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To

The Late Andrew S. Draper LLB. LLD.

In

Recognition of his services to public education as a teacher, a member of a city board of education, a trustee of a State Normal College, a State Superintendent of Public Instruction, a superintendent of schools in a leading American city, a president of a great university, and Commissioner of Education of the State of New York from April 1, 1904, to March 29, 1913.

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INTRODUCTION

In 1822, the Legislature conferred upon the State Superintendent of Common Schools the authority to hear and determine all questions in controversy which might arise in the administration of the common school system. The decision of the State Superintendent upon such questions was made final. As the public school system has developed, the authority of the chief school officer of the State has been extended in such matters until the Commissioner of Education is not only authorized but is required to hear and determine such cases as are properly brought before him. These cases are called appeals and include all disputed points which may arise at school district meetings or school board meetings or that may grow out of the official action or decision of any school officer. The language of the law is broad and includes the official act or decision of any officer, school authorities or meetings under the general Education Law or any other law pertaining to the common school system. The Commissioner of Education is given great power in this respect, as the law distinctly provides that his decision in all such cases shall be "final and conclusive and not subject to question or review in any place or court whatever."

It will be observed that the chief educational officer of the State has exercised this judicial function for ninety years. The exercise of this authority for such a long period has resulted in the establishment of rules of practice so that a proceeding before the Commissioner of Education must be instituted as an appeal or petition and with the formality of a court proceeding. The law gives the Commissioner of Education the authority to make such necessary orders in a proceeding as will make effectual his decision therein.

More than twelve thousand formal opinions have been rendered by the chief officer of the State education system during the ninety years that this practice has been in operation. For many years these decisions were not numbered but over six thousand of such decisions have been rendered since the plan of numbering them was commenced.

The decisions in these cases have been regarded as binding in the interpretation of the laws relating to the schools, as the decisions of the courts have generally been upon the interpretation of all laws.

This method of disposing of contested cases involving the administration of the schools has been of vital service to the interests of public education. It has provided an inexpensive, expeditious means for the settlement of the numerous questions which are bound to rise in the administration of a work involving so much detail and such important interests as a great system of education which is designed to meet the necessities of ten million people. This plan also placed the interpretation of these questions with the officer charged with the general supervision and direction of the State's educational policies so that such questions should be determined upon sound educational principles.

The preparation of this volume has necessitated great labor and research. These decisions were not all in printed form. It was necessary to obtain copies and read the entire number of twelve thousand and more. From these about eight hundred cases have been selected. Those have been chosen which are of value in showing the historical development of the school system and more particularly those which have a bearing upon the interpretation of the present laws governing that system. The labor of preparing this volume was commenced during the period which I served as Chief of the Law Division of the Education Department and had been completed at the time of the Capitol fire on March 29, 1911 when the manuscripts thereof were destroyed in that fire. Some courage and some faith in the necessity of the work were necessary for the duplication of the labor required to prepare the manuscripts a second time. This task is again completed and in the hope that the volume may be of sufficient service to those officially charged with the management of the schools to cause them to feel that the labor of the author has been well directed.

T. E. F.

Albany, N. Y.

December 17, 1913

APPEALS

JURISDICTION OF SUPERINTENDENTS DISCUSSED AND DETERMINED

If commissioners withhold assent to raise a tax larger than $400 for building a schoolhouse, their refusal is subject to review upon appeal.
Decided September 18, 1841

Spencer, *Superintendent*

The inhabitants of the village of Cuba had been united in one district by the consolidation of two others. They had been offered a site for a schoolhouse, in a central and commodious location, upon the sole consideration that they should erect upon it a house worth $800. They unanimously voted to accept the site and raise the tax, and applied to the school commissioners for consent to levy that sum. Consent was refused on the ground that the consolidation of the districts would be the means of breaking up the select school hitherto maintained in the district, and, further, that the inhabitants were unable to bear the increased burdens of such an organization.

The commissioners have a discretionary power to grant or refuse their consent. But in this case it was not wisely exercised. They were bound to have a stronger interest in the improvement of the common schools than in the welfare of a private select school. The inhabitants, who ought to understand their own interests, and know their pecuniary resources, had unanimously resolved to raise the tax and shoulder the burden of the new organization. The commissioners ought not to assume that they had overestimated their ability.

The majority of the inhabitants of a district may consist of persons destitute themselves of pecuniary resources, and desirous to avail themselves of the property of the minority to build an unnecessarily costly schoolhouse for the district. The check, which the commissioners possess, to abuses like this, is wise and salutary, and that check was undoubtedly conferred with a view to the possible happening of cases of this description.

The discretion exercised in this case, like that of granting or refusing a certificate to a teacher, is the subject of appeal. The authority of the Superintendent upon appeal extends to all matters arising under the school laws. His decisions have been treated as conclusive by the courts, and acquiesced in by the Legislature and the people.

The commissioners were ordered to give their consent to the tax of $800. Per Spencer, July 19, 1841.

Subsequently the same case came up a second time, on the refusal of the

commissioners to obey the order of the Superintendent. The previous decision was sustained and enforced in an elaborate opinion, from which we take the portions treating of discretionary powers, and the appellate jurisdiction of the school department.

"The discretion of public officers is a legal one, to be governed by sound principles, and not by the capricious whim of the individual, and the instances are frequent where courts of law regulate and direct the exercise of discretionary power by officers, where third persons have an interest in such exercise. The only discretion which courts do not undertake to control is that which, according to Justice Sutherland (5 Wendell 125), 'is not and can not be governed by any fixed principles and rules.' Few matters would seem more susceptible of the application of fixed rules than the size of a schoolhouse necessary to accommodate properly a given number of children, the amount of money required for its construction, and the ability of a district to raise a given sum. So that even upon any of the ordinary processes of law, this would be a case where the discretionary power of commissioners could be regulated and controlled. But when we consider that a tribunal has been erected for the express purpose of supervising all the officers engaged in the administration of the common school system; that there is scarcely an act to be performed by them which does not involve more or less discretion, and that an appeal is given from all these acts in the most comprehensive terms; we see at once that the rules which would govern legal proceedings on common law process are not the proper guides, and that we must recur to broader and more enlarged principles.

"The word 'appeal' comes from the civil law, and its nature and office is to substitute the appellate tribunal for that whose acts are examined; and, if the case be one involving discretion, then the appeal invokes that very discretion in the superior, in the same manner and to the same extent that it was possessed by the inferior. 'The cause is in the appellate court,' says the Supreme Court of the United States, in 1 Wheaton 112, 'as if it were in the inferior court.'

"The great majority of cases decided in this Department are those involving more or less discretionary power.

"The statute itself enumerates many cases that are entirely of a discretionary character. The decisions of district school meetings upon any subject upon which they are competent to act, such as the designation of the site of a schoolhouse, the amount of money to be raised by tax, and the omission to levy taxes, involve large discretion, but are nevertheless subject to appeal by the express words of the law. The formation and alteration of school districts must be guided by a sound judgment upon various facts and circumstances, such as the number of children, the amount of taxable property, the extent of territory, and the convenience of the inhabitants. Some fixed rules may be applied, but in many cases the decision must depend on general ideas of the propriety and fitness of things.

"Among cases not enumerated, and which fall within the fourth subdivision of the section conferring the right of appeal, the following are of daily occurrence, viz: the granting or refusing a license to a teacher; the valuations of

schoolhouses or other property on the formation of new districts; the refusal of trustees to call special meetings, to employ teachers, or to keep the schools open, and the employment and dismissal of teachers; the government of the school; the admittance and expulsion of scholars, etc. Indeed it would be difficult to specify a single act which any officer concerned in the administration of the system may perform, that has not been the subject of appeal.

"The present case presents less opportunity for the exercise of discretion than many of those above enumerated. The expense of a schoolhouse must depend upon its size and materials. Its size, the number of rooms, and the proper conveniences, will depend upon the number of children in the district of the proper age to occupy it. The only other element for consideration is the ability of the district, a fact easily ascertained from the assessment roll. There is, therefore, nothing in the nature of the decision to be made to prevent its being reviewed and examined upon fixed and settled principles.

"So far as our laws afford any analogy in cases of appeal, there does not appear to be any distinction between discretionary and other cases. Thus, appeals to county judges from commissioners of highways, respecting the opening, altering and discontinuing of highways, necessarily involve that discretion which depends on private judgment.

"Upon the most mature deliberation, then, I can not doubt that the granting or refusing of a certificate, that a larger sum than $400 should be raised for building a schoolhouse, is necessarily the subject of an appeal to the Superintendent. And as, in all cases of appeal, the statute declares his opinion to be 'final,' there must be some mode of giving it effect. In the present case, the commissioners decline obedience to the order directing them to grant the required certificate. From that refusal an appeal has been made, and the commissioners have answered. The whole system must be very defective if there be no power to have an act performed which the competent tribunal has determined to be legal and proper. Perhaps the appellants may enforce the order of the Superintendent, by an application to the Supreme Court for a mandamus.

"But, if there be a more direct, simple and less expensive remedy, I am bound to pursue the policy of the statute in erecting this tribunal by furnishing it. I think there is. It is a universal principle, recognized in England and in this country, that the court to which a writ of error or an appeal is brought is bound to render the judgment which the inferior tribunal should have rendered. Upon this principle, this Department may authorize the inhabitants of the district, at a lawful meeting, to raise the additional sum necessary for building a new schoolhouse that being the judgment or decision which, in the opinion of the Superintendent, the commissioners should have made. I find an order of my immediate predecessor, founded on this principle, and analogous to the one proposed to be made on this appeal, in the case of the trustees of school district no. 30, in Johnstown, in *Common School Decisions,* page 161. The inhabitants of the district had authorized the trustees to make such repairs to the schoolhouse as they should think necessary and proper, and, in pursuance of such authority, they had contracted with a workman to make the repairs, and agreed to pay

him $30. But the district refused to vote more than $25. On appeal, the Superintendent, Mr Dix, held that the district was bound to indemnify the trustees; and he ordered that the trustees should make out a tax list for the whole amount and collect it."

In pursuance of this opinion, the district was authorized to raise a tax of $400, over and above the $400 which the district could otherwise raise, and the trustees were empowered to levy and collect it.

3583

The law intends the jurisdiction of the Superintendent of Public Instruction to be statewide and to cover all controversies touching any official act of local school officers. His jurisdiction is not obtained from local school acts, but from the general school law, and is general unless taken away by a special act in language so clear as to leave no doubt of its intent.

Decided April 4, 1887

Draper, *Superintendent*

In an appeal brought from the action of the board of education of the city of Binghamton in the matter of the change or designation of certain textbooks, the board denied that the Superintendent had any jurisdiction to hear and decide the appeal.

"It is said that the school system of the city of Binghamton is governed by a special act of the Legislature (chapter 322, Laws of 1861) and its amendments and that there is nothing in this special act conferring upon the State Superintendent the authority to determine appeals from the acts of the board of education of that city. It is also insisted that the provisions of the Consolidated School Act (chapter 555, Laws of 1864) concerning appeals to the State Superintendent from the acts of local school officers do not extend jurisdiction to the act of a board of education in a city having a special school act. It is accordingly argued that there is no jurisdiction at all in the present case."

The question is an important one and I have endeavored to give it that examination which its gravity demands.

I have examined the statutes specially referring to the supervision of the schools of the city of Binghamton with considerable care and am of the opinion that, if jurisdiction in this case depended alone upon these statutes, it would not be difficult, reading the several successive acts together, to discern an intention to confer it, on the part of the Legislature.

But in my opinion it does not depend upon the provisions of the special acts, having reference only to a particular locality. Title 12, section 1, chapter 555, Laws of 1864, is as follows:

Section 1 Any person conceiving himself aggrieved in consequence of any decision made

1 By any school district meeting.

2 By any school commissioner or school commissioners and other officers, in forming or altering, or refusing to form or alter, any school district, or in refusing to apportion any school moneys to any such district or part of a district.

3 By a supervisor in refusing to pay such moneys to any such district.

4 By the trustees of any district in paying or refusing to pay any teacher, or in refusing to admit any scholar gratuitously into any school.

5 By any trustee of any school district library concerning such library, or the books therein, or the use of such books.

6 By and district meeting in relation to the library.

7 By any other official act or decision concerning any other matter under this act, or any other act pertaining to common schools, may appeal to the Superintendent of Public Instruction, who is hereby authorized and required to examine and decide the same; and his decision shall be final and conclusive, and not subject to question or review in any place or court whatever.

The seventh subdivision of this section contains language as comprehensive as could well be employed. It authorizes any person aggrieved at "any other official act or decision concerning any other matter under this act, or any other act pertaining to common schools," to appeal to the State Superintendent. The contention of the respondent's counsel that the phrase, "any other official act," refers only to acts by the same body, or of the same nature as though specified in the first six subdivisions of the section, can not be adopted. It is an official act concerning "any other matter under this act, or under any other act pertaining to common schools," which is the subject of appeal. It was the obvious intent of the Legislature to provide an easy, inexpensive, speedy and conclusive way for procuring a determination of complaints against any official act of any local school official. Both the language of the law and the different steps taken by the Legislature to bring it to its present state, sustain this construction. Enacted in the early days of the school system, it has from time to time been added to with the evident purpose of making it clear that the jurisdiction of the Superintendent is intended to be statewide, and is to cover all controversies touching any official act of local school officials.

These provisions of the general law were, in substance, in force long before the passage of the special laws referring only to the city of Binghamton. If the Legislature had intended to cut off the right of appeal, as to that city, it would have so provided in the laws particularly applicable to it. It not only did not do this, but it is worthy of note that it expressly preserved the right in the first instance, and omitted to do this only upon a reenactment of the Binghamton school laws, consequent upon the granting of a city charter to the place. It is fair to assume that the omission at that time was either because of inadvertence or because an express reservation was deemed unnecessary. In any event, the State Superintendent does not get jurisdiction from local school acts, but from the general school law. The authority must be held to be general, unless taken away by a special act, in language so clear as to leave no doubt of its intent, and there is no such taking away in the statutes applicable only to the city of Binghamton.

There is another consideration which has not been suggested by the able and alert counsel who appeared upon the argument of this appeal, and which, in view of the foregoing, is perhaps not material to the determination of the question of jurisdiction, and yet it has sufficient bearing upon it to justify me in mentioning it. The appellant claims that the action of the respondent is in violation of chapter 413 of the Laws of 1877, entitled "An act to prevent frequent changes of textbooks in schools." This is an "act pertaining to common schools." The question brought here is one arising under it. The determination of this question may involve the construction of the provisions of this general law, rather than of the special laws relating to Binghamton. It will hardly be contended that the Legislature meant to leave it to the board of education or trustees in each city or district having a special school act, to place such construction as it should see fit upon this general law, and to suit its acts to its views of the meaning of the law, without affording a means of redress to persons differing with it in opinions and aggrieved by its acts. Such a view would result in as many different constructions of the meaning of this statute as there are different localities having special acts, and would defeat the purpose and intent of this general law.

In view of these considerations, it seems clear to me that the grievance of the appellant is properly brought before the Department by means of an appeal, and that, under the laws, it is the duty of the Superintendent to determine the matter.

On this same subject, see also decision no. 3576, dated March 19, 1887.

5384

In the matter of the appeal of Elias P. Mann, mayor of the city of Troy, from the decision of the board of education of the city of Troy, dismissing the charges preferred against Edwin S. Harris, superintendent of schools.

The Appellate Division of the Third Department has held that the Commissioner of Education has the legal authority to hear and determine an appeal from the action of a board of education of a city of the second class operating under the uniform charter for cities of such class in a proceeding to remove the city superintendent of schools on charges.

Decided March 9, 1908

Hon. George B. Wellington, corporation counsel and attorney for appellant
Hon. John T. Norton, attorney for respondent

Draper, *Commissioner*

On May 24, 1907, Elias P. Mann, mayor of the city of Troy, preferred charges against Edwin S. Harris, superintendent of schools of said city. The board of education gave a hearing on such charges and thereafter dismissed the same. On September 4, 1907, Mayor Mann instituted this proceeding to review

the action of the board of education in dismissing such charges. Superintendent Harris, a party in interest in such proceeding, raised the question of jurisdiction of the Commissioner of Education to entertain such appeal. On October 2, 1907, I gave a hearing upon the question of my jurisdiction to hear such appeal and heard argument of counsel for the respective parties to this proceeding. At the close of such hearing I decided that the statutes made it my duty to hear and decide such appeal. On October 9, 1907, an alternative writ of prohibition was obtained from Mr Justice Betts by Superintendent Harris restraining me from hearing or deciding such appeal. Such writ was returnable at Kingston November 16, 1907. Proper return was made and argument heard on that date on a motion to quash such writ. On February 25, 1908, Justice Betts rendered a decision holding that the Commissioner of Education did have the legal authority to hear and determine such appeal and dismissing the writ of prohibition.

The object sought by this appeal was the removal of Superintendent Harris. During the latter part of January Mr Harris resigned the office of superintendent of schools of the city of Troy. It appears unnecessary therefore to give this proceeding further consideration and on motion of Mr Wellington, attorney for appellant, the appeal is hereby dismissed.

Edmund Whittier against the inhabitants of school district no. 11 in the town of Ogden.

An appeal to the Superintendent will not be entertained when the point at issue has been settled by an adjudication upon the same case in a court of competent jurisdiction.

Decided June 23, 1826

Flagg, *Superintendent*

This was an appeal from the proceedings of a meeting of the inhabitants of school district no. 11 in the town of Ogden, at which a tax of $250 was voted to build a schoolhouse. The facts are fully set forth in the decision of the Superintendent.

It is alleged that the vote imposing the tax was carried by the admission on the part of the moderator of the illegal votes of William Hill and Alsen Smith.

The appellant has presented a number of affidavits to show that Hill and Smith, in the opinion of those who testify, were not legal voters. The affidavits set forth generally that the persons testifying have no knowledge that Hill and Smith were legal voters, and from their situation and circumstances do not believe they were.

On the other side, the record of proceedings before a magistrate is produced and duly authenticated, by which it is shown that Hill and Smith were prosecuted for having voted, without being entitled to vote by law, and that on

the trial of the cause it appeared that they were legal voters at the time of the meeting, from the proceedings of which the appeal is brought. In addition to this, Smith and Hill testify that they were at the time of the meeting worth $50 in taxable property.

The Superintendent feels bound to recognize the decision of the court as having settled the point that Hill and Smith were legal voters. This being the only point at issue, it is ordered that the appeal in this case be dismissed.

3875

Frank J. Alverson v. Michael Joy, jr, trustee of school district no. 14, town of Springwater, county of Livingston.

The courts having acquired jurisdiction of the subject matter of an appeal through an action brought thereon by the appellant, the appeal will not be entertained.
Decided April 22, 1890

Draper, *Superintendent*

The appellant, on the 15th day of October last, was employed by the respondent to teach the common school in said district for the period of sixteen weeks. No agreement was made between the appellant and the respondent on the subject of janitor work, or the care of the schoolhouse. The appellant alleges that upon assuming the charge of the school, he found that no arrangement had been made for building fires and cleaning the school building; that he applied to the trustee who assured the appellant that he would attend to the matter at once. This, however, he neglected to do, and the appellant cared for the fires and cleaned the schoolhouse; that the appellant then engaged a boy who assisted in those services for a period of five weeks, for which assistance the boy charged $3, which the respondent refused to pay. Thereafter, the appellant continued to care for the schoolhouse, sweeping the same and building fires until the close of his term. The appellant claims for such services the sum of $15, and for the services of the boy the further sum of $3.

The respondent admits that there was no agreement with the appellant relative to the janitor work, denies that he ever agreed to arrange for having this work done, and avers that it was the custom of the district for the teacher to perform this work. It appears further, that before taking this appeal the appellant brought an action against the respondent before a justice of the peace in said county for the value of the identical services claimed by this appeal.

The fact that an action had been commenced, and that the appellant had sought in the courts the same remedy he now seeks by this appeal, makes a decision by me improper, if not unnecessary. It is a well-established rule that, when the courts have acquired jurisdiction of a matter in controversy over which this Department has concurrent jurisdiction, an appeal will not be entertained. It is unnecessary, therefore, to look into the merits of this appeal.

The appeal is overruled.

3754

In the matter of the appeal of Irving Holcomb v. school district no. 17, of the town of Hancock in the county of Delaware.

Appeals to the Department will not be sustained when the papers submitted are so very defectively prepared, and so poorly arranged as to render it altogether impossible to gain any intelligent understanding from them.

Decided January 19, 1889

Draper, *Superintendent*

Several appeals are brought before the Department by the appellant above named, all of which involve the right of the respondent to tax certain parcels of land owned by the appellant and described by him as lots nos. 5, 6, 7, 16, 17, 18, 26, 27, 28, 36, 37, 38, 46, 47, 48, 56, 57, 58, lying in the Spooner tract. These lots all lie in district no. 17, but the appellant claims that they are owned and occupied by him, and that they lie in one body, and that as his residence is in district no. 12 of the town of Hancock, the lots referred to should be taxed in that district.

The papers submitted by the appellant are numerous, and are very defectively prepared and so poorly arranged as to render it altogether impossible to determine in which case he desires each to be considered. Indeed, it is difficult to understand after the most earnest efforts, what the purpose of the several separate appeals may be. There is no map worthy of consideration submitted.

I shall not undertake to finally determine upon these papers the question as to whether the lots referred to are properly taxable in school district no. 12 or no. 17, but have concluded to discuss the appeals and permit the taxes now levied to be collected, for the following reasons:

1 Because of the defective papers and insufficient map.

2 Because it is shown that the property referred to lies bodily within district no. 17, and is described as separate lots.

3 Because it is shown that it has been taxed in that district for many years.

4 Because it appears that the appeals were longer delayed than they should have been; in one case at least, the proceedings have gone so far as a levy and sale under execution by the district collector.

In view of the foregoing, the several appeals are dismissed without prejudice to the right of the appellant to raise the question as to the right of district no. 17 to tax this property at any future time.

4169

In the matter of the appeal of Seymour C. Bishop and others from proceedings of a special school meeting of district no. 1, town of Fairfield, Herkimer county.

To sustain an appeal to this Department, the appellant must show that he is aggrieved, that is, injured, by the action or decision of which he complains. There should be some real grievance, some positive and serious injury sustained to justify a resort by appeal

to this Department for redress. Where there is no proof that the appellant or any qualified voter of the district has sustained any damage or injury, or that the educational interests of the district have sustained damage, the appeal will be dismissed.

Decided March 9, 1893

P. H. McEvoy, attorney for respondent

Crooker, *Superintendent*

On or about December 1, 1892, the trustee of district no. 1, town of Fairfield, Herkimer county, removed from said district, thereby creating a vacancy in the office of trustee in said district. The clerk of said district issued a notice, stating the fact of the vacancy in the office of trustee, and calling a special meeting of said district to be held at the schoolhouse in said district on December 27, 1892, at 7 o'clock p. m., for the purpose of electing a trustee to fill said office. That said clerk posted said notice for seven full days prior to said December 27, 1892, in seven conspicuous places in said district, but did not serve any other notice of said meeting. That on said December 27, 1892, said special meeting was held and one Simon Eustace was elected trustee to fill said vacancy. That said Eustace accepted said office and entered upon the discharge of the duties thereof, contracted for a teacher and a school is being conducted in said district. From the proceedings of said special meeting this appeal is taken.

The appeal states that the appellant was not served with a notice of said special meeting and had no knowledge of said meeting, and upon information and belief avers that Stephen Comstock, Charles Rands and Philo Hoover, residents of, and legal voters in, said district, were not notified of said meeting and had no knowledge thereof. The affidavit of Comstock only is presented in support of this allegation, and his affidavit is to the fact that he (Comstock) had no notice or knowledge of the meeting.

Section 7 of title 7 of the Consolidated School Act of 1864 provides "The proceedings of no neighborhood or district meeting, annual or special, shall be held illegal for want of due notice to all the persons qualified to vote thereat, unless it shall appear that the omission to give such notice was wilful and fraudulent."

No wilful or fraudulent intent on the part of the clerk in the service of the notice of said special meeting is alleged or shown; but he seems to have acted according to such knowledge as he had upon the subject, believing his action to be legal and proper. There is a complete failure on the part of the appellant to show that he, or any one, has been injured by the alleged irregularity in the service of the notice of said special meeting, and that the results of the meeting would, under any circumstances, have been different.

No person can sustain an appeal unless he is aggrieved, that is, injured, by the action or decision of which he complains. There should be some real grievance, some positive and serious injury sustained, to justify a resort by appeal to this Department for redress. There is no proof that the appellant, or any

qualified voter of the district, has sustained any damage or injury, or that the educational interests of the district have sustained damage.

The appeal herein is dismissed.

3611

In the matter of the appeal of Octave N. Bonnefond, from certain proceedings of the annual school meeting held in district no. 23, town of Hancock, Delaware county, August 31, 1886.

Where a former trustee is charged, after he has ceased to be a school officer, with wrongfully retaining money of the district, the State Superintendent is without jurisdiction over the person charged. In such case, redress can be obtained only through the courts.
Decided June 20, 1887

Draper, *Superintendent*

This is an appeal by a resident and taxpayer of school district no. 23, town of Hancock, Delaware county, from the proceedings of the annual school meeting held in said district August 31, 1886.

The particular proceeding of the meeting objected to by appellant was the vote given to accept the report of the retiring trustee, which contained an item of eleven dollars, paid by said retiring trustee to his counsel for his costs and disbursements in preparing an appeal from the proceedings of the annual meeting, at which one Thomas Swope was declared elected trustee, and immediately thereafter entered upon the performance of the duties of such office. The appellant avers that said retiring trustee appropriated eleven dollars for such expense without a vote of a district meeting authorizing it, or the determination of a county judge after an appeal from a refusal of a district meeting to so authorize the expenditure; that at the time the appeal was taken, said retiring trustee was not a school officer, and was not authorized by a vote of a district meeting to prosecute such appeal.

The present trustee answering said appeal, alleges that said appeal was decided in favor of said retiring trustee, who was the appellant therein; that at the last annual meeting the retiring trustee presented his annual report, and, after request by some voters, presented a receipt for eleven dollars from his attorneys for such services, after which the meeting approved and adopted the report.

I shall not express an opinion as to the legality of the retiring trustee's action, or the action of the district meeting in accepting and approving the same.

The former trustee having ceased to be a school officer at the meeting in question, this Department has no jurisdiction over him. If he has retained moneys illegally, the statute points out the manner of recovering the same by civil and criminal proceedings in the courts. The amount involved is small and the appellant's tax therefor is scarcely noticeable, being ten or twelve cents.

Having no power to enforce a decision of this appeal, if one should be made, I dismiss the same.

3995

In the matter of the appeal of E. R. Fuller v. James M. Shultz and Henry Wheeler, as trustees of school district no. 8, towns of Bath, Wheeler and Avoca, county of Steuben.

Appeals will not be entertained where the allegations are vague and indefinite, and legal and comprehensive proof is not furnished.

Decided September 7, 1891

Draper, *Superintendent*

By this appeal the removal of the respondents from the offices held by them, as trustees, is sought.

The respondents are charged generally with converting district funds to their own use; with receiving pay from the district for services personally rendered; with giving orders upon the collector when there were no funds in his hands; with using public money for repairs without a vote of a district meeting authorizing such repairs; with being discourteous to their associate trustees, and with refusing to respect the expressed wish of the voters in the matter of employing a teacher, and finally, " with many minor illegal acts and irregularities too numerous to mention."

An answer has been interposed in which some of the allegations of the complaint are flatly denied. Others are admitted and an explanation attempted, and countercharges of irregularities made against the appellant during the time he was a trustee of the district.

I am satisfied that the affairs of the district are in a chaotic state. If the respondents have given district orders upon the collector or supervisor when there was no district or public money in their hands, they are guilty of a misdemeanor and are amenable to punishment therefor. If they have appropriated district money to their own use, they are guilty of a felony. If they have become individually interested in contracts with the district, they are guilty of a misdemeanor, and if found guilty of either of the offenses, they should be punished and removed from office.

But I have not sufficient evidence before me upon which a conviction could be had. A majority of the board of trustees at a regularly called meeting of the board, could legally employ a duly licensed teacher, even though a majority of the patrons of the school and taxpayers of the district were dissatisfied with such selection. I have received numerous letters and sworn statements upon each side relating to the charges and counter charges, of which no proof is furnished showing service of copies upon the other side, which I am, in consequence of the failure to show due service, unable to use upon the consideration of this case.

From the correspondence, it would seem that light upon some of the charges has been discovered since the appeal was prepared.

The allegations of the appellant are too vague and obscure.

I have concluded to dismiss the appeal, without prejudice to the right of the appellant to renew the same, when the charges can be more intelligently and definitely stated and more comprehensive and legal proofs offered.

3601

In the matter of the appeal of Edward Thompson v. George L. Johnson, as trustee of joint school district no. 14, towns of Nassau, Stephentown and New Lebanon, counties of Rensselaer and Columbia.

An appeal taken four months after the performance of the act complained of, when no sufficient excuse for the delay is given, will be dismissed.

Decided May 28, 1887

Draper, *Superintendent*

This is an appeal by a resident and taxpayer of joint school district no. 14, towns of Nassau, Stephentown and New Lebanon, counties of Rensselaer and Columbia, from the action of the trustee of said district in issuing a tax list to collect $193.20.

The tax list was issued on the 4th day of October 1886. It is alleged by the appellant that the district meeting authorized a tax of only $150 and that the trustee has added thereto $43.20, which was unauthorized.

The trustee, who appears as respondent, alleges that the sum of $150 was for the current expenses of the school year, and that there existed a deficiency for teachers' wages of $43.20, which it was necessary to raise. It is also alleged that the appeal was not taken until four months had elapsed after the return of the warrant by the collector, and that the appellant had paid his tax under said tax list and the warrant thereto attached.

In view of the facts, which are undisputed, that the tax list and warrant were delivered to the collector in October last and the tax collected of every taxpayer but one, and that the appeal was not taken until February 22, 1887, I am compelled to dismiss the appeal under the rules.

Appeals must be taken within thirty days from the time of the act complained of, or some satisfactory excuse must be given for the delay. None has been given.

5008

In the matter of the appeal of The Hartwood Club v. Frank L. Muller, as trustee of school district 5, Forestburgh, Sullivan county.

An appeal from a school district tax list must be brought by the party aggrieved immediately upon being apprised of the issuance of such tax list. A delay in appealing until after the tax is paid, or its collection enforced, will be fatal.

Decided May 31, 1902

William H. Crane, attorney for appellant
George H. Smith, attorney for respondent

Skinner, *Superintendent*

This is an appeal from the action of the trustees of school district 5, Forestburgh, Sullivan county, in assessing in the school year 1900–1 the sum of $54.50 for school taxes upon the property of the appellant, and also assessing in the school year 1901–2 upon such property the sum of $60.45 for school taxes.

The appeal herein was filed in this Department April 9, 1902, and the answer thereto was filed May 7, 1902.

The following facts are established by the pleadings filed herein:

The appellant herein, The Hartwood Club, is a domestic corporation of the State of New York, incorporated in pursuance of chapter 267 of the Laws of 1875, and the several acts amendatory thereof and supplementary thereto, and was organized in the year 1890 for the purpose of owning and maintaining a game and fish preserve and a summer home for its members, and became the owner, and still owns, a large tract of land in great lots 17, 18, 19 and 20 in the first division of Minisink patent, which tract is a continuous body, and lies mostly in the town of Forestburgh, Sullivan county, and partly in the town of Deer Park, Orange county, State of New York.

The clubhouse, barns, cottages and important improvements owned by the appellant are located on lot 17 and in joint school district 6, aforesaid, and the agent of the appellant resides upon said tract of land and is in occupation of the same, but lives in a dwelling located on lot 17, in said district 6, and the lands in lots 18, 19 and 20 are entirely without buildings thereon, and unoccupied except by the said agent of the appellant, as aforesaid.

In the year 1900, upon the assessment roll of the town of Forestburgh, all the said lands of the appellant were assessed as sixty-five acres improved, at a valuation of $105 per acre; 2783 acres unimproved, at a valuation of $1.50 per acre; making a total of 2848 acres, at a total valuation of $11,000. In said year 1900 the assessors of the town of Forestburgh, in an apportionment made by them, filed with the clerk of said town, apportioned the value of the property of the appellant for school purposes at the sum of $5000. The trustee of school district 5, in the tax list issued by him for the school year 1900–1, assessed the appellant $54.50 upon its property valued at $5000, which sum the appellant paid, under protest, to the collector of said district January 18, 1901.

In the year 1901 the property of the appellant was assessed upon the town roll of Forestburgh at $11,500, and the town assessors of 1901 filed with the town clerk an apportionment of the value of the property of the appellant for school purposes in school district 5 at the sum of $5250. The trustee of school district 5, in the tax list issued by him for the school year 1901–2, assessed the appellant $60.45 upon its property, valued at $5250, which sum the appellant paid, under protest, to the collector of the district September 30, 1901.

The appellant claims that the apportionment so made by the assessors of the town of Forestburgh was null and void; that the assessments so made upon the tax rolls of school district 5 were irregular and without warrant of law; that the taxes so levied in pursuance of such assessments were without juris-

diction of the trustee, and that the moneys collected thereupon should be returned to the appellant.

This Department has uniformly held that an appeal from a tax list, on whatever grounds, must be brought before the payment of the tax, or the collection of the tax; that such appeals must be brought by the party considering himself aggrieved immediately upon becoming apprised of the existence of such tax list. A delay in appealing until the tax is paid or its collection enforced will be fatal.

The rules of practice relative to appeals taken to me provide that an appeal should be taken within *thirty days* after the making of the decision or the performance of the act complained of, or within that time after the knowledge of the cause of complaint came to the appellant, or some satisfactory excuse must be rendered for the delay.

The first act complained of by the appellant was performed in the year 1900, and the second act complained of was performed in the year 1901. No satisfactory excuse is given by the appellant for the delay in bringing the appeal herein. The appellant having paid the taxes assessed upon its property, I am powerless to afford any relief.

The appeal herein is dismissed.

3628

In the matter of appeal of Abbie M. Armstrong v. the trustees of school district no. 15, town of Hopkinton, county of St Lawrence.

Appeal dismissed, not having been taken timely and no reason for the delay being shown. Decided August 10, 1887

Draper, *Superintendent*

This appeal is taken by a person who alleges she was employed in the month of December 1885, by Herbert C. Maynard, then trustee of school district no. 15, town of Hopkinton, in said county, to teach the school in said district for the term of twenty-eight weeks, commencing on or about the 20th day of December 1885, at the rate of eight dollars per week; that she commenced teaching pursuant to said agreement and continued for the term of ten weeks; that at the expiration of said ten weeks a contagious disease prevailed in the district, and that, on account thereof, the trustee requested the teacher to dismiss the school until such disease should disappear; that the appellant dismissed the school accordingly; that said appellant was notified by the trustee that he would advise her when he was ready to have the school begun; that in April 1886, the appellant was requested by the trustee to attend a teachers institute; that she did attend said institute and at its close returned to the district and commenced teaching the school and taught for three weeks; that thereupon the

appellant was informed by said trustee that diphtheria was still prevailing in the district and, acting upon the advice of a physician, he had concluded to close the school for another term; that the appellant returned home and did not and could not engage in any occupation on account of such unfulfilled engagement with the trustee, and that she kept herself at all times in readiness to finish out the term for which she was employed, but that the trustee never notified her to finish such term; that she was paid the sum of $112 only on account of such engagement, and that the district is now indebted to her in the sum of $112, which sum she has demanded payment of from the trustee, and the trustee refused and still refuses to pay the same or any part thereof.

This appeal was verified on the 16th day of October 1886, but was not filed in the Department until the 3d day of March 1887, and a copy of the same does not appear to have been served upon the trustee until the 26th day of February 1887. For an informality the petition was returned to the appellant and refiled in this Department on the 15th day of March 1887. No answer has been received from the trustee to this appeal.

The rules of the Department require appeals to be taken within thirty days from the performance of the act complained of, and without entering into the merits of this case, or without intending to prejudice any rights which the appellant may have in an action in the courts against the district for the recovery of wages, I am compelled to dismiss the appeal.

3963

In the matter of the appeal of Lovina Munson v. school district no. 9, of the town of Hartwick, county of Otsego.

Appeals not brought within thirty days, unless the delay is excused for satisfactory reasons shown, will not be entertained.

Claims for damages for breach of contract, when the extent of the damages are altogether indefinite and uncertain, will not be entertained by the Department.

Decided February 16, 1891

Edick & Smith, attorneys for appellant
Pierce & Arnold, attorneys for respondent

Draper, *Superintendent*

The appellant claims to have been employed by the trustee of the district above named in December 1889, to teach the school in said district for the period of sixteen weeks in the next summer, at the rate of four dollars per week. Numerous conversations between the father of the appellant and the trustee are set forth in their papers, to establish said employment. The term was to commence on the last Monday of March 1890. When the time arrived the trustee refused to permit the appellant to open the school, and informed her that he had

employed another teacher. She brings her appeal for the purpose of enforcing her claim to damages for a breach of the alleged contract.

The appellant is too late in bringing her appeal. The rules of the Department require that it should be brought within thirty days, or that some satisfactory excuse should be rendered.

But aside from this fact, her appeal could not here be entertained. It has been repeatedly held that the Department would not undertake to enforce a claim for damages for the breach of a contract, when the extent of the damage was altogether indefinite and uncertain.

See case of Tillson v. school district no. 4, in the town of Forestburgh, in the annual report of this Department for 1890, at page 131.

The remedy of the appellant is an action in the courts. The appeal is dismissed.

Power of the Department to grant rehearings in matters of appeal considered.
Decided April 18, 1859

Van Dyck, *Superintendent*

This is an appeal asking for a rehearing of all matters in controversy in the district that have been brought before this Department since March 24, 1857.

The main purpose of this appeal is to secure a rehearing, upon the merits, of those facts and arguments presented in an appeal to this Department which was dismissed December 19, 1857, and by restoring, as far as may be, the condition of things existing at that time, to afford the appellants the relief at that time sought.

At this point we are met by the position of the counsel for the respondents, that this Department has no power to grant a rehearing of any matter of appeal, and that, the order of this Department dismissing the appeal having been issued, no further action upon the matters embraced in that appeal can be taken.

It would be doing injustice to the able, ingenious and plausible argument of the counsel upon this point, for the Department to controvert it simply in action, by granting the rehearing, without any statement of the grounds upon which its conclusions respecting the extent of its rights and powers are based.

First, upon this particular case it may justly be said that the *decision* of the Department upon it was expressed or rendered in the communication to Commissioner Boyce, that embodied the conclusions at which the Department had arrived from an examination of the evidence adduced; it is, to all intents and purposes, the decision of the questions at that time pending, and it was proposed, when certain conditions should be reached by the further acts of the parties themselves, to issue an order adapted to the circumstances of the case at that future time. On information, supposed to be reliable, that the conditions stated had been reached, the order was issued dismissing the appeal; this being done for the sole purpose of enforcing the decision already rendered. The dis-

missal of the appeal, therefore, was *not the decision of the case,* as appears by its terms, in which it especially disclaims to act upon the questions raised in the controversy, they having been disposed of (as was supposed) according to the terms of the decision rendered by the Department. If it be objected that this decision was not in form and under seal, it is sufficient to answer that the statute does not prescribe the manner or form in which these decisions shall be expressed. That is left to the judgment of the Department itself. The seal, or other forms commonly attending the rendering of a decision, are proper as evidences to third parties of the authenticity of the proceedings. But they are of no importance to the Department itself, which is cognizant, at all times, of its own decisions.

An order of the Department may be antecedent or supplementary to a decision, and hence may be continued in force, or vacated, at the pleasure of the Department. Thus, on an appeal, by inhabitants, from the proceedings of trustees in the matter of paying public moneys to a teacher, it might be necessary to issue an order to the supervisor, directing him to withhold the payment of the moneys of that district until otherwise directed. It will not be held that this order is fixed and can not be vacated. So, where an order is issued supplementary to a decision, and with a view, or for the purpose of enforcing its conclusions, if the Department shall afterward find that such order is insufficient to accomplish the enforcement of the decision, or, owing to any circumstances of which the Department was unaware, is calculated to thwart the ends proposed by the decision to be reached, it is absurd to maintain that such order may not be modified or vacated, and such other order be issued as will conform to the doctrines of the decision rendered.

I come now to a review of the power of the Department to grant a rehearing of a case upon its merits, after a decision has once been rendered.

The argument of the counsel was chiefly confined to two points: First, that the power to rehear a matter of appeal, after decision rendered, could only exist by express legislative provision, and, no such power having been conferred by the statute, it, of course, did not exist. Second, that the words of the statute, which declare that the "decisions of the Department shall be final and conclusive," expressly prohibit the exercise of any such power as is asked by the appellants.

In the decisions referred to by the counsel, I fail to find any cases where the power to rehear a cause upon the merits has been denied, that are at all analogous to the one now present. In denoting the distinction between a superior and an inferior court — that is, one competent to grant a new trial and one incompetent — the courts say: "We think that a superior court of general jurisdiction must have full cognizance *of one at least of the principal departments of the law throughout the State,* and must be free, in its primary action, from the control of any other tribunal."

I can conceive of no language that should more clearly describe and designate this Department than that above quoted. I can, therefore, draw no other

conclusion than that this Department is a superior court of general jurisdiction, and hence that to it the decisions relative to the powers of inferior courts do not apply.

But again, in 1 Johnson's Cases 179, which the counsel cited in support of his position, I find the following language: "The power of granting new trials can only be applied in a manner which precludes the possibility of its exercise being reviewed in this or any other court." These are just the circumstances under which this Department always exercises this power. And, further, in the same decision, the court says: "Indeed, no inferior jurisdiction can possess this power without express authority," plainly implying that courts of *superior* or *general jurisdiction* may, in the very nature of their organization, possess this power of granting new trials.

It is my conviction, therefore, that the power to grant a new trial of any cause brought before this Department on appeal may exist without special legislative designation, being involved in the powers distinctly conferred, and the purposes and objects sought to be accomplished in the organization of this tribunal.

I pass now to consider the second point in the argument of the counsel upon this question of the power of the Department to grant a new trial, which is based upon the restrictive terms of the statute itself, which says that "the decision of the State Superintendent shall be final and conclusive."

This language has ever been interpreted as characterizing the exclusiveness of the jurisdiction of this Department in matters brought before it for determination, and not as limiting the Department itself to a single examination of any cause before it. It was designed as a check against the interference of other authorities with the decisions here rendered, and not as defining or circumscribing the powers of the Department itself.

The nature of the trust committed to this Department, and the form of procedure necessary for the proper exercise of its powers, preclude the presumption that the Legislature ever intended that the terms "final and conclusive" should bear the construction put upon them by the counsel in this case.

The indication of the exercise of this power by this Department to grant new trials is made not essentially to meet the *present case,* but to meet and put at rest, so far as it can be done here, the general issue so strongly raised; and I must and shall assume that the practice of this Department, in granting new trials for causes satisfactory to itself, is a legitimate and necessary exercise of powers with which, in the nature of its organization, it is invested.

3508

Nathaniel Coon and others v. Abner L. Sprague, sole trustee of school district no. 14, Sandy Creek, Oswgeo county.

When an appeal has been decided, such appeal will not be reopened, unless upon the ground of newly discovered evidence.

The submission of testimony not contained in original appeal is not sufficient, unless it is made to appear that such testimony was not known to, or could not have been procured by the appellants at the time of bringing the original appeal.

Decided June 1, 1886

Draper, *Superintendent*

This is a proceeding purporting to be an "amended appeal" from the election of Abner L. Sprague as sole trustee of school district no. 14, Sandy Creek, Oswego county, N. Y., at the annual meeting held August 25, 1885.

It appears from the records of this Department that an appeal was taken from such election and a decision rendered therein on the 12th day of December 1885.

This appeal was filed in the Department May 11, 1886. Under the rules of practice, an appeal from the action of an annual meeting must be brought within thirty days from the date of such meeting or some satisfactory excuse must be rendered in the appeal for the delay.

Again when a decision has been rendered in an appeal, such appeal will only be reopened upon the production of new evidence which was not in the possession of the appellant, or could not have been procured when the appeal was brought.

While more testimony is submitted in the papers now before me than was contained in the former appeal, it does not appear that such testimony was not known to or could not have been procured by the appellants at the time of bringing the first appeal, and no reason is given for bringing this appeal at so late a day except that it was supposed that the papers in the former case were sufficient, no answer having been made to them. This is not a satisfactory excuse. For these reasons I would decline to entertain the appeal. It might be well (or more satisfactory), however, for me to add briefly, that I have examined the papers herein, and find that the appellants allege as the grounds of their appeal, that the respondent was not eligible to the office of trustee, and that the election was procured by illegal votes. But I also find, by a thorough examination of the testimony, that the appellants fail to show either that Abner L. Sprague was, at the time of his election, ineligible to the office of trustee, or that his election was procured by illegal votes.

The appeal is overruled.

3941

In the matter of the appeal of James D. Van Vechten and others from the proceedings of an adjourned annual meeting held in school district no. 11 of the town of Schodack, county of Rensselaer.

Action of a district meeting in allowing a claim for legal services incurred by a district officer in defending an appeal, sustained.
Decided December 18, 1890

Draper, *Superintendent*

This is an appeal by residents of school district no. 11, town of Schodack, county of Rensselaer, from the proceedings of the adjourned annual meeting held on the 9th day of August 1890, in voting to allow a claim of $133.25 for legal services rendered by Messrs Davenport & Hollister, counselors at law, for the respondents in the matter of the appeal of Alfred T. Bortle and others from the election of James Benner as trustee of the above-mentioned district.

The grounds of the appeal are: that the motion to allow the claim was not made by a legal voter; that the vote was not taken by ayes and noes; that the said James Benner was not instructed by a resolution of a district meeting to defend the appeal; that the claim was not itemized and verified to the district meeting; that the charge is exorbitant; that the appeal brought was sustained; that the appeal was not against any official act of the trustee.

The respondent alleges that, at the meeting referred to, a motion was regularly put and carried authorizing a tax to raise the sum of $133.25 to liquidate the charge for legal services rendered by Davenport & Hollister as attorneys for said James Benner and others; that the said Benner made no charge for expenses incurred by himself beyond the charge for his attorneys as above stated, and that the same was regularly presented to the district meeting and allowed. Respondent alleges that the motion to pay the claim was regularly made by a resident and taxpayer of the district, and carried by a nearly unanimous vote, not to exceed three of the fifteen or eighteen persons present voting against the same. He alleges that he has no acquaintance with the value of legal services, and can not state, of his own knowledge, whether the charge is exorbitant or not.

In the consideration of this appeal, my attention is directed to subdivision 14 of section 16 of title 7 of the Consolidated School Act, which reads as follows:

> The inhabitants so entitled to vote, when duly assembled in any district meeting, shall have power, by a majority of the votes of those present, to vote a tax . . . to pay the reasonable expenses incurred by district officers in defending suits or appeals brought against them for their official acts. . . .

I have no evidence before me which will enable me to pass upon the value

of the services rendered by the attorneys whose bill is objected to, except the record evidence connected with the appeal on file in this Department, and the fact that the attorneys appeared before me upon the argument of said appeal.

This is a matter which the district meeting had authority under the statute to act upon. As it has acted, its action must be upheld unless good ground is shown for setting it aside. The burden of proof is upon the appellant to show that the bill audited was excessive. They fail to show this. Indeed, they adduce no proof at all to show it. The overwhelming vote in the district meeting indicates a general willingness in the district to pay the bill, and consequently, a general belief that the amount claimed was not excessive.

The appeal must be dismissed and the stay heretofore granted herein is hereby set aside and revoked.

3983

In the matter of the appeal of Jonathan E. Leach and others v. George E. Fralick, as trustee of school district no. 4, towns of Marathon and Willett, county of Cortland.

Costs and expenses incurred in instituting proceeding on appeal can not be legally allowed by a district meeting, unless the appeal was instituted or prosecuted by a school district officer in his official capacity.

Decided June 30, 1891

William D. Tuttle, attorney for appellant
Milo C. Paige, attorney for respondent

Draper, *Superintendent*

By this appeal an item for expenses incurred in preparing and prosecuting an appeal before the State Superintendent of Public Instruction, which item has been audited and allowed by a district meeting, and thereupon included in a district tax, is objected to, upon the ground that the action of the district meeting was without authority of law.

From the evidence before me, and which is undisputed, it appears that the appellant was the immediate predecessor of the respondent herein in the office of trustee of school district no. 4, towns of Marathon and Willett, Cortland county, and that during the appellant's term of service the respondent was the clerk of said district; that during this time an appeal was taken by the respondent herein and others from certain proceedings of the then trustee.

It is conceded that the appeal was not brought by the direction of a district meeting, and the appellant herein alleges that it was not brought by the clerk ex officio, but only in an individual capacity in which he was joined by other taxpayers of the district. The respondent insists that he proceeded upon such appeal as district clerk, and that he personally incurred the attending expenses.

Had the appeal been instituted or prosecuted by the direction of a district meeting, or without such direction by the clerk, in his official capacity in a case in which he would have been authorized to institute such a proceeding, the item would be approved, no question having been raised as to its reasonableness. My attention having been directed to the former appeal, no. 3883, I have examined the pleadings of the appellant therein, and I do not find that the district clerk instituted said appeal in his official capacity or in any other than an individual one, and I am, therefore, led to the conclusion that the case is not brought within the statutory provision which authorizes a district meeting to allow the expenses incurred by a district officer in prosecuting an appeal.

The appeal is sustained, the action of the district meeting declared invalid, and the order heretofore granted herein enjoining the collector of the amount voted for expenses incurred on said appeal, is hereby made permanent.

3558

In the matter of the appeal of Aaron N. Losee and others v. Alfred P. Blenis, as trustee of district no. 7, town of Greenville, Greene county.

The district meeting appointed a committee to represent the district upon proceedings before the county judge, for determining the amount of the liability of the district for costs and expenses of an appeal in which the district had been involved (section 9, title 13, Consolidated School Act), and the chairman of the committee having been subsequently elected trustee, levied a tax for the sum of $195 to pay the counsel fee and expenses of such committee.

Held, (1) that a charge for services of counsel amounting to $160 for defending against a claim of $180, was exorbitant; (2) that the committee could not be allowed any compensation for their services; (3) that the committee could not be allowed for the use of their own conveyances.

Decided January 28, 1887

E. C. Hallenbeck, Esq., attorney for appellants
Franklin J. Taylor, Esq., attorney for respondent

Draper, *Superintendent*

The district from which this appeal emanates is very small, comprising, all told, about twenty taxable inhabitants. It has been involved in a quarrel for a long time, and there seems little prospect of a settlement. About a year since, Alfred P. Blenis, the respondent above named, and others, appealed to this Department to remove from office Leander W. Hallock, then trustee of said district. The decision of such appeal, made upon the 29th day of March 1886, denied the application. Subsequently Mr Hallock presented to a district meeting a claim for costs, charges and expenses incurred by him upon such appeal, and upon the refusal of the district meeting to pay the claim, he appealed to the county judge of Greene county to adjust the same, pursuant to the provisions

of section 9 of title 13 of the Consolidated School Act of 1864, and the district subsequently appointed a committee consisting of Mr Blenis, Amos B. Story and Oliver H. Bogardus to protect its interests before the county judge. In the discharge of its duty, the committee incurred some expense and employed counsel. Two lawyers were called in to represent the district before the county judge and defend against a claim amounting to $180. There appears to have been two adjournments of the proceedings before the county judge, and finally in September, that officer adjusted the claim of Hallock, at the sum of $120. Then Mr Blenis, the respondent above named, having in the meantime been elected trustee of the district, made out a tax list and warrant and placed the same in the hands of the collector for the purpose of raising the sum of $195 to cover the expenses of the committee. From this action this appeal is taken.

Whether the committee appointed to represent the district had the right to employ counsel or not, is a matter not free from doubt, but as the trustee who was pressing the claim against the district was represented before the county judge by counsel, there would seem to be some reason in the district being so represented, and as counsel were, in fact, employed, and did appear and represent the district, and as the objections of the appellants here seem to be directed against the amount of the claim for counsel fees rather than against the right of the committee to employ counsel, I am not inclined to inquire into that question too closely. But in any event, it is difficult to justify the proceedings of the committee in employing two attorneys to represent it upon a very simple proceeding before the county judge, when the claim against the district was but for the sum of $180, and it is still more difficult to justify the claim which is presented for counsel fees in the sum of $160, for defending against a claim for $180. Furthermore, it is noticed that the committee have included in their personal bills, items for the use of their own conveyances in going to the county seat upon the several occasions when the matter was expected to be up for consideration. The statute only authorizes them to charge for expenses incurred in the performance of their duty, and provides only that such expenses shall be a charge upon the district. It is not possible to hold that they were subjected to expense in the use of their own conveyances.

I have, therefore, concluded to sustain the appeal, unless the respondent shall, within fifteen days from the date hereof, withdraw the warrant and tax list from the hands of the collector, and reduce the amount levied by said tax list, by deducting therefrom all items charged by members of the committee for the use of their own conveyances and by reducing the amount claimed for the services of counsel to the sum of $75. The said trustee has my permission to withdraw said warrant and tax list and correct the same as herein indicated. In case this is done, restitution must be made to such of the taxpayers in the district as have paid the amount levied against them by the said tax list, or, at least by restoring so much of the amounts so paid respectively, as will be in excess of the amount which they will be obliged to pay under the modified and corrected tax list. In the meantime, the matter will be held in abeyance, and upon proof of such modification being made, the appeal will be dismissed.

3399

Expenses of a member of the board of education in defending action brought against him are chargeable against the district.
Decided March 12, 1885

Ruggles, *Superintendent*

This appeal is brought from the action of the annual meeting in ordering payment of the sum of $235 to one of the trustees for the legal expenses incurred by him in defending certain actions brought against him.

From November 28, 1882, until June 30, 1883, Sandford S. Gowdey was employed as principal teacher in the school in that district. The board of education in May 1883, assumed to discharge Gowdey from the duties of his office, the discharge to take effect on the 30th of June 1883. In July 1883, Gowdey claimed that he had not been legally discharged, and appeared at the schoolhouse of the district and interfered with a teacher, employed by the board of education in the discharge of her duties, and ordered her and the trustees to vacate the school at once. Gowdey insisted upon his right of possession of the schoolhouse as teacher for several days thereafter. Finally the board held a special meeting to consider what action should be taken in the premises to stop the intrusion of Gowdey, and at the meeting a resolution was unanimously adopted directing George W. Payne, the president of the board, to employ counsel to "defend" the board in the matter of the dispute between said board and Gowdey. Payne was advised by counsel to make complaint to a justice of the peace and have said Gowdey arrested forthwith. On the 8th of September Payne reported to the board the retaining of Benjamin W. Downing as counsel and the advice given by him, and the board then and there adopted a resolution, instructing Payne to cause the arrest of said Gowdey. Acting under this instruction, Payne made a complaint against Gowdey to Justice Van Nostrand, of Flushing, who issued a warrant for his arrest. The case coming on for trial, counsel deeming the warrant irregular withdrew it, and immediately procured another from the justice. The prisoner was immediately rearrested and thereupon tried and acquitted. After his acquittal, Gowdey brought two suits against Payne in the Supreme Court in Queens county, one for false imprisonment and one for malicious prosecution, laying his damages at $10,000 in each suit. These suits were tried at the January circuit following. The plaintiff was nonsuited in both cases. The first case was dismissed on the ground that the warrant was a good one, and in the second case (the action for malicious prosecution), on the ground that upon his own testimony, there was probable cause for the arrest of the plaintiff by the trustee, for disturbing the school. Following this a suit was brought by Payne's counsel in these cases, in a justice's court, against the board of education, some time in June or July 1884. In this suit the complaint charged that the plaintiff and B. W. Downing, rendered certain services for said board, at its request, and that the reasonable value of such services was $200. The answer of the defendant denied that the services were rendered at the

request of the defendant, or for its benefit. The judgment for the defendant in this case seems to have been based upon the ground that the plaintiff never had any privity with the defendant, and that he failed to show that he legally derived his claim through any person who was in privity with such defendant. The counsel, Drew and Downing, thereupon demanded payment for these services from the trustee Payne, who at the annual meeting presented an account in writing of the costs, charges and expenses paid by him, with the items thereof, verified by his oath or affirmation, and asked the adoption of the resolution by the meeting, that the same might be assessed upon the taxable property of the district, and when collected to be paid over to said Payne.

There are two questions worthy of consideration in this case:

1 Was the determination of the case of Drew against the board of education of such a character as to constitute *res adjudicata?*

2 Was Payne a district officer within the meaning of sections 7 and 8, title 13, of the Code of Public Instruction?

A party setting up an estoppel by reason of a former adjudication, must by competent evidence prove affirmatively that the issues on the former adjudication were the same, and between the same parties or their privies. Now, it appears that the action of Drew against the board of education proceeded upon the theory that he and his partner, Downing, were employed by the board. The judgment of dismissal in this case was based upon the ground that they were not so employed, and this was undoubtedly correct. Downing and Drew were employed by direction of the board of education in a criminal action against Gowdey, out of which grew the suits for false imprisonment and malicious prosecution brought by Gowdey against Payne, who had, in the criminal action, made the complaint under the direction of the board. It can not be held that the judgment of dismissal, in the action of Drew against the board of education, could in any way estop a district meeting from legally adopting the resolution from which this appeal is taken, if Payne was a district officer, within the meaning of sections 7 and 8, title 13 of the Code of Public Instruction. This leads to the second question.

Was Payne a district officer within the meaning of sections 7 and 8, title 13 of the Code of Public Instruction?

While the board of education is a corporation, and the individuality of its members is lost sight of in the action of the board, yet each member of the board must be regarded as a school officer; especially so, where the board delegates to, or charges a member with, certain definite duties. Such was the case in the proceeding which led to the resolution of the annual meeting and to this appeal. The board of education vexed and annoyed by the action of Gowdey, whom they had assumed to discharge from his position as teacher by a formal resolution, directed the president to take legal advice as to the best means to defend the board under the circumstances. Payne did as he was directed, and reported back to the board the advice he received, and was in terms empowered and directed to cause the arrest of Gowdey for disturbing the school. All these

proceedings were taken in good faith; Gowdey was arrested, tried and acquitted. Up to this point the board of education was directly responsible for the action of its agent, and had suit been brought by counsel against the board for services in this criminal proceeding, and for the advice given to Payne, acting as its agent and president, there can be no doubt that recovery would have been had. But now, Gowdey commenced his two actions in the Supreme Court against Payne. There is no doubt, from the evidence, that in the trial of these two cases it was shown that Payne's action in the arrest of Gowdey was taken as trustee; and in these cases he was forced to defend the suits brought against him for his action as trustee. So, that from the beginning to the end of the controversy, Payne acted in his capacity as a district officer. I think there can be no doubt these actions involved the rights and interests of the district, and that it was within the province of the district to provide for the payment of the reasonable costs, charges and expenses of the district officers.

4652

In the matter of the appeal of Louis F. Metz as trustee of school district 8, Ridgeway, Orleans county, from action of special school meeting in school district 8, Ridgeway, Orleans county, held on January 28, 1898.

Where a school district meeting refuses to pay the reasonable expenses incurred by a district officer in defending an appeal brought against him for his official acts, an appeal will lie to the State Superintendent of Public Instruction from such refusal. If, upon such appeal, it is established that the appeal so defended by the district officer was taken wholly from his official acts, or contained allegations charging him as such officer with acting improperly or illegally, and the expenses paid by him in such defence are reasonable, the State Superintendent has jurisdiction and may make such order therein by directing the levying of a tax or otherwise as shall, in his judgment, be proper and necessary to give effect to such decision.

Decided May 13, 1898

Harry Cooper, attorney for appellant
Irving L'Hommedieu, attorney for respondent

Skinner, *Superintendent*

This is an appeal from the action of a special school district meeting held in school district 8, Ridgeway, Orleans county, January 28, 1898, in refusing to vote a tax for the sum of $30 to pay the expenses incurred by the appellant in defending an appeal brought against him for his official acts as trustee of such district.

Watson H. Whipple, a qualified voter of such school district, has answered the appeal and alleges that the appellant defended the appeal as an individual and not as trustee; that such defence was made by him without the authorization or sanction of the inhabitants of such district.

From the proofs herein, and from the records of this Department, it appears that the appellant was the trustee of such district for the school year of 1896-97; that on August 3, 1897, the annual school meeting was held in such district,

at which certain proceedings were taken, from which one Bowen and the respondent herein appealed to me, alleging in such appeal, among other things, that said trustee Metz "had resorted to deceitful, fraudulent and unlawful tactics in order to secure his reelection as trustee," etc.; that he had called such meeting to order at 7.30 p. m. when the notice of the meeting, as posted by the clerk, states that the meeting would be held at 8 p. m.; that the proceedings of the meeting were principally taken and the meeting adjourned before the majority of the voters of the district arrived at the schoolhouse, etc.; that the election of district officers was illegal and that illegal votes were received; that a copy of the appeal was served upon trustee Metz, who employed counsel and filed his answer thereto.

Upon the proofs filed in such appeal it appears that on July 29, 1897, trustee Metz inquired of the district clerk whether he had posted notices of the annual meeting, and was informed that he had not, and thereupon was directed by the trustee to post such notices; that such clerk posted one notice in which he stated that the meeting would be held on August 3, 1897, at 8 o'clock p. m.; that on the evening of August 3, 1897, nearly all of the qualified voters of the district assembled in the schoolhouse, or upon the schoolhouse grounds, and a discussion arose as to whether the meeting could be legally organized at 7.30 or 8 p. m., and Trustee Metz stated to those present that the clerk had not inserted in the notice posted the hour fixed by the school law for holding the meeting, and the meeting would be called to order at 7.30, and requested all present to come into the schoolhouse and be present at such meeting; that about one-half of the voters present entered the schoolhouse and took part in the meeting, the others remaining outside and declining to take part in such meeting; that after the adjournment of the annual meeting the persons who declined to enter the schoolhouse held a meeting and voted to appeal from the action of the annual meeting, and said Bowen and Whipple appealed.

In my decision of such appeal I decided that such annual meeting was legally held, and that Metz was legally elected trustee; that there was no one elected district clerk, and that the collector was not legally elected, nor was the tax legally voted, and directed that a special meeting be called for the purpose of electing a district clerk and collector, and to vote upon the question of levying a tax or taxes.

It also appears that Trustee Metz called a special meeting of the district, to be held on October 12, 1897, to transact the business directed by my decision, but added thereto a notice that such meeting would also be asked to vote a tax to defray the expenses of the trustee incurred by him in defending the appeal brought by Bowen and Whipple; that such special meeting refused to vote such tax; that Trustee Metz appealed from such refusal, and the respondent herein answered said appeal, alleging therein (as in his answer herein) that Metz did not defend the appeal of Bowen and Whipple as trustee, but as an individual, and such appeal was not taken from the official acts of Metz, and that he was not requested by the inhabitants to defend. He also alleges that as such special meeting was called pursuant to the directions contained in my decision for

specific purposes, the action of the meeting in voting upon the expenses incurred by Metz was without authority.

In my decision of the appeal of Metz I stated that the contention of the respondent, Whipple, that Metz did not answer the appeal of Bowen and Whipple as trustee but as an individual, was not well taken; that as such appeal charges Metz in his acts as trustee with deceitful and fraudulent practices to secure his reelection as trustee, such appeal was brought from his official acts relative to such annual meeting; that upon the facts established he acted properly in defending such appeal; that the sum of $30 paid by him as expenses in such defense was reasonable, and that no good reason was shown why the qualified voters of school district 8, Ridgeway, should not vote a tax to pay the same.

In subdivision 15 of section 14, title 7 of the Consolidated School Law of 1894, it is enacted that the inhabitants entitled to vote, when duly assembled in any district meeting duly called and held, have power, by a majority of the votes of those present, to vote a tax to pay the reasonable expenses incurred by district officers in defending suits or appeals brought against them for their official acts, or in prosecuting suits or appeals brought by direction of the district.

When an appeal is brought, which alleges improper or illegal acts on the part of a district officer, such officer may apply to, and obtain from, a district meeting authority to defend the same, or he may defend such appeal without such authority. If defended without obtaining such authority from the district he can present to an annual meeting, or a special meeting of the district, duly called, a statement of the expenses incurred by him in such defense, and such meeting has authority to vote a tax to pay the reasonable expenses so incurred by him. If the meeting refuses to vote a tax he may appeal from such refusal to the State Superintendent of Public Instruction under title 14 of the Consolidated School Law of 1894. If upon such appeal it is established that the appeal defended by such district officer was taken wholly from his official acts, or contained allegations charging such officer with acting improperly or illegally, and that the expenses paid by him in such defence are reasonable, the State Superintendent has jurisdiction to entertain such appeal, and may make such order therein by directing the levying of a tax or otherwise as shall, in his judgment, be proper and necessary to give effect to such decision.

I decide:

That the said appeal of Bowen and Whipple was brought not only from certain proceedings taken at the annual school meeting, held in school district 8, Ridgeway, Orleans county, on August 3, 1897, but from certain improper and illegal acts done by Metz as trustee of said district; that said Metz, as such trustee, properly interposed a defence to such appeal; that the sum of $30 incurred and paid by him in defending such appeal is reasonable.

It is ordered, That for the purpose of giving effect to my decision herein, Louis F. Metz, as trustee of school district 8, Ridgeway, Orleans county, is directed to levy a tax for the sum of $30 upon the real and personal property subject to taxation in such district for school purposes, to pay the reasonable

expenses incurred by him in defending the said appeal brought by Messrs Bowen and Whipple, charging therein improper and illegal acts on the part of said Metz as trustee of such district.

4507

In the matter of the appeal of Harvey D. Titch from proceedings of annual school meeting held August 4, 1896, in district no. 10, town of Andes, Delaware county.

Under the provisions of subdivision 15 of section 14, article 1, title 7, of the Consolidated School Law of 1894, the inhabitants entitled to vote, when duly assembled in any district meeting, shall have power, by a majority of the votes of those present, to vote a tax to pay the reasonable expenses incurred by district officers in defending suits or appeals brought against them for their official acts or in prosecuting suits or appeals by the direction of the district against other parties.

The provisions contained in sections 4 to 8, inclusive, of article 1, title 15, of the school law, have reference solely to the prosecution or defense by trustees of school districts in actions or proceedings brought by or against them in the courts of the State, but not expenses incurred by district officers in defending appeals brought to the State Superintendent of Public Instruction.

Decided November 7, 1896

Williams & Conlon, attorneys for appellant
Wagner & Fisher, attorneys for respondent

Skinner, *Superintendent*

This appeal is taken from the proceedings of the annual school meeting held on August 4, 1896, in school district no. 10, town of Andes, Delaware county, in the adoption of a resolution that so much of an account of Wagner & Fisher, amounting to the sum of $142.50, as exceeds the sum of $15 therein, be audited and allowed at said amount, and said sum be included in the tax list as asked for by the trustee in his report, upon the ground that the part of the said account amounting to $127.50 is not a proper charge against said district.

Frank B. Scudder, as trustee of said district, has answered said appeal.

The items in the account of said Wagner & Fisher to which the appellant objects are:

For services and disbursements in the appeal of Lewis C. Titch, against John G. Scudder, trustee, and William Middlemist, collector of said district:	
Drawing answer and affidavits and making copies for services	$25 00
Drawing rejoinder, affidavits and making copies for services	25 00
Three days' service in drawing brief	30 00
Disbursements in said appeal	7 50
For services before county judge in the appeal of Harvey D. Titch from the action of school meeting held December 10, 1895, in refusing to allow said Titch the expenses incurred by him in defending an appeal:	
Services before county judge, making argument, copying decision, serving same, and disbursements made	30 00
Services in the Matter of the Appeal of Rene M. Jackson	10 00
	$127 50

It appears that on or about January 1, 1896, one Lewis C. Titch appealed to the State Superintendent of Public Instruction from the action of John G. Scudder, trustee, and William Middlemist, collector of said district and that said trustee and collector employed the law firm of Wagner & Fisher to defend them in said appeal; that in August 1895, William Middlemist appealed to the State Superintendent of Public Instruction from the proceedings of the annual school meeting held in said district in August 1895, at which Harvey D. Titch was claimed to have been elected trustee, and that said Titch employed counsel to defend said appeal, and at a special school meeting held in said district on December 10, 1895, said Titch presented to said meeting an account amounting to $51.44 for expenses incurred by him in defending said appeal and asked to have said amount allowed to him; but said meeting refused to allow any part thereof, and said Titch presented the matter to the county judge of Delaware county, who decided that no part of said claim of Titch ought to be charged to said district; that at a meeting held in said district on December 21, 1895, at the house of one Calvin Smith, John Smith and William Middlemist were appointed a committee to represent said district before said county judge in said matter of the claim of said Harvey D. Titch; that said committee employed said Wagner & Fisher as their counsel in the hearing before said county judge; that in January 1896, Rene M. Jackson brought an appeal to the State Superintendent of Public Instruction from the refusal of John G. Scudder, trustee of said district, to pay her the sum due to her for services rendered as a teacher in the school in said district, and said trustee employed said Wagner & Fisher to defend said appeal.

It does not appear that said Harvey D. Titch, as trustee, in defending the appeal of Middlemist, nor said Scudder, trustee, and Middlemist, collector, in defending the appeal of Lewis C. Titch, nor said Scudder, trustee, in defending the appeal of Miss Jackson, were or any one of them was, authorized by a vote of the district to make such defense.

In subdivision 15 of section 14, article 1, title 7, of the Consolidated School Law of 1894, it is enacted that the inhabitants entitled to vote, when duly assembled in any district meeting, shall have power, by a majority of the votes of those present, to vote a tax to pay the reasonable expenses incurred by district officers in defending suits or appeals brought against them for their official acts, or in prosecuting suits or appeals by direction of the district against other parties.

Under the provisions of the school law above cited, when an appeal, in any school district, is taken by any voter or voters of said district, from the proceedings of a school meeting or from the acts of any school district officer, or the refusal of such district officer to act, to the State Superintendent of Public Instruction, or when a suit in the courts is brought against any district officer, a special meeting of such district may be called for the purpose of determining whether the district shall defend such appeal or suit. If such meeting shall determine to defend the appeal or suit, then, under section 51, article 6, title 7,

of the Consolidated School Law, any reasonable expense incurred in said defense is a charge upon the district, and the trustee or trustees may raise the amount thereof by tax in the same manner as if the definite sum to be raised had been voted by a district meeting.

When, however, no authorization to defend the appeal or suit is given by the district, and the trustee or trustees of the district in good faith believe the appeal or suit should be defended, he or they should employ competent counsel to assist in such defense, and when the appeal or suit is decided, an account for the expenses incurred by the district officer or officers in such defense should be presented at an annual or special meeting of the district, and such meeting has authority to vote a tax to pay the reasonable expenses incurred by said district officer or officers therefor.

In the appeal of Lewis C. Titch, Scudder, as trustee, and Middlemist, as collector, without any authorization of the district, defended the appeal and employed counsel who rendered services therein and the account for such services was presented at the annual meeting and the aggregate amount of $87.50 allowed by said meeting. I can not say that the amount allowed was not reasonable for the services rendered, and the action of the meeting in allowing the same is approved.

The appeal of Miss Jackson was brought while the appeal of Lewis C. Titch was pending and undetermined, and Scudder, as trustee, defended the appeal and employed counsel therefor. The counsel for the appellant and respondent therein stipulated for a stay therein until the Lewis C. Titch appeal was decided. The charge of counsel of Trustee Scudder in the appeal of Miss Jackson was not unreasonable, and the district meeting allowed it, and such action is approved.

The remaining item for consideration is the charge of Wagner & Fisher, as counsel for a committee of the district before the county judge, in opposing the claim of Harvey D. Titch for expenses incurred in defending an appeal brought under title 14 of the Consolidated School Law, by William Middlemist from the proceedings of the annual school meeting in said district, held in August 1895, which expenses a school meeting refused to allow, or to vote a tax to pay.

In the Code of Civil Procedure the word "action," as used in the new revision of the statutes, when applied to judicial proceedings, signifies an ordinary prosecution, in a court of justice, by a party against another party, for the enforcement or protection of a right, the redress or prevention of a wrong, or the punishment of a public offense (section 3333, Code of Civil Procedure). Every other prosecution by a party, for either of the purposes specified in the last section, is a special proceeding (section 3334, Code of Civil Procedure).

By section 1926 of the Code of Civil Procedure it is enacted that an action or special proceeding may be maintained by the trustee or trustees of a school district; and by section 1931, an execution can be issued upon a judgment for a sum of money, rendered against the trustee or trustees of a school district

in an action or special proceeding brought by or against him or them in his or their official capacity, and may be collected out of the property of the trustee or trustees, and the sum must be allowed to him or them, in the settlement of his or their official accounts, except as otherwise specifically prescribed by law.

Subdivisions 15 and 17 of section 14, article 1, title 7, and sections 4, 5, 6, 7 and 8 of article 1, title 15, of the Consolidated School Law of 1894, provide for reimbursing the trustee or trustees of school districts for costs, expenses and judgments paid in actions and proceedings in the courts.

Harvey D. Titch, when the school meeting refused to allow, or to vote a tax to pay, the reasonable expenses incurred by him in defending the appeal to the State Superintendent by Middlemist, seems to have entertained the belief that under sections 4 to 8, inclusive, he could appeal from the action of said meeting to the county judge of his county. In this he was mistaken, as the expenses he had incurred were not incurred in defending any action or proceeding brought against him as trustee in the courts, nor for any costs or damages adjudged against him as such trustee in the courts, and the county judge had no jurisdiction of such appeal to him.

Sections 4 to 8, inclusive, have reference solely to the prosecution or defense by trustees of school districts in actions or proceedings brought by or against them in the courts of the State, and not expenses incurred by district officers in defending appeals brought to the State Superintendent of Public Instruction.

The alleged special meeting held at the house of Calvin Smith, on December 21, 1895, at which the committee was appointed to represent the district before the county judge on the appeal of Harvey D. Titch, was, on appeal to me, declared to be illegal and void, and all proceedings had and taken thereat vacated and set aside.

Assuming, for the purpose of argument only, that said committee was legally appointed, and said Titch was authorized to appeal to the county judge, I concur with Superintendent Draper in the opinion expressed by him in decision no. 3558, rendered January 28, 1887, that whether such committee had the right to employ counsel is not free from doubt.

I decide that the annual school meeting held in said district on August 4, 1896, did not have authority to vote a tax to pay the sum of $30 for the services of Wagner & Fisher as counsel for said committee or district in the hearing before the county judge upon the said appeal taken to him by Harvey D. Titch.

The appeal herein is sustained as to so much thereof as is taken from the item of $30 allowed at said annual meeting, and as to all other matters it is dismissed.

It is ordered, That so much of the proceedings of the annual school meeting held in district no. 10, town of Andes, Delaware county, on August 4, 1896, as allowed the item of $30 for the services of Wagner & Fisher, before the county judge of the said county, upon the appeal to him of Harvey D. Titch, be, and the same is, vacated and set aside.

4890

In the matter of the appeal of Squire M. Brown and Alfred E. Stacey from certain proceedings taken at the annual meeting held August 7, 1900, in school district 9, Elbridge, Onondaga county.

Under the Consolidated School Law of 1894, the qualified voters duly assembled at a school meeting in any school district, have the power, by a majority vote, to levy a tax to pay the reasonable expenses incurred by district officers in defending suits or appeals brought against them for their official acts.

The trustees of school districts have the power, when the schoolhouse is not in repair, or not properly ventilated or heated, or has been injured or damaged by the elements, or is not of sufficient capacity to accommodate the children attending school in the district, to hire rooms temporarily, and levy a tax to pay the rent thereof.

Decided October 9, 1900

Lewis & Crowley, attorneys for appellants
Northrup & Northrup, attorneys for respondents

Skinner, *Superintendent*

This is an appeal taken from the action of the annual school meeting held August 7, 1900, in school district 9, Elbridge, Onondaga county, in authorizing the levy of a tax for the sum of $85 for the payment of expenses incurred by the trustees of such district in defending a suit or action brought against them for their official acts; and authorizing the levy of a tax for the sum of $100 for the payment of the rent of certain rooms in the Munro academy.

The appellants allege, as the grounds for bringing their appeal, in substance, that the levy of a tax for the sum of $85 was illegal and void, because the bill for such sum was not properly presented or verified, and had not been paid by the trustees, and was not incurred in the exercise of their official duties; that the levy of a tax for $100 for rent of rooms in the Munro academy is illegal and contrary to the interests of the district and the taxpayers therein, and contrary to the policy and practice of the Department of Public Instruction in regard to district property.

Messrs Ranney, Allen and Cone, as trustees of such district, have answered the appeal.

The following facts are established from the pleadings and proofs filed herein:

In June 1899 certain proceedings were taken under the provisions contained in article 1, title 8 of the Consolidated School Law of 1894, and the acts amendatory thereof, for the consolidation of school districts 8, 9 and 10, Elbridge, Onondaga county, by the establishment of a union school therefor and therein; that the trustees of school district 10, Elbridge, brought an action in the Supreme Court against Messrs Allen, Templar and Ranney, then trustees of said school district 10, individually and as such trustees, and against the trustees of school district 8, and others, alleging certain irregularities and illegal acts in proceedings taken to consolidate said school districts 8, 9 and 10 by the establishment of

a union school therefor and therein; and upon the complaint and affidavits, and without notice to the defendants, on or about August 28, 1899, obtained a preliminary injunction restraining the defendants from further proceedings in the establishment of such union school during the pendency of such action; that the said trustees of district 10 employed the firm of Northrup & Northrup, counselors at law, residing in Syracuse, N. Y., to appear, act for them and defend the said suit brought against them; who did appear and perform services for said trustees therein; that upon an order to show cause, and an argument for and against the continuance of the said injunction, such injunction was continued during the pendency of such action; that no trial of said action upon the merits was ever had, but after the making of the order aforesaid, upon a stipulation of the respective parties, an order was entered at a special term of the Supreme Court, held at Syracuse, October 14, 1899, discontinuing said action without costs to either party as against the other, and thereupon and in the manner aforesaid, said litigation, in respect to the said proceedings for the consolidation of such districts 8, 9 and 10, by the establishment of a union school therefor and therein, ended without any final decision of the court as to whether such proceedings were, or were not, legal; that said firm of Northrup & Northrup presented to said trustees a bill for the services so rendered, as aforesaid and for which the trustees had become personally liable to pay, amounting to the sum of $85; that bill was presented at the annual meeting held August 7, 1900, in said school district 9, and a motion or resolution appropriating the sum of $85, and to include said sum in the tax levy for the payment of the same, was adopted, the vote thereon being taken by ballot, 22 persons voting for and 6 against.

That a special meeting of the inhabitants of said school district 9, qualified to vote at school meetings therein, duly called, was held therein June 8, 1900, to consider the advisability of building an addition to the schoolhouse therein, or for the renting of part of the Munro academy, and hiring a third teacher; that a resolution was adopted by a vote of 27 in favor and 6 against, ascertained by a ballot being taken, authorizing the trustees of said school district 9 to rent of the trustees of the Munro academy the three east rooms in said academy, in which to conduct the school of such district upon the terms and conditions stated at such meeting; that the conditions of such rental so made by said trustees are to continue for two years with the privilege of ten years, the rent for the first year to be $50, and making certain changes to the extent of $50; that after one year it shall be $100, with the option to either party to terminate the lease or contract by giving six months' notice prior to the end of the school year, the trustees of the district agreeing to vacate such rooms at any time in favor of a normal school if one shall be established therein; that at said annual meeting, held August 7, 1900, a motion was adopted by a vote of 22 for and 2 against, ascertained by a ballot, that the sum of $100 be appropriated for rent of, and changes in, such rooms so rented and authorizing such sum to be included in the tax levy; that the school in said district, for the present school year, opened September 10, 1900, in the three rooms in such academy, so rented, with three teachers and an attendance of 93 scholars.

It is also established that the schoolhouse of said district is a two story building with one room below and one above, having but one stairway; that it is an extremely cold building; that there is no mode of ventilation; that it is unsanitary; that it will not accommodate over 75 scholars while the number of scholars now attending the school in the rooms in the Munro academy is 93, of which number only 8 are nonresidents; that the entire number of children of school age in the district, by the last census, is 127.

The respondents allege that the action of the district in renting and occupying the rooms in the Munro academy is intended to be *temporary only*, and to await the outcome of a movement that has been inaugurated for the establishment of a normal school to be located in said academy; that should the efforts to establish such normal school fail, steps will be taken for permanently improving the schoolhouse of the district, or building a new schoolhouse.

The contention of the appellants that the action of the annual school meeting, held August 7, 1900, in the appropriation of the sum of $85, and to include such sum in the tax list, was illegal and void, is not well taken.

Under the provisions contained in subdivision 15 of section 14, article 1, title 7 of the Consolidated School Law of 1894, the qualified voters duly assembled at a school meeting in any district, have the power, by a majority vote, to levy a tax to pay the reasonable expenses incurred by district officers in defending suits or appeals brought against them for their official acts.

The proofs herein show that the trustees of district 9 were sued in the Supreme Court for official acts performed by them; that they employed competent legal counsel to defend them in such suit; that such counsel performed services therein for which they charged the sum of $85; that such sum was reasonable; that the school meeting had the legal authority to vote to appropriate money to pay said sum and to authorize the same to be included in the district tax.

The contention of the appellants that the action of the special school meeting, held June 8, 1900, in authorizing the trustees to rent of the trustees of the Munro academy certain rooms therein in which to conduct the school of the district, and the action of the annual meeting in appropriating the sum of $100 to pay such rent is illegal, is not tenable.

Subdivision 5 of section 47, article 6, title 7 of the Consolidated School Law of 1894 provides that it shall be the duty of the trustees of every school district, and they shall have power, to *hire rooms* or buildings for school purposes, and to keep such rooms in repair, etc.

Subdivision 8 of section 14, article 1, title 7, provides that the school district meetings have the power to vote a tax to *hire* or purchase rooms or buildings for schoolrooms, etc., and to keep the same in repair, etc.

It is the policy of the school law and of this Department that school districts should own the buildings in which their schools are maintained. Neither the school law nor this Department favors the hiring of rooms for school purposes, in any school district *except temporarily*, and then only when the schoolhouse

of the district is not in repair or not properly ventilated and heated, or has been injured or damaged by the elements, or is not of sufficient capacity to accommodate the children attending the school in the district.

It is in proof that at the time of the contract for the renting of rooms in the Munro academy, the schoolhouse was not of sufficient capacity to accommodate the children of the district, with no mode of ventilation, unsanitary, and difficult to heat. The renting of said rooms was temporary, the agreement containing a clause that either party could terminate the lease by giving six months' notice prior to the end of the school year.

It is in proof that the school meeting at which the trustees were authorized to enter into such lease, was held June 8, 1900. No appeal has been taken to me from the proceedings of such meeting. This Department has uniformly held that where no appeal has been duly and legally taken from the action of a school meeting, so far as this Department is concerned such action will be deemed to have been legal and valid.

The special meeting, held June 8, 1900, having duly and legally authorized the respondents herein to rent said rooms and to make changes therein, the expense of which the first year was not to exceed $100, and no appeal having been duly and legally taken from such action, the respondents had the legal authority to raise by tax said sum without any further action at any district meeting.

September 11, 1900, upon petition of the appellants, I made an order staying all proceedings on the part of the respondents herein as trustees of said district in the payment of said sums of $85 and $100 respectively, and staying all proceedings on the part of the collector of such district in the collection of the taxes assessed in a tax list delivered to him by said trustees with their warrant on or about September 5, 1900, until the hearing and decision of the appeal herein, or until a further order should be made by me herein.

I decide that the appellants herein have failed in establishing their appeal herein and such appeal should be dismissed and said order of stay, made September 11, 1900, should be vacated.

The appeal herein is dismissed and said order of September 11, 1900, is hereby vacated.

5433

In the matter of the appeal of Olney A. Gifford from the tax list and warrant issued in school district no. 1, towns of Sidney and Unadilla, counties of Delaware and Otsego.

Equalization of taxes in joint districts; failure to conform to order of supervisors. A taxpayer may not appeal from the failure of a board of education to conform to the order of supervisors in equalizing the taxes in a district comprising a portion of two or more towns, unless he is injuriously affected by the failure of the board to comply with such order.

Notice of collection of taxes. The neglect of a collector to post a copy of the collector's notice of the collection of taxes on the door of the schoolhouse, as required by section 397 of the Education Law of 1909, does not nullify the tax list and warrant nor justify an order invalidating the proceedings of a board of education in respect to the collection of taxes.

Decided January 6, 1910

Olney A. Gifford, attorney for appellant
Charles H. Seeley, attorney for respondent

Draper, *Commissioner*

This appeal is brought from the tax list and warrant of union free school district no. 1, towns of Sidney and Unadilla, counties of Delaware and Otsego, which was prepared by the board of education of such district and delivered to the collector thereof on the 7th day of September 1909. The district is a joint district embracing parts of the towns of Sidney and Unadilla. An application was duly made by taxpayers in the district for an equalization of the value of the taxable real property within the parts of the two towns embraced within the district. The supervisors of the towns met as provided by law, and determined that "96¼ per cent of all taxes levied upon the real property of the town of Sidney lying in said district, and 3¾ per cent of all taxes levied on the real property of said district should be assessed upon the real property of the town of Unadilla lying in said district."

The appellant insists that the board of education, in making its tax list, did not conform to the order of the supervisors, in that they failed to assess upon the real property alone, the portion of the taxes levied upon real property in the district. It is apparent that the board levied upon both the real and personal property in the parts of the two towns comprised in the district, the percentage of the entire tax to be levied in the district. What should have been done was first to ascertain the portion of the entire tax of the district to be borne by the real property in the district, and then impose 96¼ per cent of this amount upon the real property situated in the part of the district in the town of Sidney, and impose the remaining 3¾ per cent upon the real property situated in the part of the district in the town of Unadilla. If this course had been pursued, the tax to be paid by the part of the district in the town of Sidney would have been increased a very few dollars — not more than fifteen. Special franchises are included as real property, leaving only about $20,000 of personal property valuation out of a total of about $660,000 to be affected by the error. The discrepancy caused by the error is very small. Taxpayers residing in the town of Sidney benefit by the error, while those residing in the town of Unadilla are adversely affected. The appellant does not allege where he resides; the respondent alleges that he is not aggrieved by the mistake complained of, since he does not pay a tax upon personal property. The fact that he is not assessed on personal property in the district does not affect his standing in this proceeding. But unless he is a resident of the part of the town of Unadilla comprised in the district, he is not injured by the alleged error, and should not be heard to complain.

Another allegation of the petition pertains to the collector's notice. Its form is apparently sufficient. It was posted throughout the district in a number of conspicuous places, on the 7th day of September, and the time of receiving taxes at 1 per cent was stated therein to expire October 6th, which was thirty days after the notice was so posted. But it seems that the collector neglected to post a copy of the notice on the door of the schoolhouse as required by the statute (Education Law, § 397). This was a mistake which is admitted by the collector, but it does not necessarily nullify the tax list and warrant, nor does it justify an order invalidating the proceedings of the board in respect thereto. A large portion of the taxes on the tax list had been paid before this appeal was brought. The warrant was executed by the board September 6, 1909; it was delivered to the collector September 7, 1909, and notices were posted on the same day, and published September 11, 1909. Under such circumstances the appellant is too late to raise the question as to the sufficiency of the posting of the notice.

The appeal herein is dismissed.

ASSESSMENTS

Personal property in the hands or under the control of any executor or administrator must be assessed in the district where such executor or administrator resides.
Decided April 10, 1884

Ruggles, *Superintendent*

William C. Fields, late of the village of Laurens, Oswego county, died there on the 27th of October 1882, leaving a last will and testament in which executors were appointed. The will was admitted to probate and the executors duly qualified. The executors are residents of Albany, and had not been residents of the town of Laurens at any time for five years previous to the assessment appealed from.

The trustee of school district no. 2, Laurens, assessed the personal estate of said Fields, deceased, in that district. The appeal is brought by the executors from such assessment.

These facts bring the case within the provisions of the statute, that personal property in the hands of, or under the control of, any executor or administrator is assessable, where the administrator or executor resides, and not elsewhere. (Section 5, article 1, title 2, chapter 13, part 1, Revised Statutes.)

RESCISSION

When a special meeting had voted a tax for building a new house, and had adjourned four weeks to consider proposals for building, and at the adjourned meeting voted to rescind the vote levying the tax, the vote to rescind was legal and valid, even though the tax list had been made out, and a part of the tax voluntarily paid.
Decided February 18, 1858

Van Dyck, *Superintendent*

At a special meeting duly called a vote was taken and carried, ayes 28, noes 24, to raise $1000 by tax on the district, for the purpose of building a new schoolhouse. The meeting then adjourned for four weeks for the purpose of receiving propositions that might meantime be submitted to the trustees relative to site. At the adjourned meeting a motion was carried to reconsider the vote of the last meeting, after which the meeting adjourned *sine die*.

In the meantime the tax list for the $1000 had been made out, and a part of the same had been voluntarily collected before the adjourned meeting; but this will avail nothing, as the trustees could not issue their warrant till the expiration of thirty days after the tax was voted. No legal collection could therefore have been made before that time. Voluntary payments may have been made which

the trustees would be authorized to receive, but these are not such collections as the courts contemplate in order to place the repeal of a tax levy beyond the power of a district meeting.

It is assumed by the appellants that the special meeting being adjourned for a specific purpose, no other business could be transacted than that specified in the notice for adjournment. This is an error. The meeting was competent to transact any business brought before it.

From the evidence before me, I am compelled to regard the proceedings of the adjourned meeting as a fair expression of the will of the district upon levying the tax, and it is unfavorable to such action. The vote at the adjourned meeting is much larger than that of the special meeting; it is plain, therefore, that no advantage was taken of the absence of any considerable number of the voters by the majority in their vote to rescind the tax. Under these circumstances, therefore, the proceedings of the adjourned meeting are declared legal and are hereby affirmed.

5240

In the matter of the appeal of Round Lake Association and Round Lake Summer Institute from the assessment made against said association and against the property of said institute by the board of education of district no. 9, town of Malta, Saratoga county, for the year 1905, and also from certain acts of the collector of said district in refusing to receive certain taxes.

The school law does not confer upon district trustees the power to review in their discretion the assessments made by town assessors.

The power of such trustees to assess property is only incidental to their general functions and is restricted to cases of emergency or to correcting undisputed errors for which the law distinctly provides.

Decided February 16, 1906

Irwin Esmond, attorney for appellants

Draper, *Commissioner*

The Round Lake Association is a domestic corporation organized and existing under the provisions of chapter 617 of the Laws of 1868 and the acts amendatory thereof.

This corporation acquired title to certain real estate located in the town of Malta, Saratoga county. This real estate was divided into lots, streets were established, etc., and such lots leased. These lots were leased for a period of 99 years and renewable to the lessee, "his heirs and assigns for a like term of years *forever*." For some time there has been a difference of opinion between the town assessors and the Round Lake Association as to whom this real property should be assessed. The association has contended that these lots should be assessed to the individual lessee while the town assessors have claimed that they should be assessed to the Round Lake Association. The town assessors in assess-

ing property for the year 1905 assessed each of these lots separately but to the Round Lake Association.

It appears that on August 25, 1905, an agreed statement of facts relating to this controversy was presented to the State Tax Commissioners and a stipulation entered into between the assessors of the town of Malta and the Round Lake Association by which the parties thereto agreed that the decision of the said tax commissioners on the questions therein presented for determination should "be final and binding upon all the parties hereto with respect to the said assessments for the year 1905, and that no other or further proceedings shall be instituted for the purpose of reviewing said assessments for said year."

It also appears that the State Tax Commissioners referred all matters submitted to them and pertaining to this subject to the Attorney General and on September 13, 1905, that officer wrote an opinion on the qusetions presented, holding that the real estate in question had been erroneously assessed and that such property should be assessed to the individual lessees and not to the Round Lake Association. This opinion appears to have been filed with the town assessors of the town of Malta on September 15, 1905, the last day allowed assessors under section 38 of the tax law for filing with town clerks the completed and verified assessment roll of the town.

The town assessors do not appear to have been governed by the opinion expressed by the Attorney General and the State Tax Commissioners. No change was made by the town assessors in the method of assessment of the property in question before filing the completed and verified assessment roll of the town with the town clerk.

It further appears that William A. Bedell, supervisor of the town of Malta, Saratoga county, petitioned the board of supervisors of said county to change the assessment of the property in question from the Round Lake Association to the individual lessees of such property pursuant to the provisions of section 60 of the tax law. On December 6, 1905, the law and finance committee of that board, to whom had been referred the petition of Supervisor Bedell, made a report recommending that said petition be given favorable consideration. The report of this committee also contained the opinion of the Attorney General to the effect that the board of supervisors possessed the power under section 60 of the tax law to make such change. This report was adopted and the board of supervisors directed Supervisor Bedell of the town of Malta to change the assessment of this property on the town assessment roll from the Round Lake Association to the individual lessees of such property.

None of the questions above mentioned came within the jurisdiction of the Commissioner of Education. They have been recited here because of the relation which they bear to the questions which are within his jurisdiction and which we are now to consider.

On October 25, 1905, the board of education of school district no. 9, town of Malta, issued a tax list and warrant and placed such list in the hands of the collector of the district for collection. The boundaries of the Round Lake Asso-

ciation grounds appear to be identical with the boundaries of this school district. The property in question is therefore all located within the boundaries of such school district. The president of the board of education is one of the town assessors and his views on the matter of assessing this property for school purposes would of course be the same as his views on the method of assessing such property for town and county purposes.

Section 63 of title 7 of the Consolidated School Law provides that school district taxes shall be apportioned by trustees upon all the real estate within the boundaries of the district and that such property shall be assessed to the person or persons or corporation owning or possessing the same at the time such tax list shall be made out. Section 64 of the same title provides that the valuations of taxable property shall be ascertained so far as possible from the last assessment roll of the town after revision by the assessors. It is therefore the duty of trustees in making out a tax list to assess real estate to the person or corporation owning it at the time such tax list is made out and at the valuation at which such property is assessed upon the latest completed and verified assessment roll of the town. If it is known by the trustees at the time the tax list is made out that the title to a parcel of real estate has been transferred since the assessment made by the town assessors, it is the duty of the trustees to assess such property to the owner thereof at that time and in such amount as the property is assessed on the town assessment roll.

Section 65 of title 7 of the Consolidated School Law confers upon trustees the power to make original assessments. This section defines the conditions under which such original assessments may be made. If any person shall request a reduction in the assessed valuation on his property, or if the assessed valuation of taxable property can not be ascertained from the last assessment roll of the town, or if the valuation of property shall have increased or diminished since the last assessment roll of the town was completed and verified, or if an error, mistake or omission on the part of the town assessors has been made in the description or valuation of taxable property, the trustees have power to ascertain the true value of such property and to assess it accordingly. These are the only cases wherein a board of trustees may make an original assessment and in making such assessment they must proceed in the same manner as town assessors proceed in the assessment of property. Trustees are not required to appoint a grievance day unless they have made an original assessment.

The necessity of empowering trustees to make original assessments in the foregoing cases is quite obvious. Many clerical errors are made. The value of property often changes between the date of assessments made by assessors and the date of issuance of a tax list. It often occurs that new buildings are erected and then again buildings are destroyed so that the value of a piece of property may materially change. In such cases an injustice and many times a hardship would follow if some authority did not possess the power to make equitable changes under these circumstances. Provision is also made in section 84 of title 7 for the correction of errors in a tax list.

The provisions of the school law above mentioned do not confer upon trustees the power to review in their discretion the assessments made by town assessors. Where an issue relative to the assessment of property is raised previous to the assessment of such property and the town assessors with a full knowledge of the points involved in that issue proceed to a determination of such issue and thereby fix a valuation upon, and the ownership of, a piece of property, the right to review such action of the town assessors is not vested by law in school district trustees. To hold that the law extends such power to trustees of school districts would practically give such officers of the several school districts of a town the right to change the valuation upon every piece of property in a town. This is neither necessary nor desirable. It is unnecessary to speculate upon the results which would follow if the law were construed to confer such power upon school district trustees.

If town assessors err in the determination of such questions, the aggrieved party should seek redress through proper channels and school district trustees should not undertake to review and correct the action of town assessors in such cases. I think it will not be claimed that if the town assessors had decided that the property in question was assessable to the individual lessees and had so assessed it the trustees of the school district could have lawfully reviewed such assessment and have assessed such property for school purposes to the Round Lake Association.

Assessors are officers especially empowered to determine the valuation of property and to assess it accordingly. They are elected by the people to perform that special duty. Trustees are the chief administrative officers of school districts. Their power to assess property is only incidental to their general functions and is restricted to the cases above cited for the purpose of promptly meeting some emergency or correcting some undisputed error for which other provision has not been made. It was never contemplated under the provisions of the school law to which reference has herein been made that the power of trustees to assess property should be equal or superior to that of town assessors. [*See* decision no. 4163½]

Appellant sought relief from the action of the town assessors. He petitioned the board of supervisors of Saratoga county to correct the alleged error of the town assessors. The Attorney General of the State held that the board of supervisors possessed the power to make that correction. The board of supervisors in due time authorized that such assessment should be changed. Appellant's relief from the action of the board of education was an appeal to the Commissioner of Education and a petition to restrain the authorities of the school district from collecting the tax imposed by the tax list issued until the final determination by proper authority of the question involved.

It is unnecessary to determine whether in this particular case the board of education was bound by the agreement between the town assessors and the Round Lake Association and was required to assess this property in accordance with the method which the Attorney General held was proper and legal. The State Tax Commissioners and the Attorney General of the State hold that the

method of assessing the property in question was wrong. The Attorney General holds that the board of supervisors could legally correct the error made by the assessors. Such correction has been made. The property is now assessed upon the town assessment roll to the individual lessees of the property. The opinion of the tax commissioners and of the Attorney General should be respected and considered sound until the courts shall hold otherwise. Could this error have been corrected previous to the issuance of the tax list in the school district, it would have been the duty of the board of education to have assessed this property in accordance with the corrected town roll. Appellant should not be compelled to pay a tax levied for school district purposes upon the property in question through such error. Provision has been made in the school law whereby relief can be afforded through an order made by the Commissioner of Education. Such action will be taken.

In the agreed statement of facts presented to the tax commissioners, two other questions were submitted for determination. The Round Lake Association and the Round Lake Summer Institute are two separate corporations. Each claimed exemption from taxation on certain properties. In the Attorney General's opinion that officer holds that the Round Lake Association was not entitled to such exemption. He expressed no opinion on the claim of the Round Lake Summer Institute to such exemption. The property owned by this corporation and the amount for which it is assessed is as follows: George West Museum $5000; Alumni Hall $500; Kennedy Hall $2000; and Garnsey Hall $2500.

Round Lake Summer Institute was incorporated under the Regents on January 12, 1889, as an academy. However, the only one of these buildings which appears to be used exclusively for educational purposes is the George West Museum and that property should be exempt from taxation for school purposes. [32 App. Div. 197; 74 App. Div. 553]

The appeal herein is sustained.

It is ordered, That the board of education of said school district no. 9, town of Malta, Saratoga county, be, and they hereby are, ordered to change, correct and amend the tax list issued by said board on or about the 25th day of October 1905, in and for said district by substituting for the name of Round Lake Association the name of the individual lessees of the several parcels of real estate included in such tax list and assessed to Round Lake Association, and in case any of such lessees shall not be residents of said school district no. 9, Malta, to make such further changes in said tax list as shall be necessary to assess the property of such lessees as nonresident land in accordance with the provisions of section 63, title 7 of the Consolidated School Law.

It is also ordered, That the collector of said district no. 9, Malta, shall immediately after said tax list has been thus changed, corrected and amended, give notice as provided in section 81, title 7 of the Consolidated School Law of the receipt of such tax list and the said collector shall thereafter receive voluntary payment of the taxes of said tax list for thirty days as provided in said section 81.

It is also ordered, That the collector of said district no. 9, Malta, shall receive any tax included in said tax list and which may be tendered to him by any officer or employee of the Round Lake Association or by any other person and shall credit the same to the person to whom said taxes are properly chargeable on said tax list.

It is also ordered, That the said board of education of district no. 9, Malta, shall strike from such tax list the assessment against Round Lake Summer Institute of $5000 on the George West Museum.

5381

In the matter of the appeal of the Round Lake Summer Institute from a certain assessment made against said institute and upon its property described as "George West Museum and Park" by the board of education of district no. 9, town of Malta, Saratoga county, for the year 1907.

When the Supreme Court holds that property is exempt from taxation for State, county and town purposes by reason of being exclusively used for educational purposes and coming within the provisions of subdivision 7 of section 4 of the tax law it will be held by this Department that such property is also exempt from taxation for school district purposes.

Decided February 25, 1908

Irwin Esmond, attorney for appellant

Draper, *Commissioner*

This proceeding was filed at this Department October 24, 1907. An order was made by me on the date on which such proceeding was filed, restraining the collector of union free school district no. 9, town of Malta, from collecting or attempting to collect from the Round Lake Summer Institute a certain tax levied upon its property known as the "George West Museum and Park."

A decision herein has not before been rendered for the reason that the moving papers showed that appellant had obtained a writ of certiorari from the Supreme Court of the State of New York to review the proceedings of the board of assessors of the town of Malta, Saratoga county, in assessing the property in question, that a return to such writ had been made and filed by the said assessors, but that no hearing had been given thereon and therefore no determination of the issue involved.

It appears that Mr Justice Van Kirk rendered a decision in such case on February 21, 1907, holding that the property in question is exempt from taxation by reason of being exclusively used for educational purposes and coming within the provisions of subdivision 7 of section 4 of the tax law of the State and ordering that the assessment of such property for State, county and town taxes be stricken from the tax rolls.

If the property in question was exempt from taxation for town, county

and State purposes for the reasons thus held, it follows that it is also exempt from taxation for school district purposes. It further appears that the property in question was assessed for school purposes in the year 1905 and that on an appeal to this Department it was held that such property was exempt from taxation.

The appeal herein is sustained.

It is ordered, That the board of education of union free school district no. 9, town of Malta, county of Saratoga, shall strike from the tax list of such district issued by said board of education on or about the 24th day of September 1907, any assessment against the Round Lake Summer Institute upon property described as "George West Museum and Park" and that the said board of education shall strike from any other tax list now in force in said district any assessment appearing thereon against the Round Lake Summer Institute upon the said property described as "George West Museum and Park."

It is further ordered, That the board of education of said union free school district no. 9, town of Malta, county of Saratoga, is hereby enjoined and restrained from assessing for school district purposes the property of the said Round Lake Institute known as "George West Museum and Park" so long as said property shall continue to be used exclusively for educational purposes.

3967

In the matter of the appeal of G. D. S. Trask v. the trustees of school districts nos. 2 and 3, town of Castleton, Richmond County.

Equitable relief is sought from erroneous assessments paid long before this appeal was instituted. *Held,* to be too late to secure the relief from this Department. Relief so sought must come from the courts.

Opinion determines the place of taxation of a small tract of land lying in one district, adjoining land of same occupant and owner in another district, for a succession of years.

Decided April 20, 1891

Draper, *Superintendent*

The appellant who is the executive officer and agent in charge of property owned by the trustees of the Sailors Snug Harbor, situated in the town of Castleton, Richmond county, where he resides, has instituted this proceeding for the purpose of having it judicially determined where a certain lot of land, comprising three acres, situated within the boundary of district no. 2, in said town, should have been taxed for school purposes since the title to such property was acquired by the corporation represented by the appellant.

It appears that the property in question was purchased by the trustees of the Sailors Snug Harbor, in April 1888, and adjoins the main property of the corporation, situated in district no. 3 of said town, upon which its buildings are erected and where the appellant resides.

The property in question was separately assessed upon the town assessment rolls after April 1888, and until the town assessment roll of 1890–91, when the entire body of land owned by the said corporation was assessed in one body.

With these facts conceded, the question is asked where should the three acres, lying within the boundary lines of district no. 2 be taxed for school purposes.

Section 66 of title 7 of the Consolidated School Act previous to the amendment of May 29, 1889, provided that "land lying in one body, and occupied by the same person either as owner or agent for the same principal, or as tenant for the same landlord, shall, though situated partly in two or more school districts, be taxable in that one of them in which such occupant resides."

By legislative enactment the above section was amended May 29, 1889, so that since said date, lands lying in one body but in two districts are not to be taxed together for school purposes in the district in which the occupant resides, unless the said lands are *assessed as one lot* on the preceding town assessment roll.

It will therefore be seen that the lot in question was taxable prior to the amendment of May 29, 1889, in district no. 3, with the main land which it adjoined and where the occupant resided.

Since May 29, 1889, and until the town assessment rolls of 1890–91 were prepared and revised by the assessors, it was taxable in district no. 2 as a separate lot.

Since the revision of the said rolls of 1890–91, it was taxable in district no. 3, with the main land as one entire lot.

Other questions are presented which I can not determine upon this appeal.

It is too late to ask for equitable relief from erroneous assessments paid long before this appeal was instituted. Any relief so sought must come from the courts.

5166

In the matter of the appeal of Allen D. Spink as trustee of school district no. 4, Orangeville, and John S. Head as trustee of school district no. 17, Sheldon, county of Wyoming, to determine whether certain real estate shall be assessed as land lying in one body.

No land can be assessed as land lying in one body which does not meet fully each of the four following conditions: (1) The land must lie in one body. There must be an actual line of contact between the boundaries of such two bodies of land. (2) Such land must be owned by *one* person. (3) The land must be occupied by one person. This person must be either the owner of such lands or the agent or tenant of one and the same landlord. (4) Such land must have been assessed as one lot on the last assessment roll of the town after revision by the assessor.

Decided January 17, 1905

Draper, *Commissioner*

The trustees of these school districts have submitted a statement of facts agreed upon by them in relation to two parcels of land located therein. These facts show that Ira D. Calkins and his wife, Emma L. Calkins, jointly own a tract of 100 acres of land located in school district no. 17, Sheldon, and that they reside thereon. The facts also show that adjoining this 100 acres of land but located in school district no. 4, Orangeville, is another parcel of land of 76 acres owned by the said Ira D. Calkins. These two pieces of property were assessed by the town assessors in 1904 as one body of land. The question presented for my determination is, Shall this land be assessed for school purposes in accordance with the provisions of section 63, title 7 of the Consolidated School Law, in school district no. 17, Sheldon, as land lying in one body, or shall the 76 acres be assessed in school district no. 4, Orangeville, and the 100 acres in school district no. 17, Sheldon?

It appears that this question was submitted to the school commissioner of the first commissioner district of Wyoming county, in which these school districts are located, and he decided that such property should be assessed in district no. 17, Sheldon, as land lying in one body. I assume that the question was submitted to the school commissioner simply to obtain his opinion and not with the understanding that such opinion should in any way be binding upon the districts. It was entirely proper to request an opinion from the school commissioner on this question and also proper that he should express one, or that he should give any advice to school officers on the question which might be helpful to them. It must be understood, however, that the school law does not confer on a school commissioner judicial or ministerial power to pass upon such questions and that the decision of a school commissioner thereon would have no binding effect upon the school districts.

The school commissioner has filed an answer to this appeal. Since a statement of facts has been submitted by the trustees of two districts for determination of a question of law which such commissioner has not power to determine, this Department might properly refuse to accept such answer. He contends that the joint ownership of this 100 acres by Mr Calkins and his wife is not a bar to the assessment of these lands as land lying in one body. In this he is in error as we shall hereafter show. He also contends that the trustee of district no. 4, Orangeville, in assessing the 76 acres in question to Ira D. Calkins did not follow the course of procedure directed by law and therefore asks that the assessment by such trustee be declared illegal. The question of the validity of such assessment is not properly raised. The only question which this Department has been asked to determine in this appeal is whether the two bodies of land in question could be assessed as land lying in one body. This was the only question presented to the commissioner for his opinion. This is the only question which we can properly determine. The commissioner is also barred from raising the question of the validity of this assessment as he does not appear to be an aggrieved party under such assessment.

In order to assess two bodies of land located in different districts as lying in one body under section 63 of title 7 of the Consolidated School Law, four distinct conditions must be satisfied. These are:

1 Such lands must lie in one body. There must be an actual line of contact between the boundaries of such two bodies of land.

2 Such lands must be owned by *one* person.

3 Such lands must be occupied by one person. This person must be either the owner of such lands or the agent or tenant of one and the same landlord.

4 Such lands must have been assessed as one lot on the last assessment roll of the town after revision by the assessors.

No land can be assessed under this provision of law which does not meet fully each of the four conditions above stated. The statement of facts agreed upon by the trustees presenting this question shows that in this particular case the lands in question do not meet the second of these conditions. It is expressly stated that the lot of 100 acres is owned jointly by Ira D. Calkins and Emma L. Calkins and that the lot of 76 acres is owned by Ira D. Calkins. The whole of these two bodies of land is not therefore owned by one person. It is unnecessary to examine into this case to determine if the other conditions are satisfied. The failure to satisfy one condition renders it impossible to assess these two bodies of land in one school district.

I decide, That the said lot of 76 acres should be assessed to Ira D. Calkins in school district no. 4, Orangeville, and that the said lot of 100 acres should be assessed to Ira D. Calkins and Emma L. Calkins in school district no. 17, Sheldon.

It is ordered, That the trustee of school district no. 17, Sheldon, shall not include in any tax list issued by him the said lot of 76 acres owned by Ira D. Calkins and located in school district no. 4, Orangeville; that if the trustee of district no. 17, Sheldon, has already issued a tax list and has included thereon the said lot of 76 acres owned by Ira D. Calkins and such tax list has not been returned, the said trustee shall immediately amend such tax list by striking therefrom such assessment against Ira D. Calkins; that if the said Ira D. Calkins has paid a tax on such 76 acres to school district no. 17, Sheldon, during the current school year by reason of such 76 acres having been included in a tax list issued for the current year, then the trustee of district no. 17, Sheldon, shall immediately refund to the said Ira D. Calkins any and all tax thus paid.

3935

In the matter of the appeal of Isaac E. Shipley and others, trustees of school district no. 6, town of Williamson, county of Wayne, v. Henry P. Benton, trustee of school district no. 1 of the same town.

Lands lying in one body but in more than one district, owned and occupied as one farm, were not assessed in one body upon the last corrected town assessment roll. *Held,* not taxable for school purposes in one body in the district in which the occupant resided.

Each district is entitled to levy a tax only upon the land lying within its own boundary. Appeal dismissed upon the ground that appellants not being the owners of the land in question, were not the aggrieved persons.

Decided December 3, 1890

Draper, *Superintendent*

Appeal from the action of the trustee of school district no. 1, town of Williamson, Wayne county, in including in a tax list an assessment against the lands of one John Shipley, 93 acres which lie in one body, 12 acres of which are within the bounds of district no. 1, and 81 acres of which lie in district no. 6. The owner occupies the entire farm, and resides thereon in district no. 1. The land is assessed in two parcels, 12 acres and 81 acres, respectively, upon the last corrected town assessment roll.

The following is the statute providing for the assessment of such lands for school purposes:

Section 66 . . . but land lying in one body and occupied by the same person,either as owner or agent for the same principal, or as tenant under the same landlord, if assessed as one lot on the last assessment roll of the town after revision by the assessors, shall, though situated partly in two or more school districts be taxable in that one of them in which such occupant resides. . . . (Title 7)

It will therefore be observed that, if this land in question had been assessed in one body by the town assessors, the action of the respondent would have been proper. As it is, each piece is taxable in the district in which it is situated.

But I must dismiss the appeal upon another ground. The appellants are not aggrieved persons. John Shipley, the owner, may be, and may become so. The trustees of district no. 6 in preparing a district tax list, were in no way prevented from assessing a tax upon the 81 acres. The fact that it may have been improperly assessed in district no. 1, was no bar to their right to assess.

For the reasons given, the appeal is dismissed.

3931

In the matter of the appeal of Theodore G. Peck and others v. the board of education of union free school district no. 3, Haverstraw, Rockland county.

Lands lying in one body but in two districts, all owned and occupied as one farm by the agent of the owners, who resides thereon, and which land is assessed in one body by the town assessors. *Held* to be taxable in one body in the district in which the agent of the owners who is also one of the owners, resides.

Decided December 3, 1890

Draper, *Superintendent*

The appellants, who reside in the town of Haverstraw, Rockland county, and one Edith P. Halstead, of the city of New York, are the owners of a certain

body of land of about 360 acres, known as the "Peck estate," of which about 325 acres lie in school district no. 2, Haverstraw, and about 35 acres lie in district no. 3, Haverstraw. The entire property is occupied by one or more of the owners, and particularly by the agent of the owners, Gordan H. Peck, and resides in the only dwelling thereon, which is on the land in district no. 2. The entire farm is in one body and is so assessed upon the last town assessment roll.

The board of education of union free school district no. 3, Haverstraw, has made a separate assessment upon the land lying in their district, and from such action this appeal is brought.

The entire farm is and has been for years assessed for school purposes in district no. 2. No answer has been filed.

The action of the board of education of union free school district no. 3, as above set forth, can not be sustained. The statute in such cases provides: ". . . but land lying in one body and occupied by the same person, either as owner or agent for the same principal, or as tenant under the same landlord, if assessed as one lot on the last assessment roll of the town after revision by the assessors, shall, though situated partly in two or more school districts, be taxable in that one of them in which such occupant resides. . . ." (See section 66 of title 7 of the Consolidated School Act.)

The assessment of the 35 acres in district no. 3 is therefore invalid, and the board of education is hereby ordered to withdraw and correct their tax list accordingly.

The appeal is sustained.

3680

In the matter of the appeal of Calvin C. Reed, as sole trustee of district no. 12, town of New Lebanon, county of Columbia, for and on behalf of the United Society of Shakers, v. school district no. 9, in said town.

Lands owned by the United Society of Shakers which lie in one body, but in different districts, are taxable in the district in which the owners reside.

The objection that the statute (section 66 of title 7, of the Consolidated School Act) refers to a sole ownership or occupancy — *held,* not tenable. Lands jointly owned are controlled by the same statute.

Decided April 16, 1888

W. C. Daley, attorney for the appellants
Daniel E. Miller, attorney for the respondent

Draper, *Superintendent*

School district no. 12 of the town of New Lebanon is comprised of lands owned and occupied in common by numerous persons, known as the United Society of Shakers. Some of such lands, lying in one body, extend into district no. 9 of said town. District no. 9 claims the right to tax the lands which lie in that district. The Society of Shakers resist this claim, and contend that, under the

provisions of section 66 of title 7, of the Consolidated School Act, said lands are liable to taxation only in district no. 12. This appeal is taken from a tax list, including the land in question, made and delivered to the collector in district no. 9, for the purpose of determining the matter.

In general, real estate is taxable in the school district in which it is situated. The statute (section 66, title 7, chapter 555, Laws 1864) makes an exception to this general rule, however, in the following words, namely: "but land lying in one body and occupied by the same person, either as owner or agent for the same principal, or as tenant under the same landlord, shall, though situated partly in two or more school districts, be taxable in that one of them in which such occupant resides."

I am called upon to determine whether the land in question must be held to be taxable under the general rule or under the exception thereto.

The appellants say that the land in the two districts lies "in one body," and this is disputed.

They say also that such land is owned and occupied by the same persons, namely, the United Society of Shakers. It is admitted that there are two occupied dwellings upon the Shaker land in district no. 9, but it is claimed that the occupants are mere agents or employees of the society, and that seems to be the fact.

An issue is raised between the parties as to the meaning of the words, "occupied by the same person either as owner or agent for the same principal, or as tenant under the same landlord." The respondents contend that the ownership or occupancy of the land must be by a single individual. The appellants assert that the statute meant that the land lying in two districts and one body must have an identical ownership, but that several persons may share in it. In support of their position the respondents cite the comments of the editor in the Code of Public Instruction (page 337, edition of 1887). The statements of the editor are based upon a decision made by Superintendent Gilmour, March 24, 1879, in appeal no. 2839. But an examination of the full opinion of the Superintendent clearly shows that it does not sustain the editorial comment referred to. In that case the ownership was not identical, the portion in one district being owned by one person and that in the other district being owned jointly by that person and another. So it can not properly be said that the Superintendent has ever held that land lying in one body must be owned wholly by but one person in order to be taxable in the school district in which the owner or occupant resides.

What, then, did the Legislature mean when it used the language about which the parties to this appeal differ? In order to answer this, it is pertinent to inquire what the purpose was in enacting such a provision. It is evident that the object was to convenience and facilitate the transaction of public business. Land lying in one body, with an identical ownership, is valued for the purposes of taxation by town assessors, and their valuation is fixed, determined and announced in the town assessment rolls. Trustees in school districts are charged with the duty of levying and collecting school taxes. But the law does not

assume that they are as well qualified to fix and determine the values of real estate as are officers specially chosen for that particular purpose, and it therefore provides that trustees shall, so far as possible, ascertain the values of real estate from the last assessment roll of the town. Lands lying together, and having the same ownership, are valued upon the assessment rolls as one piece. In very many cases the valuations placed upon these parcels by the town assessors could not be used by trustees in the levying of school taxes, for the reason that the parcels frequently lie in two or more school districts, but for the provision that they shall be taxed in the district containing the residence of the occupant. It was in furtherance of the law that trustees, in levying taxes, shall follow the town assessment rolls, and to obviate the necessity of imposing upon them the duty of fixing a value upon the respective parts of the whole parcel lying in each district, that the exception to the general principle was enacted. I can think of no other reason for this arrangement. Is there any reason why such an arrangement should be extended to lands having a sole ownership which does not apply with equal force to lands having a joint ownership? I can conceive of none. To take a contrary view would lead to endless uncertainty and confusion, for numberless land titles are involved in doubt, vested in heirs, and subject to conflicting claims, the determination of which it is not the purpose of the law to impose upon the school authorities. Moreover, the same section of the statute which contains the provision under consideration also provides that "such property shall be assessed to the person or *persons* or *corporation* owning or possessing the same at the time such tax list shall be made out." The phrase under discussion uses the term "persons" and "occupant" in the singular number, but it will hardly be contended that there could be but one person *occupying* such a parcel of land, in order to render it taxable in the school district containing the residence. Yet the statute seems to imply *that,* as much as it does that the ownership must be in but one person. The statute not being distinct, it is our duty to give it such a meaning as is consistent with the general and manifest purpose of the Legislature in enacting it. Reading the whole section together, and in connection with other sections related to it, I had no difficulty in arriving at the conclusion that it was the purpose of the Legislature to say that lands lying in one body, and being owned and occupied by the same person or persons, no matter whether the ownership and occupancy is individual, or is shared in by several persons, shall be taxed in the school districts containing the residences of the owners or occupants.

Coming to this conclusion, it necessarily follows that land, the legal title of which is in trustees representing the United Society of Shakers, must, so far as the levying of school taxes is concerned, be treated precisely the same as would be the case if such title were vested in a single individual.

I have examined the last assessment roll of the town of New Lebanon, so far as any real estate in either school district no. 9 or district no. 12 of that town is concerned. I find that the largest parcel of land appearing upon such roll, in either of said districts, consists of 355 acres. This is not so large as to preclude

undivided occupancy. Section 67 of title 7 of the Consolidated School Act provides that "the valuation of taxable property shall be ascertained, so far as possible, from the last assessment roll of the town." There was a wise purpose in this provision. Trustees are not at liberty to disregard it where it is possible to observe it. No state of circumstances is shown here which renders it impossible or impracticable for the respondents in the present case to follow it. This being so, they are not at liberty to divide lands appearing in single parcels upon the town assessment rolls, or to assume to fix and determine for themselves the assessable valuation of the different parts. The law contemplates that the valuations fixed by the assessors shall be used by trustees, except where that is, for some reason, impossible. I fail to find any reason why it is impossible to do so here.

The rule of the statute that provides that, in certain cases, land may be taxed for school purposes in another school district than that in which it is situated, sometimes operates harshly. Possibly it may be so in the present case, although I observe that the acreage and valuation in the two districts are not widely different, and I see nothing which leads me to think that the provision operates any more harshly in this case than in innumerable other instances. What this district may lose upon one side it may gain upon another. The general advantages which flow from the provision, in the practical transaction of the business to which it relates, I have no doubt, outweigh the disadvantages which may incidentally result from it.

The appeal is sustained.

3700

In the matter of the appeal of Calvin G. Reed as sole trustee of district no. 12, town of New Lebanon, county of Columbia, on behalf of the United Society of Shakers, v. school district no. 9 in said town.

The rule laid down by section 66, title 7 of the Consolidated School Act for assessing land lying in one body and owned or occupied by the same person, *held,* to apply to corporations as well as individual owners.

Trustees are to follow assessors' valuations as far as possible.

It is not the policy of the law to charge school officers with the responsibility of making original assessments to any considerable extent.

Decided July 24, 1888

W. C. Daley, attorney for the appellant
Daniel E. Miller, attorney for the respondent

Draper, *Superintendent*

This is an appeal from a tax list made by the trustee in school district no. 9 of the town of New Lebanon, which tax list includes certain real estate belonging to the United Society of Shakers. That society claims that such real estate is not taxable in school district no. 9, but rather in school district no. 12 in said town,

which it adjoins, on the ground that it is real estate lying in one body and owned and occupied by the same persons. The case has been before me heretofore and was decided on the 16th day of April 1888, in favor of the appellants. The respondents have sought a rehearing, and have been heard at length upon their application. Two points have been strenuously urged as against the soundness of the former decision.

1 It is claimed by them that the United Society of Shakers is a corporation, and that corporations are not entitled to the benefit of the exception stated in section 66, of title 7 of the Consolidated School Act, in the words following: "But land lying in one body and occupied by the same person either as owner or agent for the same principal, or as tenant under the same landlord, shall, though situated partly in two or more school districts, be taxable in that one of them in which such occupant resides."

2 They urge that the town assessment roll of the town of New Lebanon is erroneous in that it does not properly state the legal ownership of the lands in question. Assuming that this is so, they claim that the trustee of school district no. 9 was justified and will hereafter be justified, in practically disregarding the town assessment roll and assessing the real estate of the appellants for school purposes in the manner followed by him in the present case.

There seems to be little doubt about the proposition that the United Society of Shakers, in the eye of the law, is a corporation for certain purposes at least; but I am unable to adopt the view of the respondent that a corporation is not, in a proper case, entitled to the benefit of the exception above quoted. It is true that the statutes specially provide that railroad, telegraph, telephone and pipe line companies, shall be taxed in the several school districts through which their lines run, without reference to the location of their principal offices. The reason of this is obvious. But I have no doubt about the real property of corporations being subject to the same rules which govern the taxation of individual real estate, except where the statute expressly provides otherwise, as in the case of railroads, telegraph lines, etc. If this is so, then the first objection urged by the respondent is disposed of.

As to the other objection, it may be said that, although it is possible that the town assessors of the town of New Lebanon have erred in the making of their assessment rolls in the manner claimed by the respondents, yet, that claim being disputed, neither the trustee of school district no. 9 of that town, nor this Department, has the facilities for ascertaining, nor is either bound to ascertain, whether the claim be true or not. I am entirely confident in my view, that it is not the policy of the law to charge school officers with the responsibility of making original assessments to any considerable extent. The law wisely provides, for obvious reasons, that they shall follow the town assessment rolls, which are prepared by officers specially chosen with reference to fixing values of assessable property. The law does provide that, in exceptional cases, the trustee, in making his tax list, may make an original assessment, but I take it that these cases must be deemed to be of a very exceptional nature, as for instance, where a house had been destroyed

by fire, or a building had been erected, or something else had occurred to indisputably change the value of the property in question since the last town assessment roll was revised and perfected. The law nowhere contemplates an entire disregard of the policy of the assessors in making their roll. It nowhere authorizes school officers to overrule assessors. It only permits them to act upon their own motion where the circumstances have so changed since the assessment rolls were made as to make it obviously necessary that they should act, in order that justice may be done. Even in such exceptional cases the law does not permit them to act blindly or in the dark, but provides that it shall be upon notice to the person interested, and that they shall proceed in the same manner as the town assessors are required by law to proceed in fixing the valuation of taxable property. It is not pretended that any such course has been pursued by the respondents in making out the tax list appealed from.

I am not prepared to say that section 66 of title 7 of the Consolidated School Act relative to the taxation of land lying in one body and subject to the same ownership does not operate, with exceptional harshness, as against the respondents. I can not say whether it does or not, or whether or not they ought to receive relief. But it seems entirely clear to me that they can not gain redress in the way which they have undertaken. If the assessors of their town are committing errors in the preparation of the town assessment rolls, it seems to me that the remedy of the respondents lies in an application to the board of town assessors, or in proceedings in the courts to compel a true and proper assessment, and that that course must be taken before the officers who are charged only with the collection of school taxes can be compelled or permitted to change their course. They are, in my opinion, bound to follow the revised assessment roll of the town, and parties who are dissatisfied with the assessments must seek redress elsewhere.

The application to reopen the case is denied.

3762

In the matter of the appeal of Benjamin Gates and Robert Valentine, trustees of the United Society of Shakers in Columbia county, and Timothy Rayson, trustee of school district no. 12, of the town of New Lebanon, Columbia county v. the trustees of school district no. 9 of said town.

Certain lots of land owned by the United Society of Shakers are assessed in the district in which the property was situated. It was claimed by the officers of the Society of Shakers, who reside in an adjoining district, that because the land was a part only of the larger body of contiguous land owned by the Society of Shakers in the adjoining district, the property should be taxed in the district in which such officers reside. A question in relation to the taxation of this property was before the Department some time ago, and it then appeared that it was assessed in one body by the town assessors. It now appears that the property is separately assessed by the town assessors. *Held,* that the trustees having followed the town assessment roll, must be sustained. It is

not intended that school officers shall be charged with the duty of fixing the value upon real estate, unless in exceptional cases. As a general rule, property should be taxed for school purposes in the district in which it lies, when that may be done without involving the necessity of making an original assessment.

Decided February 9, 1889

W. C. Daley, attorney for appellant
Daniel E. Miller, attorney for respondents

Draper, *Superintendent*

This is an appeal from the action of the respondents in levying taxes about the 24th day of October 1888, on property owned by Benjamin Gates and Robert Valentine, as trustees for the United Society of Shakers, as follows, namely: Royce lots $12.23, on Bull lots $5.39, on Ira Royce lots $2.16, on brickyard lots $5.39, and on Thompson lot $1.35, and also an old tax reassessed amounting to $12.76. This property lies in district no. 9, but the appellants claim that it should not be taxed in that district, for the reason that it is only part of the larger body of contiguous land owned by the United Society of Shakers, whose residences are in district no. 12. It is urged that under the provisions of section 66 of title 7 of the Consolidated School Act this property should be taxed in district no. 12.

The question has been presented to the Department before, and decisions concerning it will be found on pages 140 and 159 of the annual report of 1889. It was there held that the property was taxable in district no. 12, principally upon the ground that it was then assessed by the town assessors, as appeared by the town assessment roll, jointly with the larger tract belonging to the Shakers, and that it was not the duty of school trustees to separate portions so assessed jointly and make an original assessment on the separate parcel.

It now transpires that, since the question was last before the Department, the town assessors of the town of New Lebanon, have changed their procedure and assessed the parcels separately, as appears by the town assessment roll. The trustees of district no. 9, in making their tax list, have followed the revised assessment roll of the town in levying taxes against the property known as the Royce lot, the Bull lot, and the Ira Royce lot. The assessments against the property known as the brickyard lots and the Thompson lot, which are complained of, appear to be original assessments.

So far as the trustees have followed the town assessment rolls, they must be sustained.

As has been heretofore said, I am of the opinion that the school laws do not intend that school officers shall be charged with the duty of fixing values on real estate, unless in exceptional cases, where there is no other way.

They are to follow the town assessments made by officers specially chosen for that purpose. Real estate is to be taxed in the district where situated, whenever that can be done without driving trustees to the necessity of making an original assessment. The provisions in section 66 of title 7 of the Consolidated School Act, that "land lying in one body and occupied by the same person,

either as owner or agent for the same principal, or tenant under the same landlord, shall, though situated partly in two or more school districts, be taxable in that one of them in which such occupant resides," is only for the purpose of carrying out this general rule.

It assumes that such land would appear in one body upon the assessment roll. There is no reason for the provision where that is not the case. It seems to me that the proposition that the land should be taxable for school purposes in the school district where it is situated, whenever the easy and natural way, provided by law, is open for doing it, needs no argument.

I find nothing in the papers and nothing was said upon the argument from which I can determine the validity of the original assessments made against the property known as the brickyard lots, and the Thompson lot. They must be presumed to be valid until the contrary is shown. From these considerations the appeal must be dismissed.

4330

In the matter of the appeal of Earl D. Howland from tax list and assessment in school district no. 8, towns of Westford and Roseboom, Otsego county, dated October 5, 1894.

The appellant Howland being the owner of a tract or tracts of land lying in one body and occupied by him as such owner, situated in the town of Westford, and said land having been assessed as one lot on the last assessment roll of said town after revision by the assessors; *held,* that said body of land although situated partly in two or more school districts should be assessed to the owner for school purposes in district no. 4 of Westford, in which said Howland resided.

Decided February 28, 1895

Barnum Brothers, attorneys for respondents

Crooker, *Superintendent*

The appellant herein appeals from a tax list and assessment made and issued in school district no. 8, towns of Westford and Roseboom, Otsego county, on October 5, 1894.

The trustee and collector of said school district have severally answered the appeal.

The following facts are established: that the appellant has for the seven years last past owned a farm situate in the town of Westford, in school district no. 8, towns of Westford and Roseboom, and upon which he resided until on or about September 25, 1894; that in the month of April 1894, the appellant purchased a farm, situate in school district no. 4, town of Westford, and adjoining his said farm in school district no. 8, both said farms being in the town of Westford; that on the last assessment roll of the town of Westford, after revision by the assessors (namely, for the year 1894) said two farms or parcels of land, so lying in one body and occupied by him, were assessed as one lot; that on Sep-

tember 25, 1894, the appellant moved from the house upon said part of his land situate in school district no. 8, to and upon that part of his land situate in school district no. 4, and ever since has, and at the time of bringing the appeal herein still did reside in said school district no. 4 of Westford; that since the commencement of the present school year the trustee or trustees of said school district no. 4 of Westford assessed a tax against the appellant for said body of land owned and occupied by him in said district, which tax has been paid by him; that on October 5, 1894, the trustee of said school district no. 8 of Westford and Roseboom made out a tax list and assessment for such school district, but instead of ascertaining the valuations of taxable property in said district from the last assessment rolls of the towns of Westford and Roseboom after revision by the assessors, namely, said assessment rolls for the year 1894, that said trustee ascertained and took such valuations from the assessment rolls of said town of Westford for the year 1893; that in said tax list and assessment of October 5, 1894, the trustee of said district no. 8 included that part of the land of the appellant lying in one body situate in said school district and assessed a tax of $3.17 against the appellant therefor; that said tax list and warrant were delivered to the collector of said district no. 8, and the appellant refusing to pay said tax the collector collected the same by a levy and sale of certain personal property by the collector.

Under the provisions of article 7, title 7, of the Consolidated School Law of 1894, chapter 556 of the Laws of 1894, and for many years prior thereto, the valuations of taxable property within school district for the purposes of assessments and taxation by trustees shall be ascertained by them, so far as possible, from the last assessment roll of the town after revision by the assessors. Each of the towns of Westford and Roseboom had on October 5, 1894, an assessment roll for 1894 revised by the assessors of each of said towns, and it was the duty of the trustee of said district no. 8 to ascertain the valuations of taxable property in the assessment made by him on October 15, 1894, from said rolls, instead of which such valuations were taken from the rolls of 1893. Such tax list and assessment roll of October 15, 1894, was invalid, and had the appellant taken an appeal in time therefrom to me such assessment would have been vacated and set aside.

This Department has held that any person aggrieved by reason of errors in a tax list must bring his appeal as soon as he has knowledge of said errors, and an appeal brought therefrom after the collection of the tax by levy and sale of his property will not be entertained, his only remedy being by a civil action against the collector. By section 63 of article 7, title 7 of said Consolidated School Law of 1894 (and such has been the school law since 1886) it is enacted that land lying in one body and occupied by the same person either as owner or as agent or tenant for the owner, if assessed as one lot on the last assessment roll of the town after revision by the assessors, shall, though situated partly in two or more school districts, be taxable in that one of them in which such occupant resides.

Since April 1894, the appellant herein has been the owner of a tract or tracts of land lying in one body, all of which has been occupied by him as such owner; that said body of land is situate in the town of Westford, and was assessed as one lot on the last assessment roll of said town of Westford, after revision by the assessors; that said body of land is situated partly in two or more school districts, namely, district no. 4 of Westford and no. 8 of Westford and Roseboom; that since September 25, 1894, the appellant has resided upon said land in district no. 4 of Westford.

I find and decide, That on October 5, 1894, under the provisions of the school law above cited, the trustee of school district no. 8 of Westford had no legal power or authority to assess and tax for school purposes in said district no. 8 said body of land so as aforesaid owned and occupied by the appellant then residing in school district no. 4 of Westford, but that said body of land should have been assessed for taxes for school purposes in said district no. 4 of Westford.

As hereinbefore stated, I have no power to afford the appellant equitable redress for the act of the trustee of district no. 8 of Westford and Roseboom in assessing his property for school purposes in said district, he not having brought his appeal in time, and for such reason said appeal must be dismissed; but for the purposes of future taxation of said land for school purposes so long as the conditions relative to said land, existing since September 25, 1894, continue, I find it my duty to indicate to the trustees of each of said districts, no. 8 of Westford and Roseboom and district no. 4 of Westford, the proper district under the school law in which said body of land is taxable.

Appeal dismissed.

4356

In the matter of the appeal of and submission by O. W. Chamberlin and C. L. Mallory, sole trustee of school district no. 1, town of Ischua, Cattaraugus county, for a decision in what school district certain real property of said Chamberlin is taxable.

Where land lying in one body, although situate in two or more school districts, is assessed for school purposes in the district in which the owner or occupant resides, such assessment does not alter the boundaries of the district, nor take any of the land from one district and transfer it to another, as such alterations of a district can only be made by the order of the school commissioner under the provisions of the school law. The provisions of section 63, article 7, title 7 of the Consolidated School Law of 1894 provide simply for the method of assessing the land for school purposes.

Decided June 27, 1895

Skinner, *Superintendent*

The persons named in the above-entitled matter have, upon a statement of facts in writing, signed by them, submitted to me for my decision the question

in what school district certain real property owned by said Chamberlin is, under the school law, taxable for school purposes.

From the statement of facts submitted to me it appears: that prior to the year 1850 there existed in the town of Ischua, county of Cattaraugus, a school district known as no. 1, of said town, and in the town of Franklinville in said county, a school district known as no. 6 of said town, and that the town line between said towns was the line between said school districts; that there was a lot of land, known as lot 30, containing 234 acres or more, situate in said town of Ischua and in said school district no. 1, of said town; that in said year 1850, 70 acres of said lot 30 was set off from school district no. 1, town of Ischua into school district no. 6, town of Franklinville; that subsequently to said year 1850 one Frederick Cline, a resident of school district no. 6, of Franklinville, became the owner of all of said 234 acres of land, then lying in one body, although situated partly in school district no. 6, Franklinville, and partly in district no. 1, Ischua, and which land joined other lands owned by Cline, and said land during such ownership by said Cline was assessed and taxed for school purposes in said district no. 6, Franklinville; that since the ownership of said Cline there have been different owners of said land and all of them were residents of said school district no. 6, Franklinville, and during such ownership said lands continued to be assessed and taxed for school purposes in said district no. 6, Franklinville; that prior to and in the year 1892, O. W. Chamberlin and one Henry C. Farwell became the owners of the said 234 acres of land and also 119 acres upon which said Cline formerly lived; that in said year 1892 the said Chamberlin and Cline made a division of the land so owned by them; the said Chamberlin became the owner of the 234 acres and the said Farwell became the owner of the 119 acres on which Cline had resided; that in said year 1892 said Chamberlin purchased 3 acres of lot 22, situate in the town of Ischua and school district no. 1, adjoining said parcel of 234 acres, and in May 1894, he purchased 3 acres in lot no. 30 adjoining said parcel of 234 acres situate in said school district and town; that said Chamberlin has sold off of said 234 acres, a parcel of 5 acres, situate in said school district no. 1, Ischua. It further appears that on June 10, 1895, the date of the submission in the above entitled matter, the said Chamberlin was the owner of 235 acres of land in one body, of which 70 acres were situate in school district no. 6, town of Franklinville, and 165 acres situate in school district no. 1, town of Ischua; that said Chamberlin is a resident in the village of Ischua, in which village he owns a house and lot, and is a resident of said school district no. 1, Ischua; that 232 acres of said land was assessed to said Chamberlin as one lot on the last assessment roll of the town of Ischua after revision by the assessors; that said Chamberlin, for the last two years, has been assessed and taxed for said land for school purposes in school district no. 6, Franklinville, and in school district no. 1, Ischua, and that he is so assessed and taxed for said land in a tax list issued by the trustee of school district no. 1, Ischua, which tax list is now in the hands of the collector of said district for collection.

The question submitted to me upon the foregoing facts is, where the said

235 acres of land owned by said Chamberlin, under the school law, should be assessed and taxed for school purposes.

By section 63, of article 7, title 7, of the Consolidated School Law of 1894, chapter 556 of the Laws of 1894, it is enacted that "school district taxes shall be apportioned by the trustees upon all real estate within the boundaries of the district which shall not be by law exempt from taxation, except as hereinafter provided, and such property shall be assessed to the person or persons, or corporation owning or possessing the same at the time such tax list shall be made out; but land lying in one body and occupied by the same person, either as owner or agent for the same principal, or as tenant under the same landlord, if assessed as one lot on the last assessment roll of the town after revision by the assessors, shall, though partly situated in two or more school districts, be taxable in that one of them in which such occupant resides." Under the provisions of said section 63, trustees of school districts must apportion school district taxes upon all real estate within the boundaries of the district, not exempt by law from taxation; and such property shall be assessed to the person or persons owning or possessing the same at the time the tax list shall be made out. The direction to trustees, as above cited, is subject to the following exception contained in said section 63, namely: but land lying in one body and occupied by the same person, either as owner or agent for the owner, or as tenant of the owner, if assessed as one lot on the last assessment roll of the town after revision by the assessors, shall, though situated partly in two or more school districts, be taxable in that one of them in which such occupant resides.

As it appears from the facts that there are 232 acres of land lying in one body, occupied by the same person, namely, O. W. Chamberlin, as owner, and that said 232 acres were assessed as one lot on the last assessment roll of the town of Ischua after revision by the assessors, said Chamberlin, being a resident of school district no. 1, Ischua, it is clear, under said section 63, that said 232 acres should be assessed for school purposes by the trustee of said district no. 1, Ischua, to said Chamberlin, as owner and occupant, although 70 acres of said 232 acres are situate in school district no. 6, Franklinville.

It is also clear that the three acres purchased by Chamberlin in May 1895, should be assessed for school purposes in said school district no. 1, Ischua.

Where land lying in one body, although situate in two or more districts, is assessed for school purposes in the district in which the owner or occupant resides, such assessment does not alter the boundaries of the districts, nor take any of the land from one district and transfer it to another district, as such alterations of district can only be made by the order of a school commissioner under the provisions of the school law. The provisions of section 63 above cited provides simply for a method of assessing the land for school purposes.

Under the statutes of the State, a farm through which the line between two towns runs, is assessable and taxable in that town in which the residence of the owner of the farm is situated; but such provisions of the statute does not change the boundaries of the towns, nor set off the farm into the town in which the tax is laid.

I decide that said 232 acres of land, owned and occupied by O. W. Chamberlin, a resident of school district no. 1, town of Ischua, and of the town of Ischua, of which land 70 acres are part of school district no. 6, town of Franklinville, but situate in the town of Ischua, under the Consolidated School Law of 1894, is assessable and taxable for school purposes in school district no. 1, town of Ischua, and not in school district no. 6, town of Franklinville.

3730

In the matter of the appeal of Emma B. Fox v. school district no. 11, town of Verona, county of Oneida.

Land owned by the same person, separated by the Erie canal and a public roadway, and lying in two districts which the canal divides, must be taxed in the districts in which it lies respectively and not as one entire farm.

Decided November 16, 1888

Draper, *Superintendent*

The appellant owns certain real estate lying in the town of Verona and in school districts nos. 11 and 19 of said town, and upon both sides of the Erie canal. The canal and a public highway run between the two school districts named. The residence of the appellant is in district no. 11. The trustees of district no. 11 have assumed to tax the entire tract in their district. The appellant objects to this. She desires that the portion lying in each district shall be taxed in the district in which it is situated. She says that this has been the case in years past, and she brings this appeal to determine her rights in the premises.

Real estate must, in general, be taxed in the district in which it is located. The statute makes one exception to this general rule. It provides that "land lying in one body and occupied by the same person either as owner or agent for the same principal, or as tenant under the same landlord, shall, though situated partly in two or more school districts, be taxable in that one of them in which such occupant resides." This exception is made for the convenience of trustees. It is not the policy of the law to require trustees to fix values upon real estate for the purposes of taxation to any greater extent than is absolutely necessary. The law, therefore, provides that trustees shall follow the last town assessment roll, after the same has been revised, so far as they can do so, and, accordingly, it permits them to make one assessment against land lying in the same body and owned or occupied by the same person, even though such land be in different school districts. But the exception made by the statute must be strictly construed. The general rule must be followed except in cases which are strictly within the provisions of the statutory exception. Even the exception now operates sometimes unjustly, but in the eye of the law this is more than compensated for by the better facility with which it enables trustees to transact public business. In the present case, it appears that the two school districts are separated by the Erie

canal and a public roadway. This fact precludes the idea that the appellant's land lies in one body, and it seems clear to me that, in consequence of that fact, such land should be taxed in the district in which it is situated.

In view of the foregoing considerations, I must sustain the appeal, and the respondents will henceforth levy school taxes against the appellant for only such portion of her land as lies within their own school district.

3703

In the matter of the appeal of Thomas Hood, Martin P. Gale and Burton L. Gale, comprising the firm of Hood, Gale & Company, v. school district no. 6, town of High Market, Lewis county.

A large tract of land owned by a firm was listed on the town assessment roll as separate lots. *Held,* that the trustees' tax lists, which followed the town assessment rolls, are correct.

Decided July 26, 1888

J. A. Warmuth, attorney for petitioner

Draper, *Superintendent*

This is an appeal from the act of James McDonald, sole trustee of school district no. 6 of the town of High Market, county of Lewis, in levying a tax for the sum of $123.57, and issuing a tax list and warrant for the collection of the same, on or about the 26th of June 1888. The appellants say that they own some 14,000 acres of land in the town of High Market, lying in school districts nos. 4, 6 and 7 of said town; that such land is used and kept for lumbering purposes, and that their mills and the residence of the superintending member of the firm, and the residences of their employees are in school district no. 4. They insist, that, in consequence of that fact and because all of the land mentioned lies in one body, they should be taxed for school purposes only in district no. 4. The trustee of school district no. 6, in his answer, alleges that the 14,000 acres of land referred to has always appeared upon the assessment rolls of the town as nonresident land. While admitting the ownership of the appellants, he claims that that portion of said land being in his district is not in fact occupied by the appellants. He says that it is far removed from their mills, and that it has not been lumbered by them at all. He furthermore states that said lands appear upon the last revised assessment roll of the town of High Market as nonresident lands, and that in said roll it is described only by the number of lots. He alleges furthermore, that school district no. 6 is very poor and weak, the entire assessable valuation being but $12,625, while the lands of the appellants lying within the district, and upon which they seek to avoid taxation, are valued at $5145.

It strikes me that the material question is as to whether the trustee of school district no. 6, in issuing the tax list appealed from, followed the last revised

assessment roll of the town, as required by statute. If the lands of the appellants appear upon said roll as separate lots, it is clear to me that they can not claim the benefit of the exception to the general rule as set forth in section 66 of title 7 of the Consolidated School Act, which provides that lands lying in one body and owned or occupied by the same person, shall be taxed in the school district in which the residence of the owner or occupant stands. It is clearly the intent of the law that school officers shall follow the last revised assessment roll of their town in levying taxes. It appears that the trustee in the present case did so. That seems to be conclusive of the matter.

The appeal is dismissed.

4209

In the matter of the appeal of Monroe Kelly v. union free school district no. 6 and school district no. 8 of the town of Collins, Erie county.

Under the provisions of article 7, title 7, of the Consolidated School Act, to enable land lying in one body and owned by one person and assessed as one lot on the last assessment roll of the town after revision by the assessors, though situated partly in two or more districts, to be taxed in that one of them in which such owner or occupant resides, said land must be occupied by one person, either as owner or as agent for the owner, or as a tenant under the owner. If not so occupied, said land must be taxed in the respective districts in which it is situated.

Decided January 30, 1894

Crooker, *Superintendent*

This appeal is taken from the action of the trustees in each of the above-named school districts in the assessment of certain lands owned by the appellant. The trustees of each of said districts concur in the statements of facts contained in the appeal herein.

The facts are as follows: The appellant, in the year 1893, resided in the town of Collins, Erie county, and was the owner of a parcel of land lying in one body, consisting of 160 acres, and situate in said town of Collins; that 60 acres of said land are situate in school district no. 8 of said town, and upon which there are a dwelling house and barn, occupied by appellant, and having a garden; that 100 acres of said land are situate in union free school district no. 6 of said town, upon which is a dwelling house occupied by a tenant of the appellant; that from about February 12, 1893, the said 160 acres of land, excepting the dwelling house, garden spot and barn room situate on the 60 acre tract in district no. 8, and occupied and reserved by appellant, was in the possession of, and occupied by, a tenant of the appellant, said tenant residing in the house on the 100 acre tract in district no. 6 and which tenant was working said land under a contract with appellant for a share of the produce of said land; that said 160 acres of land was assessed as one lot upon the last assessment roll of the town of Collins after revision by the assessors at a valuation of $2240; that the appellant is assessed on the last tax roll of district no. 8 for said 160 acres at

a valuation of $1600, and is also assessed on the tax list of district no. 8 for said land at a valuation of $2000; that the appellant has not paid either of the taxes assessed to him by said districts.

From the action of the trustees of district no. 6 and district no. 8, respectively, the appellant has appealed.

The trustees of district no. 6 contend that all of said 160 acres except the house, barn and garden, situated in district no. 8, occupied by appellant, is taxable in district no. 6, and the trustees of district no. 8 contend that all of said 160 acres except the house and garden occupied by the tenant of appellant situate in district no. 6, is taxable in district no. 8.

I am of the opinion that such contentions are not, nor is either of them, tenable.

By section 66 of title 7 of the Consolidated School Law, as amended by section 4 of chapter 328 of the Laws of 1889, it is enacted: "School district taxes shall be apportioned by the trustees upon all real estate within the boundaries of the district which shall not be by law exempt from taxation, except as hereinafter provided, and such property shall be assessed to the person or persons, or corporation owning or possessing the same at the time such tax list shall be made out, but land *lying in one body,* and occupied by *the same person,* either as owner or agent for the same principal, or as tenant under the same landlord, if assessed as one lot on the last assessment roll of the town after revision by the assessors, shall, though situated partly in two or more school districts, be taxable in that one of them *in which such occupant resides.*"

Under the provisions of section 66, to assess land lying in one body, though situate partly in two or more school districts, in that one of them in which such occupant resides, it must be established: (1) that the land lies in one body; (2) that the whole body of land must be occupied by one person, and he must be either the owner or agent or tenant of one and the same landlord; (3) that the land is assessed as one lot on the last town assessment roll after revision by the assessors.

It is conceded in the appeal that the said 160 acres of land lie in one body; that the appellant is the owner, and that it is assessed as one lot on the last town assessment roll after revision by the assessors. The question remaining to be determined is as to the *occupancy* of the said 160 acres. It is also conceded that the appellant, the owner of said land, has leased all of said land excepting the dwelling house occupied by him on the 60 acre lot situate in district no. 8, and barn room and garden spot, to a tenant who resides on the 100 acre lot in district no. 6. Upon the facts conceded there seems to be *two* occupants of said land lying in one body, namely, the appellant, as owner, of a portion of the 60 acre lot expressly reserved by him in his lease of the 160 acres to his tenant; and the tenant under his lease of all of said 160 acres except the portion in the 60 acre lot reserved by the appellant and occupied by him. Section 66 says, "but land lying in one body *and occupied by the same person,*" etc. It seems clear that the Legislature intended that when the ownership of land lying in one body is in the same person, but the land is occupied by a tenant, such occupancy

must be *of the whole body of land, and not of a part only.* I am of the opinion that the 160 acres of land lying in one body, owned by the appellant, is not, under the provisions of section 66 of title 7 of the school laws, taxable as one body in either of said districts nos. 6 and 8 of the town of Collins, Erie county, but that the 60 acres situate in school district no. 8 is taxable in said district, and the 100 acres situate in union free school district no. 6 is taxable in said district.

I do find and decide that the assessments made by the trustees of union free school district no. 6 and school district no. 8 of the town of Collins, Erie county, and each of them, of said farm of 160 acres, the property of the appellant, as conceded in the appeal herein, are, and each of them is, invalid, and the said trustees of each of said districts are hereby ordered to withdraw their respective tax lists and warrants and correct the said tax list so far as the assessment of said land of the appellant is concerned, in accordance with my decision herein.

The appeal herein is sustained.

3811

In the matter of the appeal of William Reid and others v. school district no. 10, town of Newtown, county of Queens.

Land lying in one body and owned and occupied by the same person, but lying in two or more school districts, can be wholly taxed for school purposes in the district in which the residence of the owner or occupant is, only when assessed as one parcel on the last revised assessment roll of the town. If the parcels in the respective districts are assessed separately by the town assessors then each district can tax only such parcel as lies within it.

Decided September 21, 1889

Draper, *Superintendent*

It appears that Thomas Kelly owns a hotel and 1 acre of land upon one side of the street and 16 acres of land upon the other side of the street, which are assessed upon the town assessment books in separate parcels. One parcel is in district no. 10, and the other is in district no. 4 of the town of Newtown. Heretofore the entire property has been assessed for school purposes in district no. 10. The board of education of district no. 4 contend that the 16 acres lying in their district should be assessed therein, and this appeal is brought for the purpose of determining the question.

Inasmuch as these two parcels of land are assessed as separate parcels upon the town assessment rolls, the amendment of 1889 to section 66 of title 7 of the Consolidated School Act is clearly applicable to the case. It is unnecessary to determine the question whether, in consequence of the laying out of the street referred to, there was no contact between the parcels or whether the two parcels were properly assessable to school district no. 10 heretofore. Under the amend-

ment referred to, each parcel is now clearly assessable in the district in which it lies. The appellants in this case will, therefore, be justified in including the 16 acre parcel in their future assessments.

The appeal is sustained.

4351

In the matter of the appeal of Oscar Wheeler, as trustee of school district no. 9, town of Hornellsville, Steuben county, v. board of education of union free school district no. 7, town and city of Hornellsville, Steuben county.

A farm consisting of 385 acres, situated in two or more school districts, and divided or separated into three separate parcels by the roadbed, tracks etc., of three different railroad companies, there being no proof that the owner of said farm is the owner of the fee of the land used and occupied by said railroads, said farm does not come within the exception contained in section 63 of article 7, title 7, of the Consolidated School Law of 1894, relating to land lying in one body and occupied by the same person, and assessed as one lot on the town assessment roll, being taxable in that school district for school purposes in which the owner resides. So much of said farm as lies within said two or more school districts must be assessed in each of the districts respectively for the portion situated therein. This Department has uniformly held that when a farm lies in different districts, but is separated by railroad property, it can not be regarded as land lying in one body, and each separate part must be assessed in the district in which it lies.

Decided April 4, 1895

Milo N. Acker, attorney for appellant
Dolson & Dolson, attorneys for respondent
Near & Rathbun, attorneys for intervenor

Crooker, *Superintendent*

On November 12, 1894, one Charles H. Hartshorn, a resident of the city of Hornellsville, Steuben county, was, and for some years prior thereto had been, the owner, subject to the dower right therein of his mother, Cordelia Hartshorn (which dower right has not been admeasured), and in possession of certain real estate, commonly known as the Hartshorn Stock Farm, in the town of Hornellsville, Steuben county, and which real estate was situate partly in union free school district no. 7, and school district no. 9, town of Hornellsville; that the aggregate acreage of said real estate is about 385 acres; that there are farm buildings upon said real estate, the most, if not all, of which are located upon that part situate in said school district no. 9; that said real estate has been occupied by a person acting either as the agent or foreman, or the tenant of said Hartshorn, and persons employed as laborers have also resided thereon; that said real estate was assessed upon the last town assessment roll of the town of Hornellsville for the year 1894, after revision by the assessors, to said Hartshorn as "stock farm, 385 acres, $20,000"; that extending across said farm or real estate the entire distance from east to west are the roadbed, tracks etc., with right of way, of two railroad companies, namely, New York, Lake

Erie & Western Company (formerly the Erie R. R. Co.), being 6 rods wide, and that of the Central New York and Western Railroad Company, being 4 rods wide, which said roadbed, tracks etc., are owned by, and in possession and control of, and operated by, said corporations respectively; that said corporations are assessed for and pay taxes upon said property so owned and operated by them respectively; that the roadbeds, tracks etc., of said railroads are parallel to each other, those of the N. Y., L. E. & W. R. R. running straight across said land of Hartshorn, and that of the C. N. Y. & W. R. R. at or near the boundary line between said districts 9 and 7, curving to the southwest, leaving a portion of the land of Hartshorn lying between the roadbed, tracks etc., of each of said railroads; that for several years prior to 1894 all of said real estate or farm had been assessed for school taxes in district no. 9; that the trustee of said district no. 9 appeared by counsel before the board of education of district no. 7 and objected to said board assessing any portion of said real estate or farm of said Hartshorn not lying within the bounds of said district upon the ground principally, "that said real estate or farm did not lie in one body within the meaning of the Consolidated School Law of this State"; that on or about November 12, 1894, said board of education of said district no. 7 assessed, in the tax list made by it, the whole of said real estate or farm to said Hartshorn at the valuation of $20,000; that said Hartshorn refused to pay the tax assessed to him by the trustee of said district no. 9, upon the ground that he had been assessed for said real estate in district no. 7; that pursuant to a resolution adopted at a school meeting, held in said district no. 9, on October 8, 1894, the appellant as trustee of said district appeals from the said tax and assessment of said real estate or farm to said Hartshorn in the tax list and assessment made by the board of education of said district no. 7 on or about November 12, 1894.

An answer has been made to said appeal and a reply to said answer. The said Hartshorn has been permitted to file proofs herein as intervenor.

The papers and proofs presented herein do not raise any question of fact, unless it may be relative to the occupancy of said real estate or farm, and in the view I take the occupancy of the farm is not material.

In my opinion the said real estate or farm of said Hartshorn did not, at the time of the assessment to him as aforesaid by the board of education of said district no. 7, lie in one body, within the meaning of section 63, article 7, title 7, of the Consolidated School Law of 1894, chapter 556 of the Laws of 1894, and the decisions of this Department, and hence the board of education of said district no. 7, in making said tax and assessment, acted without having jurisdiction.

The provisions of the Consolidated School Law of 1894 in relation to the taxation of real property for school purposes are as follows:

By section 63, article 7, title 7, of said Consolidated School Law it is enacted that school district taxes shall be apportioned by the trustees upon all real estate within the boundaries of the district which shall not be by law exempt from taxation, except as hereinafter provided, and such property shall be assessed

to the person or persons, or corporations owning or possessing the same at the time such tax list shall be made out; but land lying in one body and occupied by the same person, either as owner or agent for the same principal, or as tenant under the same landlord, if assessed as one lot on the last assessment roll of the town after revision by the assessors, shall, though situated partly in two or more school districts, be taxable in that one of them in which such occupant resides. This rule shall not apply to land owned by nonresidents of the district, and which shall not be occupied by any agent, servant or tenant residing in the district.

By section 67, article 7, title 7, of said law it is enacted that any person working land under a contract for a share of the produce of such land, shall be deemed the possessor, so far as to render him liable to taxation therefor, in the district where such land is situate, and any person in possession of real property under a contract for the purchase thereof shall be liable to taxation therefor in the district where such real property is situate.

By section 68, article 7, title 7, of said law it is enacted that every person owning or holding any real property within any school district, who shall improve and occupy the same by his agent or servant, shall, in respect to the liability of such property to taxation, be considered a taxable inhabitant of such district, in the same manner as if he actually resided therein.

It will be seen that real property should be taxed in the district in which it is situate, except as to land lying in one body, etc., but situate in two or more districts, as stated in section 63. In order for any person to avail himself of the provisions contained in such exception, or for any board of trustees to have jurisdiction and power to tax and assess land in accordance therewith four questions are to be determined, namely, first, does the land lie in one body? second, the ownership, third, the occupancy, and, fourth, is the land assessed as one lot on the last assessment roll of the town? The first question to be determined by the board of education of district no. 7 in November 1894, and to be decided by me in this appeal, was and is, Did the said real estate or farm of said Hartshorn lie in one body? If it did not, that ends the matter, and it was not, and is not, material to inquire as to its ownership, occupancy or assessment on the town rolls, as its several parts must be assessed and taxed in the district in which they respectively lie.

Land lying in one body must consist or be in a collective whole or totality — there must be an actual contact or touching or meeting of the respective parts — it must be contiguous, adjoining. Where, however, in said exception in section 63, two parcels in the possession of the same owner are separated by a public highway the fee of which he owns, subject to the right of passage in the public, this is not to be regarded as preventing their contact.

The proofs presented herein establish the fact that in November 1894, said real estate or farm of said Hartshorn, consisting of 385 acres and situated partly in school district no. 9, and partly in school district no. 7, was divided or separated, by the roadbed, tracks etc., and property of the N. Y., L. E. & W. and C. N. Y. & W. Railroad Companies into three separate parcels, namely, one

parcel situate north of the roadbed, property etc., of the N. Y., L. E. & W. Railroad Company; one parcel situate south of the roadbed, property etc., of the C. N. Y. & W. Railroad Company, and one parcel in triangular form situate between the roadbeds, property etc., of said two railroad companies. The contention of the respondents, the board of education, that said railroad roadbeds, tracks etc., are highways under the general definition of highways as applied to the public roads of the State, is not well taken. There is no proof that the said Hartshorn owns the fee of said land used and occupied by said railroads, subject to the rights of the corporations of the user thereof; and it is shown by the sworn statements of Hartshorn that his land was taken by the C. N. Y. & W. Railroad Company under condemnation proceedings, and he has been paid therefor. The N. Y., L. E. & W. Railroad was constructed many years ago through the farm or real estate of which Hartshorn is now the owner, and admitting, for the purpose of argument only, that said Hartshorn has the fee of its roadbed etc., through his said farm, it is not material, as the property of the C. N. Y. & W. Railroad Company divides and separates said real estate or farm of said Hartshorn into two separate parcels.

This Department has uniformly held that in the numerous cases in which land lying in one body, etc., as stated in said section 63, is crossed or cut through by a railroad, the land of the railroad company being taxable property, and coming between the two parcels of land, divides them so that the tracts of land on each side of the railroad will not, under the meaning of said section 63, be deemed or regarded as land lying in one body.

Superintendent Ruggles in appeal no. 3232, decided October 5, 1883, held that when a farm lies in different districts, but is separated by railroad property, it cannot be regarded as land lying in one body, and the respective parts must be assessed in the district in which they lie.

I find and decide, That in November 1894, said real estate or farm of said Charles H. Hartshorn, comprising 385 acres, and situate in two school districts, was not, within the meaning of said section 63, article 7, title 7, of the Consolidated School Law of 1894, "land lying in one body"; that in November 1894, the board of education of school district no. 7, of the town and city of Hornellsville, had no jurisdiction or legal authority to assess and tax for school purposes the said real estate or farm consisting of 385 acres to said Charles H. Hartshorn, and that such assessment and taxation was and is void; that the trustee of said school district no. 9, town of Hornellsville, in the year 1894, had no jurisdiction or legal authority to assess and tax for school purposes the said real estate or farm consisting of 385 acres to said Charles H. Hartshorn, and that such assessment and taxation is void; that the respective parts or portions of said real estate or farm of said Charles H. Hartshorn, consisting of 385 acres, situate respectively in said school districts no. 7 and no. 9, should be assessed and taxed for school purposes by the trustees of said districts respectively, in the school districts in which said parts or portions respectively lie.

The appeal herein is sustained.

It is ordered, That so much of the tax list and assessment made by the board of education of school district no. 7, town of Hornellsville, on or about November 12, 1894, as assessed and taxed said Charles H. Hartshorn for a stock farm of 385 acres, at a valuation of $20,000, be, and the same hereby is, vacated and set aside.

It is further ordered, That so much of the tax list and assessment made by Oscar Wheeler as trustee of school district no. 9, town of Hornellsville, in 1894, as assessed and taxed said Charles H. Hartshorn for a stock farm of 385 acres, at a valuation of $20,000, be, and the same hereby is, vacated and set aside.

It is further ordered, That the board of education of said school district no. 7, and the trustees of said school district no. 9, of the town of Hornellsville, respectively, be, and they are, hereby ordered and directed to correct their respective tax lists and assessments, made and issued in the year 1894, in relation to said assessment and taxation of said real estate or farm of said Charles H. Hartshorn of 385 acres, in conformity with the foregoing finding, decision and orders made by me herein.

A person set off from one district to another, by an order that does not take effect until three months after its issue, will be liable on any taxes levied in the district from which he is set off, prior to the taking effect of such order.

Decided June 2, 1857

Van Dyck, *Superintendent*

In March 1857, an order was made, by the school commissioner having jurisdiction, transferring the lands of the appellant and others, from district no. 1 to district no. 2. The trustees of no. 1 having withheld their consent, this order will not take effect till the expiration of three months from the 1st day of April 1857, when notice thereof was served. While the alteration was inchoate, the district meeting was held, against the proceedings of which this appeal is directed, and a tax to defray the expenses of changing site and building a new schoolhouse was voted. The appellant objects that the effect will be to charge him with the payment of a tax for constructing a schoolhouse from which he receives no benefit.

Held, That this was a proper consideration for the judgment of the inhabitants of district no. 1, in determining whether they would build at once or postpone till after the alteration should have taken effect. The appellant continues an inhabitant of the district for all purposes until the 1st day of July. If the appellant is set off from the district without his consent, he will be exempted from paying a tax from building in no. 2, for four years. If he has given his consent, he is responsible for all the consequences, and can not be permitted to trammel the action of either district for the purpose of avoiding any personal charge or inconvenience.

3723

In the matter of the difference between school district no. 1, Franklinville, and school district no. 7, Lyndon, in the county of Cattaraugus.

Under chapter 59, Laws of 1886, a person whose place of residence is divided by a town line may elect in which of two towns he will pay his tax, and this statute is held to apply to school district taxes.

Decided November 14, 1888

Draper, *Superintendent*

This matter comes before me by an agreed statement of facts out of which has arisen a question as to the proper place of taxing the lands of one Matthew Newman for school purposes.

It appears that Mr Newman is the owner of a farm which lies in two districts. He occupies the land and works it all as one farm and resides in a house situate thereon, which is divided by the line which divides the districts. Mr Newman claims to be a resident of the town of Franklinville, where he votes and to which town he pays taxes on the land in question. Under chapter 59 of the Laws of 1886, Mr Newman, in a case of this kind, would have a right to elect in which of the two towns in which his property is situate he would pay taxes, and it appears from the papers submitted that he has so elected, and wishes to pay his entire tax in the town of Franklinville.

I therefore decide that school district no. 1 of the town of Franklinville, Cattaraugus county, is entitled to assess the entire farm of Matthew Newman for school purposes.

3538

In the matter of the appeal of J. W. Rood v. John Latimer, trustee of school district no. 16, town of Pomfret, Chautauqua county.

Trustees, in assessing railroad property, are to take the assessors' valuation, filed pursuant to chapter 694, Laws of 1867.

Decided April 18, 1887

Draper, *Superintendent*

This is an appeal by a taxpayer in district no. 16, town of Pomfret, Chautauqua county, N. Y., against John Latimer, sole trustee of said district.

The appellant alleges as a ground for appeal, that in preparing a certain tax list, said trustee failed to include all the property within the district, belonging to a certain railroad company, and all of certain other property belonging to a certain telegraph company.

It appears from the pleadings of the appellant, that the town assessors apportioned to the district, the railroad and telegraph property in question, pursuant to chapter 694, Laws of 1867, as amended, and filed the statement thereof in the town clerk's office. It is provided by said act that all taxes against said companies shall be levied and assessed upon the said assessors' valuation, until

their next annual assessment or apportionment. This it appears the trustee did; consequently, there is no ground for this appeal, and the same, therefore, is dismissed.

3946

In the matter of the appeal of David Horton v. Philip Antis, as trustee of school district no. 15, town of Greenville, county of Greene.

An inhabitant of a school district, whose assessed valuation upon property by the town assessors was $2500, was assessed upon the same property by the school district trustee for school purposes upon a valuation of $5000, without receiving notice of such increase in assessed valuation. *Held,* illegal.

Decided December 30, 1890

Draper, *Superintendent*

The appellant, a taxable inhabitant of school district no. 15, town of Greenville, county of Greene, alleges that the trustee has wrongfully and illegally increased an assessment of $2500 upon the property as it appears upon the town assessment roll, to $5000, without giving to him notice thereof, and an opportunity to show that the increase was unwarranted.

The trustee has attached a warrant dated November 19, 1890, to the tax list, and delivered the same to the district collector.

No answer has been received, and the irregularity complained of is admitted by the trustee who has requested and been given permission to withdraw and correct the tax list.

The appeal is sustained, and the trustee is directed to correct his tax list, and comply with the provisions of law relating to the taxation of property for school purposes.

4006

In the matter of the appeal of George W. Martin v. Eli B. Shelmandine, trustee of school district no. 6, town of Blenheim, county of Schoharie.

Appeal by a minister of the gospel from the action of a school trustee in refusing to allow an exemption of $1500 upon certain property in the school district.

The statute provides for an exemption to ministers of the gospel of the amount claimed from the value of the property, real and personal, or either, if the value thereof exceeds $1500.

But this appeal is dismissed for the reason that the evidence does not disclose what property the appellant may be possessed of in the district and elsewhere.

Decided September 17, 1891

Draper, *Superintendent*

This appeal is taken from the action of the trustee of school district no. 6 of the town of Blenheim, Schoharie county, in refusing to allow the appellant

an exception of $1500 from the assessed valuation of his real estate lying in the above-mentioned district, which he claims as a minister of the gospel. The evidence is that upon the town assessment roll the exemption claimed by the appellant was allowed him, but that the trustee in preparing the district tax list, disallowed the exemption and so advised the appellant, basing his action upon the fact that the property assessed was not occupied by the appellant, and that the appellant resided in another district. The appellant appeared before the trustee at a time designated by that officer, and made statements claiming the exemption, but declined to make a statement in writing.

It is conceded by the respondent that the appellant is a minister of the gospel and is pursuing his vocation in an adjoining district. The appellant insists that his home is still in district no. 6 of the town of Blenheim, and that he spends some time there with his family, and that the property is in charge of his son and managed under his direction.

There is some conflict in the evidence as to the exact position the son occupies as the possessor of the farm, but if it is a fact that the son is working the farm upon shares, he would be liable to taxation for the property, but that question does not necessarily arise upon the consideration of this appeal.

Under section 5 of title 1 of chapter 13 of part 1 of the Revised Statutes, the appellant would be entitled to have deducted from the value of his property — if the same both real and personal or either of them, exceeded in value the sum of $1500. From the evidence submitted, I am unable to determine what property, both real and personal, the appellant is possessed of. Whatever it may be, he is entitled to but one exemption of $1500. He may have other real estate situated elsewhere, or he may have personal property of a sufficient amount or more, which would cover the exemption to which the law entitles him. The courts have held that a minister of the gospel is entitled to this exemption, whether he occupies his real estate or not. (See People ex rel. Mann v. Peterson, 31 Hun 421.)

It follows, therefore, that this appeal must be dismissed.

3551

In the matter of the appeal of Myra Kent from the action of Marvin Phillips, sole trustee of school district no. 16, town of Harmony, county of Chautauqua, in assessing her for personal property.

A tax upon personal property will be set aside when it appears that a trustee made an original assessment, and did not give to the party assessed twenty days notice of such assessment before delivering the tax list to the collector.

Decided January 3, 1887

F. A. Brightman, Esq., attorney for appellant
A. C. Packard, Esq., attorney for respondent

Draper, *Superintendent*

This is an appeal by Myra Kent, a resident of school district no. 16, town of Harmony, Chautauqua county, N. Y., from the action of the trustee of said district in making an original assessment against her for personal property in a tax list delivered to the collector of said district on or about November 23, 1886.

The appellant alleges as grounds of appeal:

1 That she was not assessed for personal property upon the last assessment roll of the town.

2 That she has no personal property liable to assessment or taxation.

3 That although the assessment of personal property to the appellant, by the trustee, was an original assessment, notice thereof was not given to her until several days after the tax list containing such assessment had been delivered to the collector.

The notice served is annexed to appellant's papers.

The trustee, answering the appeal, seeks to justify his assessment of appellant by certain allegations relative to property controlled by another, apparently for the benefit of appellant, and seeks to convey the idea that it is in the control of some person as guardian or trustee of the appellant.

From the allegations of the answer, it is not at all clear that this appellant has any property liable to taxation. The appellant unqualifiedly denies that she has. In any event, the trustee has neglected to proceed according to the statute, in making an original assessment in the following particulars:

1 Twenty days notice should have been given the appellant to enable her to appear and show cause why the assessment for personal property should not have been made. The notice served, gave her but nineteen days notice.

2 The roll containing an original assessment should have been open for inspection for twenty days and notice thereof given; and this before the delivery thereof to the collector.

It appears the roll was delivered to the collector three days earlier than the date of the notice given to the appellant.

I shall not pass upon the question as to whether the appellant is liable to taxation upon personal property, but she is certainly entitled to the opportunity the law gives her to examine the tax list and present her objections to the assessment.

I sustain the appeal and set aside the tax on personal property against the appellant and direct the respondent to withdraw and correct the tax list accordingly.

3857

In the matter of the appeal of Henry Ziengenfuss v. school district no. 2, of the town of Avoca, county of Steuben.

The exemption of certain property of ministers of the gospel from taxation is only intended to persons who are acting as such and derive their support from such employment.

Trustees must follow the town assessment roll except in special cases, when an original assessment may be made, but only after giving the statutory notice. In a case where the town assessors granted a person exemption from taxation as a minister of the gospel, and the school trustees had given no notice of an original assessment, but had included his property in a tax list, *held*, that it must be stricken out.

Decided February 17, 1890

Draper, *Superintendent*

Subdivisions 8 and 9, title 1, chapter 13, of the Revised Statutes, provide that the real estate of every minister of the gospel or priest of any denomination, when occupied by him, and not exceeding the value of $1500, shall be exempt from taxation. In case the value of such real estate exceeds $1500, then only the excess is to be taxed.

The appellant in this case claims to be an ordained minister of a sect known as "Advent Christians." He is not serving any organized church. He holds meetings in his neighborhood occasionally, at which collections are taken for his benefit. He is regularly engaged in the saddlery business, and maintains a shop or store where he carries on such business, and sells articles appertaining thereto. He owns real estate in which he resides and carries on his business, valued by the town assessors at the sum of $1600. It seems to be the fact that the town assessment rolls in 1887 and 1888 contained this property at its assessed valuation, with memoranda to the effect that $1500 thereof was exempt from taxation. It also seems to be the fact that such memoranda were placed upon the rolls in one or two instances, at least, only after the payment of taxes by the appellant, and that his demand for the return to him of such taxes as had been levied upon $1500 of valuation, had in each case been complied with. But the school trustees, in making out a tax list for school taxes in the district, have assessed him upon the valuation of $1600. This appeal is brought in order to avoid the taxation for school purposes upon the sum of $1500.

I am not at all certain that the appellant is in circumstances to entitle him to the exemption named in the statute. It seems to me very clear that he depends for a livelihood upon the saddlery business more than upon ministerial service, and it is very doubtful if it was the purpose of the Legislature to extend the exemption to such a case, but I do not deem it necessary to determine that question in this connection. It is the policy of the school laws to require trustees, in making out a tax list, to follow the last revised assessment rolls of the town, except in special cases where they have power to make an original assessment, but it can be done only upon notice to the person interested. There was evidently no such notice given in this case. In the absence of it, I think the trustees are bound to follow the town assessment rolls. In any case of a character similar

to the one under consideration, it would seem to be the wisest and safest policy for trustees to follow such rolls. It is always to be borne in mind that the town assessment rolls are prepared by officers who are chosen with special reference to such a service, and who must be presumed to be better informed as to what circumstances will be sufficient ground for an exemption from taxation, within the provisions of the statute, than school trustees are likely to be. While there was evidently some doubt in the minds of the town assessors as to what their duty was in this particular case, and while there is some confusion about what they actually did, and the precise time when they did it, it still remains clear that up to the present time the exemption has in fact been granted to him by the town authorities. In view of this fact, and of the other one that the trustees have never given him legal notice of an original assessment by them, I am constrained to sustain his appeal, and direct that in the tax list appealed from, they grant him the same exemption which the town authorities have extended to him.

BOARD OF EDUCATION

5202

In the matter of the appeal of Francis W. Borden and George Deuel from the action of the board of education of union free school district no. 5, town of Easton, Washington county.

A board of education is not authorized by law to borrow money to meet the general expenses of maintaining a school except as provided in subdivision 19, section 15, title 8, of the Consolidated School Law.

The affairs of a school district should be managed within its resources and a board of education should not incur a liability in excess of appropriations voted by the district or authorized by law.

Decided September 21, 1905

Clarence E. Akin, attorney for appellant

Draper, *Commissioner*

This appeal is brought by two members of the board of education of union free school district no. 5, Easton, Washington county, to compel such board to issue a tax list to raise sufficient funds to meet the indebtedness of the district. No answer has been filed in this appeal, but members of the board of education who have voted to borrow money to meet outstanding bills have consulted this Department on the questions involved herein and have agreed to issue a tax list and raise an amount sufficient to liquidate the district's indebtedness. It is quite probable that the board has already authorized the issuance of such tax list. It is necessary, however, to take some action in this appeal in order to clear the records of this Department.

This district is located in a prosperous farming community. It does not even contain a small village. Several of the surrounding districts have contracted with this district for the education of their children. The people of this district are entitled to much credit for their efforts to maintain a school of advanced grade under such adverse circumstances. It appears that the cost of maintaining the school about three years ago was more than the board believed advisable to raise by tax that year. The board therefore borrowed a sum of money to aid in meeting the cost of maintaining the school. This indebtedness now exceeds $600. Subdivision 19 of section 15 of title 8 of the Consolidated School Law authorizes a board of education to borrow money in anticipation of taxes levied but uncollected for the then current year and to issue certificates of indebtedness therefor. These certificates can not be issued for a longer period than nine months and not in excess of the amount of the tax levied. This is the only provision in the Consolidated School Law authorizing a board of education to borrow money to meet the expense of maintenance of school. The money borrowed by

this board was not borrowed in accordance with the provision of law above stated and was therefore without legal authority. It appears that some of the trustees gave personal notes to meet these obligations. The spirit shown by these individuals is commendable, but the transaction is not based upon sound business methods or wise school administration. The affairs of a school district should be managed within its resources and a board of education should not incur a liability in excess of appropriations voted by the district or authorized by law.

The necessary funds for maintaining a school should be obtained by levying a tax on the property of the district annually or as such funds are needed. Carrying an indebtedness from year to year and paying interest thereon is unwise and can not be permitted.

The appeal herein is sustained.

It is ordered, That the board of education of union free school district no. 5, town of Easton, Washington county, shall within 30 days from the date hereof levy a tax on the taxable property of such district sufficient to meet all outstanding indebtedness and cause the same to be collected as the Consolidated School Law of the State provides.

5187

In the matter of the appeal of Janette E. Hutchins and Lillian A. Hutchins from the action of the board of education of union free school district no. 1, town of Norfolk, St Lawrence county.

Ordinarily this Department will not interfere with the action of a board of education in referring to a district meeting any question involving the interests of the district. On the contrary it encourages such action.

A board of education, however, will not be permitted to delay the execution of directions from a district meeting, or to thwart the expressed wishes of a majority of the legal voters of a district without good cause, by calling special meetings of the district to pass upon questions which the district has already decided three times.

The action of a special meeting, regular in every particular, in designating a site and authorizing the board of education to obtain title thereto in behalf of the district creates a district liability.

An incumbrance upon the site designated, provided it may be removed, does not furnish sufficient ground upon which the district may refuse to complete a contract of purchase.

Decided May 25, 1905

Hon. Ledyard P. Hale, attorney for appellants
Fred. J. Flanagan, attorney for respondents

Draper, *Commissioner*

Union free school district no. 1, town of Norfolk, is located in the village of Norfolk, St Lawrence county. It was formed a few years ago by the consolidation of three common school districts. The population of the village is increasing and the school accommodations of the district are not adequate to its needs. In December 1904, the district made an appropriation of $14,300 for the erection of a new building.

It was also necessary to select a new site. A special meeting of the district was held January 17, 1905, for that purpose. The records show that five pieces of property were voted for and the one known as the Hutchins lot received a majority of 1 over all five and a majority of 9 over the one receiving the second largest number of votes.

After the Hutchins site had received a majority of the votes cast to determine which site should be chosen, the meeting proceeded to vote upon a resolution to appropriate $1000 for the purchase of that site which was described by metes and bounds in the resolution. Those who were opposed to the selection of the Hutchins site evidently voted against this resolution but it was carried by a majority of 15. This meeting therefore practically voted twice in favor of the selection of the Hutchins lot for a site.

On January 30, 1905, the board of education directed the call for a special meeting of the district to be held February 24, 1905, to rescind the vote at the special meeting of January 17, 1905, by which the Hutchins site was adopted. The records do not show that any of the residents of the district had petitioned the board to call a meeting for this purpose. The resolution offered at the meeting of February 24th to rescind the vote at the meeting of January 17th, by which the Hutchins site was chosen, was lost by a majority of 27. This meeting was well attended as 179 votes were cast. The refusal of this meeting to adopt a resolution to rescind its former action was equivalent to a vote in favor of the Hutchins site. The district therefore practically voted three times in favor of the Hutchins site.

At a meeting of the board of education held March 6, 1905, James Donnelly tendered his resignation as a member of the board and it was accepted. At a meeting of the board of education held March 13th, H. G. Atwater was elected to fill the vacancy caused by the resignation of Mr Donnelly. At this meeting of the board of education, Mr Atwater, the member just appointed to fill a vacancy, offered a resolution directing the call of a special meeting to rescind the resolution adopted by the special meeting of the district on January 17, 1905, by which the Hutchins site was selected. This resolution was adopted and a special meeting called for April 5th.

On March 22d this appeal was filed with a petition for a stay to restrain the board of education from holding a special meeting of the district until this appeal could be determined. Such stay was issued by me March 23, 1905.

Section 10 of title 8 of the Consolidated School Law provides that a majority of the voters of a union free school district may designate a site for the district. Subdivision 6 of section 15, title 8 of the same law imposes upon the board of education the duty "to purchase a site . . . for the district as designated by a meeting of the district." When the voters of the district at a district meeting have designated a site it is the duty of the board of education to purchase such site under the terms directed by the district. It was the duty of the board of education of this district to purchase the Hutchins site as directed by the voters of the district at a meeting held January 17, 1905.

Two answers to this appeal have been submitted. Thomas F. Mein and Albert B. Crabb, members of the board of education, concur in the statement set forth by appellants in their moving papers. The other members of the board of education, seven in number, set forth three reasons for failing to purchase the Hutchins site and for calling another special meeting of the district. The grounds on which they base their action are:

1 That the site was not regularly designated.

2 That the Hutchins site is not a suitable one for the erection of the building desired in this district.

3 That appellants are not able to give good title to the property.

The board of education is not the proper authority to determine whether the site was properly designated or not. The records show that the methods of procedure in relation to this matter were generally regular and in good form. It was well understood throughout the district that the meetings were to be held. The meetings were orderly and well attended. The merits of the various sites were generally discussed for several weeks and an open discussion took place at the meeting of January 17th. The meeting appears to have been eminently fair. If any of the proceedings, from the issuance of the call of the meeting to its close, were sufficiently irregular to warrant the setting aside of such proceedings the remedy of any aggrieved party was an appeal to the Commissioner of Education. Such appeal should have been brought within 30 days from the date on which such irregular acts occurred. The board of education having failed to avail itself of this remedy within the proper time, it will not be permitted at this time to interpose a mere technicality as sufficient ground for setting aside the wishes of a majority of the voters of the district clearly and properly expressed at a legal meeting. The records of the board of education show that such board recognized the action of the meeting of January 17th as proper and legal.

The notice given by the board for the special meeting of February 24th states that one of the propositions to be voted upon is "Shall the resolution for the selection of a schoolhouse site and for the raising of money for the purchase of the same, passed at the last special meeting of said union free school district, held January 17, 1905, be rescinded?" The resolution offered by Mr Atwater at the meeting of the board on March 13, 1905, contains the following proposition: "Shall the resolution for the selection of a schoolhouse site and for raising of money for the purchase of the same, passed at the special meeting of said union free school district, held January 17, 1905, be rescinded?" The board of education put itself on record twice as saying, "Shall the resolution for the selection of a schoolhouse site etc. be rescinded?" At no time does the regularity of the proceedings of the meeting of January 17th appear to have been questioned by the board of education until the appeal was brought. In view of the previous action of the board, such claim does not appear to be made in good faith now.

The board also claims that the Hutchins site is not a suitable one; that it is not centrally located; that it is not sufficiently level; that it is springy, etc. If these claims are true such facts were in the possession of the voters of the district at the time of the special meeting in January when such site was chosen. The

judgment of a majority of the voters of the district regularly and fairly expressed at a district meeting must be accepted in lieu of the opinion of a majority of the members of the board of education.

The respondents claim that the Hutchins property is subject to a mortgage that does not become due until January 1, 1906, and that the mortgagee refuses to discharge such mortgage or accept the amount due on the same until that date and that appellants are thereby unable to give clear title to such property.

Appellants acknowledge that the Hutchins lot is subject to such mortgage and show that the total amount which will be due on such mortgage January 1, 1906, is one hundred five dollars ($105). Appellants show that such amount in gold coin of the United States has been tendered the mortgagee and that she refuses to accept it. Appellants also show that said tender has been deposited in the Norwood State Bank to the credit of the mortgagee and that the cashier of said bank has notified the mortgagee of the deposit of such tender. The appellants show that they offered to put up a bond to indemnify the district or to permit the board of education to deduct from the purchase price an amount sufficient to satisfy the mortgage.

The existence of this mortgage was not sufficient ground for the board of education to refuse to carry into effect the direction of the district meeting. The existence of this mortgage appears to have been known to residents of the district at the time such lot was designated as a site. It appears that Mr Flanagan, the attorney for respondents, drew the mortgage and that his law partner, Mr Atwater, one of the members of the board of education and one of the respondents, witnessed its execution.

The action of the special meeting of the district held January 17, 1905, was legal and also binding upon the district. The appellants thereby became the vendors of the real estate in question and the district became the purchaser of such real estate. If appellants are able to give a *marketable* title to this property the purchaser, the district, is bound to accept it. The only question to determine, therefore, is whether or not the incumbrance of $105, the balance of an outstanding mortgage due January 1, 1906, is sufficient to render the title of this property unmarketable. The vendors are able to give immediate possession. The title to the property in question is not doubtful. It is simply incumbered. The amount of the incumbrance is definitely known to both parties. The date when it becomes due is fixed and known to both parties and is in the near future. In a court of equity the appellants could undoubtedly enforce specific performance on the part of the purchaser. The accepted rule on this question is: "An incumbrance upon the premises so long as it may be removed by application of the purchase money or where the vendor being solvent offers to remove it or may be compelled to do so, furnishes no ground upon which the purchaser may refuse to complete the contract or recover damages against the vendor." (*See* § 304, Maupin on Marketable Title to Real Estate; 96 Am. Dec. 582; Webster v. K. T. C. Co. 145 N. Y. 281.)

The conclusion must be reached in this appeal that a majority of the board of education is not justified in delaying an acceptance of this property. There

appears to have been the usual discussion and rivalry in this district incident to the designation of a site. A determined effort was made by certain residents of the district to select one other than the Hutchins lot. Mr Atwater appears to have been prominently identified with this element. He was present at the January meeting and spoke against the selection of the Hutchins lot. He offered to contribute $100 toward the equipment of the new building if the district would select the Bemis lot. In the face of these arguments and inducements the district meeting voted to select the Hutchins lot. The pleadings do not show that such action was unwise. The voters of the district passed upon the wisdom of this selection three times, and each time by an increased majority. It is not shown that any of the residents of the district petitioned for a further opportunity to express their wishes upon the location of a site previous to the last call for a special meeting or before this appeal was brought. Ordinarily this Department will not interfere with the action of a board of education in referring to a district meeting any question involving the interests of the district. On the contrary it encourages such action. A board of education, however, will not be permitted to delay the execution of directions from a district meeting or to thwart the expressed wishes of a majority of the legal voters of a district without good cause by calling special meetings of the district to pass upon questions which the district has already decided three times.

The appeal herein is sustained.

It is ordered, That the board of education of union free school district no. 1, town of Norfolk, St Lawrence county, shall without unnecessary delay, accept in behalf of said district the Hutchins lot as a schoolhouse site and obtain title thereto as the law provides. In performing this duty the said board of education shall exercise the usual methods of prudent men to protect the said district from any loss which might result from the incumbrance on said Hutchins lot as appears herein, and said board of education shall therefore determine whether the amount of said incumbrance shall be deducted from the purchase price of said lot, whether the vendors shall give a bond of indemnity with proper sureties, or whether some other plan shall be pursued which shall afford sufficient and proper protection to the district in the premises.

5289

In the matter of the appeal of Corwin J. Thomas and others from the action of the board of education of Pike Seminary union free school district no. 8, town of Pike, county of Wyoming.

The Commissioner of Education will not interfere with the action of a board of education whose business transactions have not conformed to the statutes through lack of knowledge of the provisions of such statutes when it is shown that the board acted honestly and in good faith and when such board gives full publicity to the voters of the district of its transactions and takes prompt action to correct all errors as soon as such board receives information of the procedure to be taken under the circumstances.

Decided October 23, 1906

G. W. Harding, attorney for appellant

Draper, *Commissioner*

It is alleged in this appeal that the annual report of the board of education is not sufficiently explicit in relation to the finances of the district as to give the taxpayers of the district a proper understanding of the real financial status of the affairs of the district. It is alleged that many of the expenditures of the board are given in the aggregate amount instead of itemized form. It is alleged that the tax list issued soon after the last annual meeting does not contain the heading required by law. It is also asserted that the annual report for 1905 was not published as required by law. It is further alleged that the board of education without authority borrowed $1100 to meet current expenses of the school and is still paying interest on that sum. It is not charged or implied in the moving papers that the board of education has wasted or extravagantly expended the funds of the district. It is not charged or implied in any way that the board of education has been guilty of any intentional wrongful conduct. In general the most that is charged is that the method of procedure has been irregular, that the board has exceeded its authority and that information desired is not obtainable.

The board of education makes a straightforward open answer and explanation to all these allegations. The board acknowledges that the tax list did not contain the heading prescribed by law, but it asserts that all taxpayers have paid their taxes and without protest. It states that the treasurer prepared the tax list and used an old form of heading without understanding the legal requirements.

The answer of the board shows that all appellants (except Greene who, it is charged, is not a legal voter) were at the annual meeting of August 7, 1906, when its report was read and that such report was approved and accepted without a dissenting vote. If the report was incorrect, misleading or incomplete it was the duty of the appellants to object at that time, but failing to raise such objection and the report having been accepted appellants are barred from objecting now unless they show that they possess information now in relation thereto which was not known then. This is not shown.

This school district was only organized into a union free school district in 1904. Upon the organization of such district Pike Seminary was transferred to it. The board asserts that during this transitory period the board of education in power failed to make definite estimates and levy sufficient taxes to meet the ordinary running expenses. It is also stated that the board of education in power at that time believed that the interest accruing from the endowment fund of Pike Seminary which would become an asset of the district could be legitimately used to pay the deficiency in the maintenance fund of the school district. The board acknowledges that for the reasons above stated it borrowed in April and May 1904, the sum of $1100 from the endowment fund in question. There was no secrecy about the action of the board and the fact that such loan had been made was generally known and that knowledge of all facts in connection therewith have been known to appellants for two years or more. The

board also claims that it acted in entire good faith in the whole transaction and on the belief that it had full legal authority to do so.

The board in its answer also shows that it has called a special meeting of the district to permit the voters of the district to provide means and methods of liquidating the indebtedness in question. It appears that the special meeting will be required to authorize the issue of bonds to meet this indebtedness. The attention of the board is directed to the provisions of sections 9 and 10 of title 8 of the Consolidated School Law as to the purposes for which bonds may be issued. The district has not authority to issue bonds for this particular purpose.

Respondents admit that no report for 1905 was published as the board was not familiar with the requirements of the law in that respect. The board however did publish its report for 1906 when it understood the law governing the same. It is too late for appellant to raise that question now as 15 months have occurred since failure to publish such report. Such report as it appears on the official files is open to the inspection of any legal voters of the district.

It appears that the Pike Seminary building burned in December 1904, and that the school district thereafter erected a new building or repaired the one injured by fire. The pleadings are not clear upon this point, but the board makes a report on a building fund. This report shows in receipts an item under the head of insurance to the amount of more than $7000, one of bonds sold for $3000 and a total of $10,598.32. One of the criticisms on that report is that the items under expenditure are not given in detail. The report shows that $6548.68 were paid to the Silver Springs Manufacturing Co. This report does not show what the expenditure was for. It evidently was for something in connection with the building. It is not shown whether the building was erected under contract or by the district. It was not practicable to publish an itemized statement of such expenditure or to report it in full in detail to the meeting. If such expenditure was under contract it is immaterial. If it was not under contract but was for material, labor etc. the proper course would be to appoint an auditing committee to go over all accounts with the board and pass upon them. Other items in this report may be treated similarly.

Appellants allege that they are unable to get full information on these expenditures but respondents claim that no request has ever been made for such information from any of appellants except Mr Smith. They claim that the secretary and treasurer showed Mr Smith all exhibits and explained all items fully to him and that he expressed himself as fully satisfied that the aggregate amounts as shown in the report were fully accounted for in the books and vouchers which he examined.

The relief requested by appellants is an order from me directing the examination of all papers and books by the school commissioner of the district. I do not think such action necessary. The board of education has been eminently fair in its treatment of appellants and offers them full opportunity to obtain any information desired or which is in its possession. The board acknowledge all irregularities which exist or which have taken place and have corrected the same

as far as possible. No improper motives are alleged to have impelled the board in its action in any of these matters. Any resident of the district has full access to the official records and until it is shown that the board is unwilling to afford reasonable access to such records assistance should not be requested from outside sources.

The appeal is dismissed.

5142

In the matter of the appeal of Helen Clark v. the board of education of union free school district no. 1, town of Thompson, Sullivan county.

The legally constituted authorities of a school act wholly within their legal rights in exercising control of the expressions and the business matters of a publication which is held out to represent the school. Such authorities are not only legally warranted in doing it but they are legally obligated to do it. A publication standing for a high school and appealing to the constituency of that school on such ground is not a private or personal affair, but a public affair and subject to public authority.

Decided September 16, 1904

Wilton Bennett, attorney for petitioner

Draper, *Commissioner*

This is an appeal from the action of the board of education of Monticello union free school district no. 1, town of Thompson, Sullivan county, in sustaining the action of the principal of the union free school in suspending from the school the son of the appellant.

The difficulty arose as follows: Several pupils in the school, among whom Matthew J. Clark seems to have been an energetic and leading spirit, began the publication of a school paper which they called the *High School Mirror*. So far as I can learn from the papers presented, this publication at first had no school organization behind it, nor was it fairly representative of the school. There can be no doubt, however, that it assumed to represent the school, and subscriptions and advertisements on the ground that it was the paper of the Monticello High School, were solicited and received. It does not appear that the school authorities at first either aided or disapproved of the enterprise. In time the paper attained some success securing considerable patronage. The statements of the parties lead me to conclude that this was largely due to the energy and business skill of Matthew Clark. With success came responsibilities in the way of moneys, obligations and editorial policies, which involved or were sure to involve the school, its faculty and the board of education. In view of this the principal proceeded to secure as responsible an organization as was practicable among the pupils for the management of the affairs of the paper. Such an organization was effected, went into operation and called upon Clark, who was the business manager, to make an accounting and submit the management of the paper to the organization. He refused to do this, taking the ground that

the publication was a personal affair with such students as had participated and not answerable to a school organization or to the school authorities. He thus joined the issue with authority and in time was suspended from school privileges by the principal who was sustained by the board of education.

It seems to me that there can be no doubt about the legally constituted authorities of a school being wholly within their legal rights in exercising control of the expressions and the business matters of a publication which is held out to represent the school. Not only are they legally warranted in doing it but they are legally obligated to do it. Under the law they are charged with the duty of protecting the good name of the school; of keeping the organization free from whatever may discredit it, and of maintaining such a state of discipline among pupils as will insure harmony and effectiveness of procedure and accomplish the general ends for which the school is maintained.

The highest point of effectiveness is reached when this general principle is commonly assumed and the largest practicable freedom is accorded to the pupils; that is, when the pupils are capable of exercising the largest freedom without rebelling against the fact that in the last resort the legal and responsible governors of a school must govern.

There would be some pleasure in sustaining this energetic young manager, but he is in error. His error lies in the fact that he does not see, as he probably will when he is older, that a publication standing for the Monticello High School and appealing to the constituency of that school on that ground is not a private or personal affair. It becomes a public affair and so subject to public authority. The principal acted lawfully and moderately, firmly and wisely, and the board of education was correct in sustaining him. It follows that the appeal must be dismissed.

Appeal dismissed.

5161

In the matter of the petition for the removal of Christopher H. Stark et al. as trustees of union free school district no. 2, town of Highlands, Orange county.

When a board of education fails to comply with the direction of a district meeting owing to some great emergency but reports fully in relation thereto to the next district meeting and the meeting acquiesces in the judgment of such board by adopting its report, the board can not be regarded as having acted in bad faith, or as not having been open and fair in its dealings to the district.

It is legal and proper for a board of education to expend for current expenses any of the usual receipts which are paid into the treasury of a district. If appropriations voted at a district meeting for contingent expenses are insufficient the board possesses power to levy a tax for the necessary amount to meet the expenditures for contingent purposes.

Certificates of indebtedness may be issued by a board of education in anticipation of taxes levied but uncollected. Such certificates can not be legally issued unless such taxes have been levied.

A mere allegation by a layman that water-closets are in an unsanitary condition is not competent proof when a board of education and a district meeting decide that such closets are suitable for use for one year. This allegation, however, is sufficient to warrant an investigation by competent authority to determine the condition of such closets.

Decided January 4, 1905

Robert H. Barnett, attorney for petitioners
C. L. Waring, attorney for respondents

Draper, *Commissioner*

The petitioners herein allege five specific acts of wilful violation of law or of wilful refusal or neglect to perform official duties as trustees on which they ask this Department to remove from office the trustees of union free school district no. 2, town of Highlands, constituting a board of education of such district.

The first and one of the most important charges made against these trustees is their failure to provide new water-closets. The board of education, through its budget presented to the annual meeting in 1903, requested an appropriation of $500 for building new water-closets. The district voted an appropriation of that amount for such purpose. The trustees failed to erect the water-closets. They used part of the money appropriated for these closets to enlarge the accommodations of the primary department. The budget of the trustees for 1903 also contained an item of $350 for furnishing additional accommodations for the primary department and an appropriation for that amount and purpose was voted. The respondents set forth that when they commenced to equip sufficient additional accommodations for the primary department it was found impossible to do so on the appropriation voted and they therefore used part of the money for that purpose which had been appropriated for water-closets. The respondents claim that they regarded the making of these accommodations of more importance to the district than the building of the water-closets and especially so since these increased accommodations were made on the recommendation of an inspector of this Department. It appears that the board of trustees made a full report to the annual meeting of the district on their action in failing to erect such water-closets and in using part of the appropriation therefor for increasing the primary department accommodations. It appears that such report was accepted by the annual meeting and the acts of the trustees in the matters in question were also ratified by such meeting. The district, therefore, acquiesced in the action of the board and accepted the judgment exercised by the board as having been in accordance with the wisest course to pursue under the circumstances. Under these conditions the board can not be regarded as having acted in bad faith or as not having been open and fair to the district in dealing with the question of closets and increased accommodations for the primary department.

A safer and wiser course for the board to have pursued under such circumstances would have been to have called a special meeting of the district and permitted such meeting to have decided whether additional money should be

appropriated or whether that appropriated for closets should be used for other purposes.

The second important count made by the petitioners is the expenditure of money in excess of that appropriated. The petitioners include in their moving papers a copy of the report of the board of education to the annual meeting in 1904. This report shows the total receipts for the year to be $16,904.03. The report also shows the expenditures including "balance on hand" to be $16,904.03 and the appropriations made by the annual meeting of 1903 amounted to $13,694. The expenditures therefore exceeded the appropriations by $3210.03. The other receipts of the district brought the total amount of receipts to within $700 of the total expenditures.

In preparing its budget for the annual meeting of 1903 the board undoubtedly took into consideration the fact that there would be receipts from various sources which could be legally expended for many purposes and therefore made their estimate of appropriations to be *voted* at that meeting less than what the aggregate expenses of maintaining the school system would be. It was proper that they should do so. It would undoubtedly have been wiser for the board to have stated fully all sources of revenue anticipated for the year, specifying each item. It was entirely legal and proper however for the board to expend for the current expenses any of the usual receipts which are generally paid into the treasury of a district. If the appropriations voted at the district meeting for teachers' salaries or for contingent expenses were insufficient the board possessed power under section 20 of title 8 of the Consolidated School Law to levy a tax for the necessary amount to meet the expenditures for such purposes. It is not even alleged by the petitioners that these expenditures were not made for legitimate purposes. The itemized report of the board accepted at the annual meeting shows the expenditures to have been proper and within the legal power of the board. The amount appropriated for teachers' salaries was $6250. The actual amount expended was $7738.65, an excess over the appropriation of $1488.65. The amount appropriated for fuel was $500. The actual amount expended was $717.40, an excess of $217.40. It is unnecessary to go into the details of all of these expenditures as all others appear to be for contingent expenses and were within the legal powers of the board.

It is also alleged that the board exceeded its authority by issuing a trustee's note for $700. The respondents state in their answer to this charge that such note was issued by them under authority of chapter 233, Laws of 1903. This law authorizes a board of education to issue certificates of indebtedness. Such certificates are to be issued in the name of the board and shall be signed by the president and clerk thereof. These certificates may be issued in anticipation of taxes levied but uncollected. The proceeds of this note amounted to $700 and were used to meet a deficiency in the expenses of the district for the payment of which no provision had been made. The law did not confer such power on the board. Not having the available funds to meet the expenses of the district, the board should have levied a tax to meet such deficiency. The board then would have possessed power to issue a certificate of indebtedness.

It is also charged that the tax list and warrant were not filed as the law requires in the town clerk's office. It appears however that such tax list and warrant were properly filed within four days after return thereof was made by the collector and this was within a reasonable time.

It is also charged that members of the board of education were personally interested in contracts for the district. It is charged that one Nelson, a former member of the board of trustees and a notary public and justice of the peace received $7.50 for acknowledging affidavits and that he was paid $5 for other purposes. The respondents admit that these payments were made but claim that the $5 was for traveling expenses to consult an architect and that said Nelson went to consult the architect at the direction of the board. The charge of $7.50 for acknowledging affidavits was an improper charge. It should not have been audited by the board or by a district meeting. The clerk of the district is authorized to administer oaths in all matters pertaining to the school affairs of the district. He received a salary and should have performed this duty without additional compensation.

It is also charged that the clerk of the district was interested in contracts. It appears that he performed certain work in the nature of grading, etc., but the board had a right to employ him for this purpose as a clerk of the board is not a member of such board but its employee.

In connection with the charge of wilful failure of the board to build water-closets, it is alleged that the present closets are in an unsanitary condition. Competent proof is not offered however in substantiation of this charge. No certificate of a school commissioner or of a health officer has been filed on this question. A mere allegation by a layman that closets are in an unsanitary condition is not competent proof when a board of education and a district meeting decide that such closets are suitable for use for one year. This allegation, however, is sufficient to warrant an investigation by competent authority to determine the condition of such closets. This Department's inspector of school buildings will therefore be authorized to make such investigation without delay. If such closets are found to be in an unsanitary condition an immediate remedy will be applied.

In proceedings of this kind for the removal of trustees this Department is governed by the decisions of the courts of the state. The Commissioner of Education, under section 13, title 1 of the Consolidated School Law, may remove a school officer who has been guilty of any wilful violation or neglect of duty, etc. The courts have held that the term *wilful* as used in this connection means "*intentional.*" The language of the court is "the words 'wilful violation of duty' as used in section 13, title 1 of the Consolidated School Law, as applicable to acts for which members of a board of education may be removed by the State Superintendent [Commissioner of Education] must be construed to mean acts intentionally done with a wrongful purpose." See 63 Hun 389, and 37 Appellate Division Reports 44.

The petitioners have failed in establishing by a preponderance of proof that the respondents in any way acted intentionally with a wrongful purpose.

In my opinion the respondents have shown that they acted in entire good faith in all of these matters. They submitted a clear and complete report of all their official acts to the annual meeting of the district. Such meeting accepted the report and ratified the acts of such trustees.

The petition is dismissed and the prayer of the petitioners is denied.

5420

In the matter of the appeal of R. J. McDowell and Thomas Henderson from the proceedings of annual school meeting of union free school district no. 3, Mooers, Clinton county.

Notice of submission of question of increase of members of board of education at annual meeting. A notice of an annual meeting held in a union free school district, whose boundaries are not coterminous with an incorporated village, prepared and posted by the district clerk, which contains a statement that a proposition will be submitted at such meeting to increase the number of the members of the board of education, is not illegal, nullifying the vote upon such proposition, because such statement was included without authority from the board, where it appears (1) that the board wrongfully refused to include such statement in the notice; (2) that the qualified electors had ample opportunity to discuss the question of increasing the number of members of the board before the meeting; and (3) the result of the vote upon such question showed that the sentiment in the district was decidedly in favor of the increase.

Decided November 3, 1909

David H. Agnew, attorney for appellant
C. J. Vert, attorney for respondent

Draper, *Commissioner*

The petitioners in this case, Russell J. McDowell and Thomas Henderson, are two of the three members of the board of education of union free school district no. 3, town of Mooers, Clinton county. They ask that the proceedings of the annual school meeting held in such district on August 3, 1909 "in voting upon the proposition to increase the number of trustees from three to five be vacated and set aside as illegal and void, upon the ground that the board of education had not authorized the submission of said proposition to said annual meeting in the manner provided by section 227 of the Education Law of this State." They also ask that the election of M. B. Stewart and W. S. Stevenson who were voted for, upon the adoption of the proposition above referred to, be vacated and annulled. All the questions properly considered on this appeal depend for their determination upon the disposition of the question raised as to the validity of the submission of the proposition for increasing the number of members of the board of education of this district. The boundaries of the district are not coterminous with those of the village of Mooers, and section 227 of the Education Law provides the procedure for the change in the number of members of the board of education of such district. Such

section is as follows: "At any annual meeting held in any union free school district whose limits do not correspond with those of any incorporated village or city, the qualified voters may determine by a majority vote of such voters present and voting, to be ascertained by taking and recording the ayes and noes, to increase or diminish the number of members of the board of education of such district. If such board shall consist of less than nine members and such meeting shall determine to increase the number, such meeting shall elect such additional number so determined upon and shall divide such number into three classes, the first to hold office one year, the second two years, and the third three years. If such meeting shall determine to diminish the number of such members composing such board, no election shall be held in such district to fill the vacancies of the outgoing members thereof until the number of members shall correspond to the number which such meeting shall determine to compose such board. No board of education of such district shall consist of less than three nor more than nine members. *No change shall be made in the number of trustees of any such school district unless notice is given by the board of education at the time and in the same manner that notice is given of the annual school meeting that a vote will be taken upon the question of changing the number of trustees at such annual meeting.*"

From the papers in the case it appears that a petition, signed by twenty-nine taxpayers of the district, was presented to the board of education requesting the board to insert in its call for the annual meeting a notice to the effect that a vote will be taken at such meeting to increase the number of the members of the board from three to five. The signers of the petition owned about one-third of the taxable property in the district. They were evidently representative men, influential citizens and interested in the welfare of the school. This petition was considered by the board at a meeting held July 6, 1909, and a motion that such petition be received and a proper notice be inserted was rejected. The petitioners McDowell and Henderson voted against such motion and the respondent, Chauncey H. Humphrey, voted in its favor. The notice of the annual meeting was prepared and posted by the said Humphrey, who was clerk of the board. He included in such notice a statement in the following form:

"Notice is also hereby given that there will be submitted for vote at said meeting the question: Shall the number of the board of education, or trustees, be increased from three to five members."

The board did not authorize the insertion of such statement. It was apparently inserted by Mr Humphrey on his own initiative in his capacity as clerk. A resolution was submitted at the annual meeting in conformity with the notice increasing the number of members of the board from three to five. The petitioners filed a written protest against a vote being taken on such resolution. The resolution was nevertheless voted upon and carried by a vote of 109 to 7. After the adoption of such resolution the meeting proceeded to elect two additional trustees.

It is insisted that under section 227 of the Education Law, above quoted, a board of education is clothed with the exclusive power of determining at what

time and under what circumstances the district shall vote to increase or diminish the number of its members, and that if such power is not exercised the qualified electors of the district may not vote upon such question. Such a construction of the statute would nullify the evident intent of the statute. The section referred to was derived from section 31 of title 8 of the former Consolidated School Law, as amended by Laws of 1903, chapter 463. Before the amendment of 1903 an annual meeting could vote upon the question of a change in the number of members of the board of education without a notice having been given. The object of amending the law by providing for notice is apparent. The Legislature intended that the district should be informed in advance of any proposed action changing the membership of the board, so that they might know how many members were to be elected at the annual meeting. It was not the intent of the statute to vest the board with the power of preventing action by the district on this important question. The statute imposes upon the board the ministerial duty of giving notice that the question of a change will be voted upon at the annual meeting. It is a positive duty to be performed by the board whenever any considerable number of persons request such notice to be given. Such duty will be compelled upon an appeal upon proof of the required facts.

In this case it clearly appears that the petitioners, constituting a majority of the board of education, arbitrarily rejected a petition of twenty-nine taxpayers representing nearly one-third of the taxable property in the district, requesting that the board give notice that the annual meeting would vote upon an increase in the membership of the board. This was a violation of duty and an official wrong upon the district. They should have acted favorably upon such petition and directed the clerk to include in the notice of the annual meeting a statement that such increase would be voted upon. The clerk of the board, who was a member thereof, took upon himself to right this wrong, by including the proper statement in the notice of the annual meeting. Except for the fact that by so doing he was performing a legal duty imposed by statute upon the board itself, I would not uphold his action. The clerk of the board must ordinarily be deemed its servant; he should not, under usual circumstances, be permitted to overthrow its official acts. But where the unauthorized act is the performance of a duty clearly imposed upon the board, which such board had wilfully refused to perform, it may be necessary to sustain and give legal force to such act.

The electors of district no. 3, town of Mooers, were entitled to the privilege of voting upon this question at its annual meeting. It could not be voted upon without notice. The board unlawfully refused to give the notice; the clerk exceeded the powers usually conferred upon clerks, in incorporating the required statement in the notice of the annual meeting. If the board is sustained in its wilful violation of duty the district will be deprived of the privilege which rightfully belongs to it, of controlling the number of the members of its board of education. If the clerk is upheld in disregarding the direction of the board, and in giving notice of the submission of the proposition for an increase in the number of members of the board, the privilege of controlling such number will be preserved to the district.

The clerk should be sustained in giving such notice. The notice must be held legal and binding upon the board, and sufficient under the statute to justify the vote taken upon the proposition at the annual meeting. Since the notice should have been given by the board in the performance of its legal duty in respect thereto, it is proper to consider such notice as having been given by the board. To hold otherwise would permit the board to profit by its wrongful acts.

Another reason exists for sustaining the acts of the annual meeting in voting upon this proposition. The result of such vote shows that the sentiment of the district, after actual notice and full discussion, was decidedly in favor of such proposition. There is no claim made that there was any lack of information about it. No unfair advantage of those opposed to it was taken. It is always the desire of the Department to uphold the deliberate, and certainly the decisive, determination of a school district upon such a question. Thus we come to the question as to whether the Department should overthrow the determination simply because of a technical defect in the method of giving the notice, which in no wise reaches the merits of the case. The Department would not do that without absolute necessity and I do not think it exists in this case.

I must therefore conclude that the proposition to increase the number of members of the board of education of this district was properly and legally voted upon at the annual meeting; that such proposition was duly adopted; that the acts of such meeting in electing M. B. Stewart and W. S. Stevenson as members of such board were legal and binding upon the district; and that the acts of a majority of the board of education as constituted by the election of the said Stewart and Stevenson are valid.

A question was raised as to the resignation of Russell J. McDowell and as to whether he is now a member of the board. Such resignation was not legally made and the said McDowell continues as a member of such board.

The appeal is dismissed.

4276

In the matter of the appeal of Edgar T. Boudy, from election of John S. Knight as member of the board of education of union free school district no. 6, town of North Greenbush, Rensselaer county.

In union free school districts other than those whose limits correspond to those of an incorporated village or city, the vote upon a proposition to increase or diminish the number of members of the board of education must be ascertained by taking and recording the ayes and noes of the qualified voters present and voting upon said proposition, and such proposition must receive a majority of the votes so taken and recorded. Where the resolution, increasing the number of the members of the board of education, was not acted upon in the manner hereinbefore stated, the election of an additional member of said board is null and void. Proceedings to increase or diminish the number of members of a board of education can only be had and taken at the annual meeting of said district.

Decided October 9, 1894

Van Alstyne & Hevenor, attorneys for respondent

Crooker, *Superintendent*

This appeal is taken from the election of John S. Knight as a trustee or member of the board of education of union free school district no. 6, town of North Greenbush, Rensselaer county, at the adjourned annual meeting of said district held on August 14, 1894.

The following facts, material to the questions arising upon this appeal, are established by the papers presented upon said appeal:

That the limits of said school district do correspond to those of an incorporated village; that on the first Tuesday of August 1894, the board of education of said district consisted of six members; that the annual meeting of said school district was held on the first Tuesday of August 1894, at which the annual report of the board of education of receipts and expenditures, with vouchers, and the amount of money necessary to be raised for the new school year, were presented and said vouchers were referred to a committee of five to examine and report at an adjourned meeting, and said meeting was adjourned to August 14, 1894, at 8 o'clock p. m., that on August 14, 1894, said meeting convened pursuant to adjournment, and after the transaction of some business, a motion was made that the number of members of the board of education of said union free school district be increased to seven; a motion was made that the matter be laid over for one week and said motion was lost, and thereupon the chairman of the meeting appointed two tellers, and the chairman of the meeting put said motion for increasing the members of said board of education to seven, stating that all those who were in favor of the motion should raise their right hands and remain so until counted by the tellers, which was done, the tellers reporting that the number of ayes was 30; the chairman then stated that all opposed to the motion should raise their right hands and remain so until counted by the tellers, which was done, the tellers reporting that the number of nays was 9; and the motion was declared adopted; that an election was then had for an additional trustee or member of said board of education, by ballot, with the following result: 50 ballots were cast, of which Joseph Parks received 5, Daniel Layden 8, Wesley O. Howard 7, Edgar Boudy 12, and John S. Knight 18, whereupon the chairman declared John S. Knight as such trustee.

Under section 31, article 5, title 8 of the Consolidated School Law of 1894, it is enacted, that at any annual meeting held in any union free school district whose limits do not correspond to those of any incorporated village or city, the qualified voters may determine, by a majority vote of such voters present and voting, *to be ascertained by taking and recording the ayes and noes,* to increase or diminish the number of members of the board of education of said district. If such board shall consist of less than nine members *and such meeting shall determine to increase the number, such meeting shall elect such additional number so determined upon,* and shall divide such number into three several classes, etc., etc.

Said union free school district no. 12, North Greenbush, under section 31, above cited, had the power and authority, at its annual meeting, held on the first Tuesday of August, or at the adjourned annual meeting on August 14th, to determine by a majority vote of the qualified voters present and voting, such vote to

be ascertained in the manner prescribed in said section, namely, by taking and recording the names of each voter voting thereon and also taking and recording the aye or no of each voter so voting upon said question opposite to his or her name, and if said meeting should so determine it could then elect the additional member of said board. The proofs show that the vote of the meeting, upon the question to increase the number of members of said board to seven, was *not* taken and ascertained in the manner provided by said section 31, but, on the contrary, said vote was taken and ascertained by the uplifted hand. The said district did not, at its annual meeting in 1894, duly and legally determine to increase the number of members of the board of education of said district, and the action and proceedings had and taken relative to such increase was null and void; that no action to determine said increase can be taken by said district until its next annual meeting.

The said district not having legally determined to increase the members of the board of education to seven, it follows that the meeting could not legally elect an additional member of said board and that the actions and proceedings of said meeting relative to the election of such additional trustee were null and void.

The school law requires that a person to be legally elected to a school district office must receive a *majority* of the votes cast for said office. Admitting, for the purpose of argument only, that at the annual meeting of said district it was duly and legally determined to increase the members of the board of education to seven, the meeting failed to elect any person as such additional member. The proofs show that the whole number of ballots cast for such additional member was 50; a majority of 50 is 26; no one received 26 votes, and hence no one was legally elected as a trustee or member of said board of education.

I find and decide that the qualified voters of union free school district no. 6, town of North Greenbush, at the adjourned annual meeting held therein on August 14, 1894, did not legally determine to increase the number of members of the board of education of said district.

That John S. Knight was not, nor was any one, duly and legally elected at said meeting held on August 14, 1894, as a trustee of said district, or a member of the board of education of said district.

That the qualified voters of said district can not take any action to legally determine to increase or diminish the number of members of the board of education of said district until the next annual meeting held in said district.

The appeal herein is sustained.

It is ordered, That all action or proceedings had and taken at the adjourned meeting, held on August 14, 1894, in union free school district no. 6, town of North Greenbush, Rensselaer county, in the election of a member of the board of education, or an additional member of the board of education of said district, be and the same are, and each of them is, hereby vacated and set aside.

5018

In the matter of the appeal of Joseph Warringer from proceedings of annual meeting held August 5, 1902, in union free school district no. 3, Red Hook, Dutchess county.

Under the provisions of section 31, article 5, title 8 of the Consolidated School Law of 1894, the vote taken at the annual meeting of a union free school district to increase or diminish the number of members of the board of education of such district must be ascertained by taking and recording the ayes and noes of the qualified voters present and voting.

Decided September 23, 1902

J. Morschauser, attorney for appellant
Hackett & Williams, attorneys for respondents

Skinner, *Superintendent*

This is an appeal from the proceedings taken at the annual meeting held August 5, 1902, in union free school district 3, Red Hook, Dutchess county, relating to the increase of the number of members of the board of education of the district from five to seven, and the alleged election of C. A. Pritchard and Clarence Ames as members of such board for the term of three years; and of Peter Rifenburgh for the term of two years; and of Henry B. Coon for the term of one year.

The appeal herein was filed in this Department September 4, 1902, with due proof of service of copy thereof personally on C. A. Pritchard, the chairman of the annual meeting, and a member of the board of education, and on Frank Berkman, a member of the board of education, on August 30, 1902; and upon Montgomery Queen, the clerk of the board of education and of the annual meeting on September 2, 1902.

An answer has been filed to such appeal in which the material allegations contained in the appeal are admitted. Annexed to the appeal is a full copy of the proceedings had and taken at such annual meeting as recorded by the clerk; and also of a printed copy of the call for said annual meeting and of the annual financial report of the board of education.

It appears from the printed copy of the notice of the annual meeting, annexed to the appeal herein, that two trustees were to be elected, each for the term of three years, in place of Watson D. Otis and C. A. Pritchard, whose respective terms of office would expire on August 5, 1902; and that the sum of $3669 would be required to be raised for school purposes for the school year 1902–3.

It further appears from the proofs herein that on August 5, 1902, certain of the qualified voters residing in union free school district no. 3, Red Hook, Dutchess county, assembled in the school building at 7.30 p. m., and organized by the choice of C. A. Pritchard as chairman, the clerk of the district, Montgomery Queen, acting as clerk; that the annual report of the trustees was read and on motion was approved; the estimate of the sum deemed necessary for the board

of education for the support of the schools for the present school year was read by items, and a motion was adopted that it be voted upon collectively; Messrs C. H. Morgan and Walter Scott were appointed inspectors of election; a vote was taken by ballot upon appropriating the sum of $3669 for school purposes, and resulted in 107 ballots being received, of which 52 were for the appropriation and 54 were against, and 1 blank; a motion was adopted referring the estimates back to the trustees.

It further appears that a resolution was offered by F. O. Green, and duly seconded, that the board of education be increased in number from five members to seven members, and a ballot was taken upon such resolution, which resulted in 109 votes being cast, of which 56 were for and 53 against such resolution, and thereupon nominations were made of persons for members of said board, and a ballot was taken. When the ballot was closed the inspectors of election reported that the whole number of votes cast was 106, of which Clarence Ames received 51, C. A. Pritchard, 56; Peter Rifenburgh, 60; Harry B. Coon, 51; James H. Kidd, 42; C. H. Champlin, 44; Ferdinand Egert, 46; and George W. Fingar, 45. The following persons were declared elected as trustees: C. A. Pritchard and Clarence Ames, for three years; Peter Rifenburgh, two years; and Harry B. Coon, for one year. Protests were made by Ferdinand Egert and F. O. Green against counting the ballots for members of the board of education, which did not divide the candidates into classes, and thereupon the meeting adjourned without day.

It is also in proof that the whole number of votes received by the inspectors was reported as 106, whereas the poll list kept by the clerk contained the names of but 102 persons as having voted, and no action was taken by inspectors to draw out, before canvassing the ballots, the excess of the number on said poll list.

It is clear from the proofs established herein that all the proceedings taken at such annual school meeting, from the action taken in referring the annual budget back to the board of education down to action on the motion to adjourn, were not in accordance with the provisions of the school law.

Under section 31, article 5, title 8 of the Consolidated School Law, the action of the meeting to increase the number of the members of the board of education from five to seven should have been ascertained by taking and recording the ayes and noes of the voters present and voting, and not by ballot.

Not having legally increased the number of members of the board of education, the meeting could only elect two members of said board in the place of the two members whose term expired on August 5, 1902. *All* the ballots cast for members of the board of education should have had designated thereon the term for which the persons named were to hold office.

The appeal herein is sustained.

It is ordered that all proceedings had and taken at the annual meeting held August 5, 1902, in union free school district no. 3, Red Hook, Dutchess county, commencing with the vote taken on the resolution to increase the number of

members of the board of education from five to seven, down to the protest made by Ferdinand Egert and F. O. Green, be, and the same are, and each of them is, hereby vacated and set aside.

It is further ordered that the board of education of said union free school district no. 3, Red Hook, without unnecessary delay, call a special meeting of the inhabitants of said district, qualified to vote at school meetings therein, in the manner prescribed by section 10, article 2, and section 13, article 3, title 8 of the Consolidated School Law, for the purpose of electing two members of such board, each for the term of three years, in place of said Watson D. Otis and C. A. Pritchard, and to consider and act upon the question of appropriating a sum of money, to be named in the notice of such meeting, for the support of the schools in the district for the present school year, and authorize the levy of a tax for the sum so voted.

4896

In the matter of the appeal of John Drummond and Jay R. Burleigh from proceedings of annual meeting held on August 7, 1900, in union school district no. 25, Verona, Oneida county.

The number of members of a board of education of a union school district, under the Consolidated School Law of 1894, can not be less than three nor more than nine. A board of education having but three members of the board can not legally reduce or diminish said number. In union school districts other than those whose limits correspond to those of an incorporated village or city the clerk of the board is appointed by the board of education and such clerk shall also act as clerk of the district.

Decided October 25, 1900

Skinner, *Superintendent*

This is an appeal taken from the proceedings at the annual meeting held August 7, 1900, in union school district no. 25, Verona, Oneida county.

A copy of such proceedings is annexed to the appeal. No answer has been made to the appeal.

It appears that said district has three trustees, and the term of office of Frank Tuttle, one of said trustees, expired at the time of such annual meeting; that a motion was adopted at such meeting that the district have but one trustee, and no person was elected as a trustee in the place of said Tuttle; that one M. L. Van Vechten was elected district clerk.

Section 31, article 5, title 8 of the Consolidated School Law of 1894, provides the method by which the trustees of any union school district whose limits do not correspond with those of any incorporated village or city may be increased or diminished. Said section also provides that no board of education of any such school district shall consist of *less than three* nor more than nine members.

As the number of members of the board of education of union school district 25, Verona, Oneida county, August 7, 1900, consisted of but *three* members, such meeting did not have the legal authority to diminish the number.

Section 7, article 1, title 8 of the Consolidated School Law of 1894, as amended by section 1, chapter 466 of the Laws of 1897, in every union school district other than those whose limits correspond to those of an incorporated village or city, gives the power to the board of education of the district to appoint one of their number, or any qualified voter in said district other than a teacher employed in said district, as clerk of the board of education of such district. Such clerk shall also act as clerk of such district, and shall perform all the clerical and other duties pertaining to his office, and for his services he shall be entitled to receive such compensation as shall be fixed at an annual meeting of the qualified voters of such district; that in case no provision is made at an annual meeting of the inhabitants for the compensation of a clerk, then and in that case the board of education shall have power to fix the same.

I decide (1) that the action taken at the annual meeting held August 7, 1900, in union school district 25, Verona, Oneida county, relative to the diminishing of the number of members of the board of education of such district from three to one, was without authority of law and void; (2) that the action taken at such annual meeting in electing M. L. Van Vechten, as clerk of such district was without authority of law and void.

The appeal herein is sustained.

It is ordered that all proceedings taken at such annual meeting in said district, in relation to the diminishing the number of members of the board of education of such district from three to one, and in the election of a clerk of said district, be, and the same are, and each of them is, hereby vacated and set aside.

It is further ordered that the members of the board of education of said union school district 25, Verona, Oneida county, without unnecessary delay, call a special meeting of the inhabitants of such district, qualified to vote at school meetings therein, for the purpose of electing a trustee of said district for the term of three years from the first Tuesday of August 1900, to succeed Frank Tuttle, whose term of office as a trustee expired at the time of the annual meeting held therein on August 7, 1900. That notice of such special meeting be given in the manner prescribed in section 10, of article 2, title 8, and section 13, article 3, title 8 of the Consolidated School Law of 1894.

4404

In the matter of the appeal of Adolph Bausch and others, from proceedings of board of education of union free school district no. 22, town of Oyster Bay, Queens county, in the election of William Smith as a member of said board.

One of the members of a board of education of a union free school district, which board consisted of nine members, resigned, and his resignation was duly accepted by the board. At a meeting held to fill the vacancy created by such resignation eight members of the board were present; that several ballots were had for member of the board without resulting in any election, when a recess was taken. When the meeting was called to

order after such recess, only four members of the board were present; that a ballot was then taken to fill such vacancy; whole number of votes being four, of which one Smith received three, and Merritt one, and thereupon said Smith was declared by the chairman of said board elected as a member thereof. On appeal; *held,* that said election was illegal and void, there being no quorum of the board present. Also, *held,* that it being shown that the members of said board can not elect any person to fill said vacancy, that a special meeting of the voters of the school district be called for the purpose of filling said vacancy.

Decided November 16, 1895

Skinner, *Superintendent*

In the above-entitled matter Adolph Bausch, Thomas J. Talbot, William Denton and Joseph H. Doud, four of the members of the board of education of union free school district no. 22, town of Oyster Bay, Queens county, appeal from the proceedings and action of Amos G. Sullivan, George H. Fuechsel, Philip Ketcham and Peter V. Ketcham, the other four members of said board, had and taken on October 18, 1895, in the alleged election of one William Smith as a member of said board.

Amos G. Sullivan, George H. Fuechsel and Peter V. Ketcham, three of the members of said board, and said William Smith, alleged to have been elected a member of said board, join in an answer to said appeal. Said answer has annexed thereto an affidavit of Philip Ketcham, a member of said board, in which he alleges that no copy of the appeal herein had been served upon him.

The appeal has annexed thereto copies of the record of proceedings of said board, held on October 18 and 23, 1895, and to the answer are annexed copies of the records of proceedings of said board on October 1 and 15, 1895.

The following facts are established:

That prior to October 1, 1895, the board of education of said union free school district consisted of nine members, to wit: John P. Heyen, Amos G. Sullivan, Peter V. Ketcham, Philip Ketcham, George H. Fuechsel, Adolph Bausch, Thomas J. Talbot, William Denton and Joseph H. Doud; that at a regular meeting of said board, held on October 1, 1895, said John P. Heyen presented, in writing, his resignation as a member of said board, which was duly accepted, and that by said resignation and the acceptance thereof, a vacancy occurred in said board, which said board had the legal power to fill; that a discussion was held relative to filling such vacancy, and the matter was laid over until October 15, 1895, to which date said board adjourned its meeting; that at said adjourned meeting on October 15, 1895, a quorum of the members not being present (only four members being present) no meeting was held; that a special meeting of said board was held on October 18, 1895, at which all of the eight members of said board were present, and a Mr Merritt and a Mr Smith were each nominated as candidates to fill the vacancy existing in said board; that five ballots for a member of said board were taken, each resulting in four votes for Merritt and four votes for Smith; that a recess of five minutes was then taken, and the chairman, after waiting about ten minutes, called the meeting to order, but only four members of the board were present, the other four members of

the board (the appellants herein) having left said meeting; that a ballot was then taken for member of said board to fill such vacancy and four votes were cast of which William Smith received three and J. C. Merritt one, and thereupon said William Smith was, by the chairman, declared elected as a member of said board.

It is clear that after the recess taken at said meeting of said board on said October 18, 1895, there being no quorum of the board present, the only business that the four members then present could legally do was to adjourn; and that the election of William Smith, as a member of said board, a quorum of the members of said board, namely, five members, not being present, was illegal and void.

Boards of education of union free school districts are severally created bodies corporate. Section 7, article 1, title 8 of the Consolidated School Law of 1894, Bassett v. Fish et al., 75 N. Y. 30.

The corporation so created takes not only the powers given expressly by the statutes, but such other powers as are necessary to its life and well being, and which such entities have at common law or by other statutes; it must act also, and can act only in the mode and by the means appropriate to a corporation. Bassett v. Fish et al., 75 N. Y. 303.

By the general corporation law of this State, chapter 687, Laws of 1892, section 29, it is enacted that "Unless otherwise provided by law a majority of the board of directors of a corporation at a meeting duly assembled, shall be necessary to constitute a quorum for the transaction of business, and the act of a majority of the directors present at a meeting at which a quorum is present shall be the act of the board of directors."

The Consolidated School Law does not state how many members of a board of education of a union free school district shall constitute a quorum for the transaction of business; but at common law, and by statute (general corporation law cited) a majority of the members of said board, respectively, shall be necessary to constitute a quorum of any such board for the transaction of business.

The four respondents herein, by their action in attempting to fill the vacancy in said board, seem to have assumed that there having been a quorum of said board present on October 18th up to the time of the recess, that such quorum continued after the recess and after the appellants herein, the other four members of the board, had left the meeting. This theory is not sound. To lawfully transact business a majority of the members of the board must be present at any meeting thereof, duly assembled, and continue to be present until such meeting adjourns to constitute a quorum; otherwise a majority, present when the session commenced, might be reduced by the members leaving the meeting, until no one remained except the chairman and clerk who, under the contention of the respondents herein, could transact any business of the board. Merely to state such a contention is sufficient to show its absurdity.

It appears from a copy of the minutes of the meeting of the said board, held on October 23, 1895, that the said William Smith who, it is claimed by respondents, was elected a member of said board, was present and acted, and that a vote to approve the minutes of said meeting of October 18, 1895, against

the protest of the appellants herein, was declared carried by the votes of the four respondents herein and the vote of said Smith. It is clear that as said Smith was not legally elected a member of said board he had no legal authority to act as such member at said meeting, or to vote upon questions arising at said meeting; that any and all actions or proceedings had and taken, or motions or resolutions adopted, at said meeting, by the vote of said Smith are, and each of them is, void.

As it is apparent that the present members of said board of education can not fill the vacancy existing in said board it becomes my duty, under the provisions of subdivision 12, of section 15, article 4, title 8 of the Consolidated School Law of 1894, to order a special election to be held in said union free school district for the purpose of filling such vacancy.

The appeal herein is sustained.

It is ordered, That all proceedings had and taken at the meeting of the board of education of union free school district no. 22, town of Oyster Bay, Queens county, held on October 18, 1895, after the recess and after Messrs Bausch, Talbot, Denton and Doud, members of said board had left said meeting, relative to the election of a member of said board to fill a vacancy therein, and especially the ballot then had and taken to fill said vacancy, be, and the same are, and each of them is, hereby vacated and set aside as illegal and void.

It is further ordered, That all proceedings had and taken at the meeting of said board, held on October 23, 1895, recognizing in any manner whatsoever, one William Smith as a member of said board, be, and the same are, and each of them is, hereby vacated and set aside as illegal and void.

It is further ordered, That said board of education, with all reasonable despatch, call a special meeting of the inhabitants of said union free school district no. 22, town of Oyster Bay, Queens county, qualified to vote at school meetings therein, for the purpose of electing a member of said board of education to fill the vacancy existing in said board by reason of the resignation of John P. Heyen as a member of said board.

4128

In the matter of the appeal of Matthew Lannon, jr, v. the board of education of school district no. 5, town of North Hempstead, Queens county.

Vacating office of trustee. A member of a board of education temporarily absent from the district but not having removed therefrom did not cease to be a resident and inhabitant of the district and the action of the board in declaring the office vacated was illegal and void.

Decided October 26, 1892

Crooker, *Superintendent*

This appeal is taken from the action and proceedings of a special meeting of the board of education of school district no. 5, town of North Hempstead, Queens county, held on August 30, 1892, declaring the office of the appellant

as a member thereof vacant, and from the action and proceedings of said board, at a special meeting thereof, held on September 10, 1892, in electing one Timothy J. Bird as a member thereof to fill the vacancy so as aforesaid declared to exist in said board on August 30, 1892.

No answer to said appeal has been filed in this Department, and the facts alleged in said appeal are deemed admitted.

The following facts are established:

That the appellant is a resident of Port Washington in school district no. 5, town of North Hempstead, county of Queens; that the annual meeting for the election of trustees of said district was duly held on August 3, 1892, and the appellant was duly elected a trustee of said district for the term of three years; that on the evening of August 16, 1892, the board of education met at Port Washington and perfected its organization for the ensuing school year by the election of Warren S. Weeks as president and Theodore F. Morgan secretary, Messrs Weeks, Morgan, Adelbert Jones, Edward F. Allen and the appellant being present; that a resolution was adopted at said meeting that the meetings of said board should be held on the last Monday in each and every month of the school year, and that the first regular meeting of said board under said resolution should be held on the last Monday in September 1892; that on or about August 19, 1892, the appellant went to the town of Jamaica in Queens county, to temporarily assume the management of the business interests of one Pettit in conducting a hotel; that engagement was merely temporary in its nature and was so understood by the parties concerned, and that neither then nor at any other time did the appellant ever relinquish his actual residence in said school district no. 5 of the town of North Hempstead; nor did he then, or at any other time, ever have or express any intention to reside elsewhere; nor did he remove, or attempt to remove, any of his personal effects or property from said school district, or engage or contract in any way for any place or residence either in the town of Jamaica or elsewhere.

That the by-laws of said board of education require that when a special meeting of the said board is called, each member thereof shall be duly and personally notified or in such other manner as shall give to him due notice of said special meeting; that, as the appellant has been informed and verily believes, a special meeting of said board was held at Port Washington on the evening of August 30, 1892, during the period of the temporary absence of the appellant as aforesaid, at which meeting a resolution was adopted declaring the office of the appellant as such trustee vacant by reason of his said absence; that no notice of such special meeting so held on August 30, 1892, was ever received by the appellant; that as the appellant is informed and verily believes, a second special meeting of said board was held on September 10, 1892, at Port Washington, and that one Timothy J. Bird was chosen as a trustee of said district until the annual election of trustees on the Wednesday succeeding the first Tuesday of August 1893, to fill the vacancy declared to exist at said special meeting of August 30, 1892, by reason of the absence of the appellant; that on September 14, 1892, the

appellant returned to his home in Port Washington in said school district, and then became apprised of the facts in relation to said special meetings of said board of education and the proceedings thereof as hereinbefore stated; that the appellant appeared at the regular meeting of said board of education held pursuant to the resolution before stated on Monday evening, September 26, 1892, at Port Washington, and attempted to exercise his right as a trustee of said school district and a member of said board, but the same was denied him, and he was denied any voice in the deliberations of said board, on the ground that he had relinquished his right of residence, and that his office having been declared vacant, the board of education, in the exercise of its powers, had elected or chosen another as trustee until the next annual election of officers. Against all of which the appellant duly protested, and thereupon brought this appeal.

Under the school laws, trustees of school districts are chosen by the qualified voters in the respective districts and not by boards of trustees or education. Such boards of trustees or education have the power to fill any vacancy which may happen in any of said boards by reason of the death, resignation, *removal* or refusal to serve of any member or officer of said board.

The appellant was duly elected a trustee of his district; he met with his associates at the organization of the board on August 16, 1892, when a resolution was adopted that the regular meetings of the board should be held on the last Monday of each and every month of the school year, and *the first of such regular meetings should be held on the last Monday of September* 1892; that on August 19th he went to Jamaica, in the same county as Port Washington, his residence, to be absent temporarily in the transaction of certain business. On August 30th, eleven days after he left his home, a special meeting was called and his office of trustee was declared vacant by reason of his absence; and on September 10th, at another special meeting, a person was elected trustee to fill such alleged vacancy. On September 14th he returned to his home and was then first apprised of the action of the board, and on attending on September 26th, at the *first* regular meeting of the board after his election, was refused to be allowed to exercise his right as such trustee.

This appeal does not present a similar state of facts to those stated in the decision of Superintendent Young, page 764, Code of 1887, nor to those stated in the decision of Superintendent Gilmour, page 787–88, Code of 1887.

It is apparent that the board of education of said district acted with undue haste and without the sanction of law. The appellant did not cease to be a resident and inhabitant of said district. He did not remove from said district, and the action of the said board of education in declaring the office of the appellant as trustee of said district vacant, and in the election of a person to fill such vacancy exceeded their powers and authority, and said acts were, and each of them was, illegal and void.

The appeal herein is sustained.

It is ordered:

That so much of the proceedings and actions of said board of trustees or education of district no. 5, town of North Hempstead, Queens county, at the special meeting held on August 30, 1892, as declared that the office of trustee, held by the appellant herein, was vacant; and so much of the proceedings and action of said board at the special meeting held on September 10, 1892, in the election of one Timothy J. Bird as a trustee of said district to fill the vacancy declared to exist by its action on said August 30, 1892, be, and each of them is, hereby vacated and set aside.

It is further ordered:

That said board of trustees or education of said district receive at all the meetings of said board the said Matthew Lannon, jr, as a trustee of said district holding his office as such trustee for the term of three years from the Wednesday succeeding the first Tuesday of August 1892, for which he was duly elected, with the right of exercising all the powers and duties possessed by him by virtue of said office of trustee.

4749

In the matter of the appeal of George Harris from proceedings of a special meeting held January 7, 1899, in union school district no. 1, Poughkeepsie, Dutchess county, in the election of a member of the board of trustees of such district.

The board of education of every union school district has the power, and it is its duty, to fill any vacancy which may occur in such board by reason of the death, resignation, removal from office or from the school district, or refusal to serve, of any member or officer of said board. Said board can not legally call a special meeting of the inhabitants of the district to fill a vacancy existing in such board. The State Superintendent of Public Instruction may order a special election to fill a vacancy existing in any board of education of a union school district, and when such special election is ordered by him, the vacancy shall not be filled otherwise. If the board fails to fill such vacancy for a period of 30 days the same may be filled by the school commissioner having jurisdiction.

Decided February 24, 1899

Skinner, *Superintendent*

This is an appeal from the proceedings of a special meeting, held January 7, 1899, in union school district 1, Poughkeepsie, Dutchess county, in the election of a member of the board of trustees in such district.

The appeal herein is not full and definite in its statement of facts, but it appears that a vacancy was created in the board of trustees of said district by the death of one of the members of such board. The ground alleged by the appellant upon which his appeal is taken, in substance, is that such vacancy could not be legally filled at a school district meeting, unless so directed by the State Superintendent of Public Instruction.

Trustee Jones has answered the appeal, and to such answer the appellant has made a reply. A copy of the call for the special meeting, held January 7, 1899, with proof of the manner of the service of such notice, and a copy of the proceedings of such special meeting, have been filed with me.

It appears that school district 1, Poughkeepsie, Dutchess county, is a union school district, with a board consisting of three trustees, namely, Joseph Jones, John F. Eagan and John Corrigan; that at some time prior to December 28, 1898, said Trustee Corrigan died, thereby creating a vacancy in said board of trustees; that Jones and Eagan, the two remaining trustees of such board, could not agree upon any person to fill such vacancy; that said Jones and Eagan interpreted the law as quoted to them in a letter from the State Superintendent of Public Instruction, that they had the legal authority to call a special meeting of the inhabitants of said district, qualified to vote at school meetings therein, to elect a trustee to fill such vacancy, when it was impossible for them to elect a trustee; that a notice, of which the following is a copy, namely, "Notice. There will be a special election held in the schoolhouse of union school district 1, Po'keepsie, Saturday, Jan. 7, 1899, 7.30 p. m., to fill the vacancy in the board of education By order of trustees. Michael Lyons, clerk. Dated December 28, 1898," was posted in six conspicuous places in the district, ten days preceding January 7, 1899; that on January 7, 1899, in pursuance of said notice certain of the inhabitants of such district assembled at the schoolhouse, Trustee Jones acting as chairman and Trustee Eagan as clerk, and the call for the meeting was read; that the appellant George Harris and Alfred Brower were nominated for trustee to fill the vacancy created by the death of Mr Corrigan and ballot was taken which resulted in 121 votes being cast of which Brower received 70 and Harris 51; that said Brower has, since said meeting, been acting as a trustee of the district in the place of Corrigan, deceased.

Assuming, for the purpose of argument only, that Trustee Jones and Trustee Eagan had the legal authority to call a special meeting of the qualified voters of such district to elect a trustee to fill the vacancy existing in the board of trustees of the district, the notice given was defective in form, and said notice was not served in the manner required by title 8 of the Consolidated School Law of 1894, and hence said special meeting of January 7, 1899, was not duly and legally called and held, and the proceedings taken thereat are illegal and void.

Section 13, article 3, title 8 of the Consolidated School Law of 1894 provides that in union school districts other than those whose limits correspond to those of any incorporated village or city the boards of education shall have power to call special meetings of the inhabitants of their respective districts whenever they shall deem it necessary and proper, in the manner prescribed in section 10 of said title.

Section 10 of said title 8 provides that notices of meetings of the qualified voters of such districts shall be published once in each week for the four weeks preceding such district meetings, in two newspapers if there shall be two, or in

one newspaper if there shall be but one, published in such district. But if no newspaper shall then be published therein, "the said notice shall be posted in at least twenty of the most public places in said district twenty days before the time of the meeting."

It is clear that Trustee Jones and Trustee Eagan had no legal authority to call a special meeting of the qualified voters of such district to supply the vacancy in the board of trustees caused by the death of Corrigan.

Subdivision 12 of section 15, article 4, title 8 of the Consolidated School Law of 1894 provides that the board of education of every union school district has the power, and it shall be its duty, "to fill any vacancy which may occur in said board by reason of the death . . . of any member or officer of said board; and the person so appointed in the place of any such member of the board shall hold his office until the next election of trustees as by this act provided. In case of the failure of such board to fill such vacancy, and in case no special election is ordered for filling the same for a period of 30 days, the same may be filled by the school commissioner having jurisdiction. The Superintendent of Public Instruction may order a special election to be held in any district for the purpose of filling such vacancy, and when such special election is ordered the vacancy shall not be filled otherwise."

The foregoing provision of law is perfectly plain. If a vacancy occurs in the board of trustees of a union school district such vacancy shall be filled by the remaining members of the board of trustees. If for any reason such remaining members can not, or do not, fill such vacancy, for a period of 30 days after the vacancy occurs, the school commissioner of the commissioner district in which the school district is situated, has the power to fill the vacancy, unless a a special election is ordered. *The only person who has authority to order a special election is the State Superintendent of Public Instruction, who, for reasons satisfactory to him, can order a special election.*

No special election has been ordered by me in said district to fill the vacancy in the board of trustees of the district, caused by the death of Mr Corrigan.

I decide:

That as the special meeting held in said school district January 7, 1899, was not ordered by me, such meeting was illegal and void; that Alfred Brower was not legally elected a member of the board of trustees of said district to fill the vacancy in such board caused by the death of John Corrigan; that such special meeting was neither legally called nor held, and the proceedings taken thereat were illegal and void and must be set aside.

The appeal herein is sustained.

It is ordered:

That the proceedings taken at said alleged special meeting, held January 7, 1899, in union school district 1, Poughkeepsie, Dutchess county, and especially in the alleged election of Alfred Brower as a trustee of said district, be, and the same are, hereby vacated and set aside.

4343

In the matter of the appeal of William Keutgen v. Nicholas J. Macklin, as president of board of education of union free school district no. 2, Middletown and Southfield, Richmond county.

When a vacancy occurs in a board of education of a union free school district, such board has power, under the school law, to fill such vacancy, and the person appointed shall hold office until the next annual meeting of the district. A board of education consisting of nine members, a quorum of the board being present, namely, five members, a person elected to fill the vacancy receiving a majority of the votes of those present is duly elected to fill such vacancy.

Decided March 19, 1895

John Widdecombe, attorney for respondent

Crooker, *Superintendent*

This appeal is, in fact, an appeal from the election of one Thomas J. Flannigan as a member of the board of education of union free school district no. 2, Middletown and Southfield, Richmond county, as, although the appellant alleges various acts of the board and its president to be irregular and contrary to the by-laws of said board, he asks that the election of Mr Flannigan, as a member of said board, be set aside as illegal. Both said Macklin and Flannigan have filed an answer to the appeal.

It appears that by the action of the school meeting by which said union free school was established the board of education thereof was to consist of nine members and nine persons were duly elected to constitute said board; that prior to January 25, 1895, one P. Albin Warth was a member thereof, but said Warth duly resigned as such member, which resignation was duly accepted by said board on January 25, 1895, and thereupon there became a vacancy in said board; that at an adjourned regular meeting of said board, held on February 6, 1895, at which there were present seven of the eight members of said board, after the transaction of various matters, Mr Cole moved that the board then proceed to the election of a trustee, and the appellant herein moved as a substitute that it be laid over until the next meeting, whereupon the substitute was lost and the motion of Mr Cole adopted; on motion by the appellant a recess for ten minutes to consider candidates was carried; that upon the expiration of said recess the president ordered a vote to be taken for the election of a trustee; that Mr Robinson, a member of the board, during the recess, was excused, and Mr Corey, also a member of the board, left the meeting; that a vote was taken for trustee which resulted in four votes for Thomas J. Flannigan and one for Mr Barry; that two other votes were taken with a like result; that appellant herein asked to be excused, and the president of the board refused to excuse him upon the ground that it would break the quorum; that Mr Cole moved for another ballot for trustee which was taken and resulted as hereinbefore stated; that Mr Cole raised a point of order demanding the president of the board to declare Mr Flannigan elected as trustee on the ground that Mr Corey, not being excused, must be recorded as present, and thereupon claimed that Mr Flannigan received a majority

vote; that the appellant herein thereupon left the meeting and the president reserved his decision and there being no quorum, ordered an adjournment of the meeting until February 3, 1895, at 8 p. m.; that on February 3, 1895, a quorum of the board not being present, the meeting of the board was adjourned to February 12, 1895, and on February 12, 1895, there being no quorum of the members present the meeting of the board was adjourned to February 16, 1895; that on February 16, 1895, an adjourned meeting of said board was held, a quorum being present, at which the president of the board stated he had looked up the question of the point of order raised by Mr Cole, at a former meeting, requesting the president to declare Mr Flannigan elected a trustee, and he had come to the conclusion that the point was well taken, and thereupon declared Mr Flannigan legally elected a trustee of said district, and directed the clerk to enter his name on the roll, and to notify Mr Flannigan of his election and to give to him notices of all future meetings of the board.

Boards of education of union free school districts are severally created bodies corporate (section 7, article 1, title 8 of the Consolidated School Law of 1894; Bassett & Fish et al. 75 N. Y. 303).

The corporation so created takes, not only the powers given expressly by the statutes, but such other powers as are necessary to its life and well-being, and which such entities have at common law or by other statutes; it must act also, and can act only in the mode and by the means appropriate to a corporation (Bassett & Fish et al. 75 N. Y. 303).

Such boards of education have power, and it shall be their duty, to fill any vacancy which may occur in any such board by reason of the death, resignation, removal from office or from the school district, or refusal to serve, of any member or officer of such board (sub. 12, sec. 15, art. 4, title 8, Consolidated School Law of 1894).

The Consolidated School Law does not prescribe how many members of a board of education shall constitute a quorum for the transaction of business.

At common law the rule was well settled, that in select governing bodies of a definite number, invested with functions of a public nature, a majority of a quorum, though less than a majority of the whole body, may legally act.

Mr Dane in his abridgment states that, "If the body consists of twelve common councilmen, seven is the least number that can constitute a valid meeting, though four of the seven may act." In Dillon on Municipal Corporations it is stated, "So if a board of village trustees consist of five members and all, or four, are present, two can do no valid act; if three only were present they would constitute a quorum, then the votes of two, being a majority of the quorum, would be valid, and certainly so when the three are all competent to act."

Section 10, article 3 of the Constitution of this State enacts that "A majority of each house shall constitute a quorum to do business." Under said clause it is competent for either house to do any business by a bare majority of a quorum, except in particular cases, such as the enactment of laws where a larger vote is expressly required by restrictive words elsewhere in such constitution. In the

general corporation law, chapter 687 of the Laws of 1892, section 29, it is enacted that "Unless otherwise provided by law, a majority of the board of directors of a corporation at a meeting, duly assembled, shall be necessary to constitute a quorum for the transaction of business, and the act of a majority of the directors present at a meeting at which a quorum is present shall be the act of the board of directors."

Superintendent Ruggles in appeal 3314, decided on March 3, 1884, held that the appellant therein, who was elected a member of a board of education by vote which was less than a majority of the board, though it was a majority of the members present, a quorum being in attendance, was legally elected.

Boards of education have power to adopt such by-laws and rules for their government as shall seem proper in the discharge of the duties required under the provisions of the school law.

It is not necessary, in disposing of this appeal, to decide as to whether or not the by-laws adopted by said board are valid or not. The appellant herein contends that the by-laws, article 2, which provides that when only a quorum of the board is present at any meeting a unanimous vote shall be necessary to decide a question other than that of adjournment, requires a unanimous vote to fill a vacancy in said board, is not tenable.

The appellant contends that after the first vote to fill the vacancy in said board the president should have declared Mr Flannigan elected and not allowed the other ballots to be taken. The appellant seems to hold the opinion that the declaration by the president of the election of Flannigan was necessary to make such election valid. In this he is in error. At a school district meeting or board of education when an election is had for an officer, it is not the declaration of a chairman, but the fact that a person received a majority of the legal votes cast, which constitutes an election. One ballot or vote was all that was necessary to be taken at said meeting of said board of education held on February 6, 1895, to elect a member of said board to fill the vacancy existing therein.

I find and decide, That Thomas J. Flannigan was, on February 6, 1895, at a duly held meeting of the board of education of union free school district no. 2, Middletown and Southfield, Richmond county, duly and legally elected a member of said board of education to fill the vacancy then existing in said board by reason of the resignation of P. Alvin Warth, which resignation had theretofore been duly made to and accepted by, said board.

Appeal dismissed.

3314

Power of board to appoint member thereof fully discussed.
Decided March 3, 1884

Ruggles, *Superintendent*

The vote by which the appellant claims to have been appointed a member of the board of education, was less than a majority of the board, though it was a majority of the members present, a quorum being in attendance.

Was it competent for a bare majority of a quorum present to make a valid appointment?

The special statute under which this school district was organized, provides that said district "shall under the direction of the board of education, which board shall consist of four members, three or more of whom shall constitute a quorum for the transaction of business."

At common law the rule seems to have been well settled, that in select governing bodies of a definite number, invested with functions of a public nature, a majority of a quorum, though less than a majority of the whole body, may legally act.

Mr Dane thus illustrates the rule: "If the body consists of twelve common councilmen, seven is the least number that can constitute a valid meeting, though four of the seven may act." 5 Dane Abr. 150. The rule is further illustrated in Dillon on Municipal Corporations (§ 279, 3d ed.), as follows: "So if a board of village trustees consists of *five members, and all, or four, are present,* two can do no valid act; if three only were present they would constitute a quorum, then the votes of two, being a majority of the quorum, would be valid; certainly so when the three are all competent to act." This rule of the common law has been made the statutory rule in this State in reference to corporations (2 Rev. Stat., 1531, § 6, 7th ed.). I am inclined to think, however, that this statute, although its words are general, applies only to private corporations. On the other hand, we have a general statute relating to the exercise of powers confided by law to three or more persons, or officers which requires the concurrence of a majority of the whole number in the valid exercise of such powers (1 Rev. Stat., 2458, § 27). It might be urged with some force that the last statute governs the case in hand, but for the fact that chapter 81 of the Laws of 1848, in respect to this particular board of education, expressly makes three members a quorum. In the use of this word, I think the Legislature intended to invest in three members, present at a duly convened meeting of the board, the ordinary common law powers of a quorum, especially in the absence of any instructive words.

The Constitution of this State, article 3, section 10, in defining the powers of the Legislature, making similar use of the word, provides that "a majority of each house shall constitute a quorum to do business. Under this clause it is competent for either house to do any business by a bare majority of a quorum, except in particular cases where a larger vote is expressly required by restrictive words elsewhere in the Constitution" (Cooley on Constitutional Limitations, 141). It follows that the vote of the appellant was sufficient to constitute a valid appointment. In this view of the case it is not necessary to pass upon the question, whether under the circumstances, Mr Marvel, the nonvoting member of the quorum, by reason of his silence, is to be deemed to have assented to, and as a matter of law voted for the appointment of the appellant.

The statute confers upon the board power to fill any vacancy which may happen in said board by reason of the death, removal or refusal to serve of any member or officer of said board. It provides for no commission, oath, bond or

other formality, subsequent to the vote and the official announcement of the result by the presiding officer, in order to perfect the appointment and invest the appointee with the office. The appointment was complete when the vote was taken and officially announced by the presiding officer. The entry in the minutes is but evidence of the exercise of the power.

Was it competent for the board to subsequently reconsider this action and make a valid appointment of another person, Mr Murray not having been removed nor in any way vacated the office? I think such action was beyond the power conferred upon the board. When the statutory authority was once exercised, the power of the board in the matter was exhausted. The general rule of law applicable to the case, is concisely stated by Reynolds C., in People ex rel. Hotchkiss v. Supervisors, 65 N. Y. 227. "The cases are very numerous and the principle perfectly well stated that when power to do a certain act is conferred upon a public officer, or board of officers, and when action has once been had under the power it is final and may not be repeated, reversed or annulled by the same officer or body."

The People ex rel. Mosher v. Stowell, 9 Abb. N. C., is a case in point in affirmance of this rule. The common council of Elmira appointed Mosher as chamberlain. Subsequently a resolution was adopted by the council purporting to rescind the appointment and to appoint Stowell. The court held Mosher entitled to the office. The court, Smith, J., says: "When the common council adopted the resolution appointing the relator, its action in respect to the choice of chamberlain was complete. It had no authority to rescind such action, the appointment being for a definite term, especially after the relator had signified his acceptance of the office by taking and filing the oath." To the same effect is Sank v. Philadelphia, 8 Phila. 117. Appellant declared legally appointed a member of the board.

4584

In the matter of the appeal of William H. Flewwellin and Isaac G. Braman v. James B. McLeese and John H. McKeever.

In the petition of two members of the board of education of the city of Watervliet, Albany county, for the removal of the other two members of such board for violation and neglect of duty and in not obeying the decisions of the State Superintendent of Public Instruction and for failure to open the schools of such city.

Held, that the common school system of the State is a State and not a local system; that the power delegated by the Legislature to the local school authorities of such city through its charter is to enforce, not to nullify, the mandate of the Constitution requiring the Legislature to provide for the maintenance and support of a system of free common schools wherein all the children of the State may be educated; that no community in the State can close its schools and refuse compliance with the provisions of the organic law; that the entire public school system of the State is under the supervision and management of the State Superintendent of Public Instruction, to the end that the constitutional requirement be complied with and the legislation accompanying it made effective; that if the school authorities fail to perform their duty in opening

the schools the State Superintendent will not hesitate to exercise the power of opening such schools; that the board of education of such city is ordered and directed to provide the necessary equipment of qualified teachers, janitors and necessary employees, and to open the common schools of that city to the pupils residing therein, on or before the 4th day of October 1897.

Decided September 27, 1897

Skinner, *Superintendent*

This is a petition presented by the above-named appellants praying for the removal from office of the respondents herein, and also that the appellants be directed by the State Superintendent of Public Instruction to open the schools in the city of Watervliet at once with a full corps of teachers, janitors and other employees.

The parties to the above-entitled proceedings constitute the entire board of education of the city of Watervliet and their office is created and their powers and duties are defined by chapter 905 of the Laws of 1896.

The relief asked for is based upon the allegation that the schools of said city remain closed, although the date upon which they usually open, and the date publicly announced by the board of education as that upon which they would open, has long since passed, it being claimed by the appellants that the respondents herein refuse to unite with them in the selection of proper teachers and other employees, and by reason of said refusal the board of education in said city is in a hopeless deadlock. It is also claimed by the appellants that the respondents herein persist against their protest, in the continued leasing, beyond the period of temporary emergency contemplated by the statute, of the building situated at the corner of Fifth avenue and Seventh street in said city, in violation of the decision of the State Superintendent in appeal cases nos. 4516 and 4546.

The respondents, by their answer, deny any intention upon their part to violate the spirit or letter of the decisions referred to, and allege that the schools in said city remain closed because of the refusal of the appellants herein to unite with them in the employment of qualified teachers and necessary employees for the opening and continuation of said schools.

Passing over the details of the unfortunate controversy as set forth in the pleadings herein, *two facts stand admitted:*

1 The school authorities of the flourishing city of Watervliet all admit there is and for a long time has been a lack of sufficient school accommodations in said city and that an additional school building is needed. Such need is admitted by all parties, is urgent, and has continued for a long time. No reason why the needed school building can not be supplied exists, or, at least, none is alleged, and yet no steps have been taken to supply the urgent demand for additional school facilities, and the board of education are still dickering with the owners of private property in an attempt to rent buildings or portions of private buildings in which to conduct a public school. As was shown in the former appeals, to which reference is herein made, few localities in the State are more fortunately situated or better able to provide for the public ownership of all property used for school

purposes. Yet no effort whatever seems to have been made to provide sufficient school facilities except an effort to continue the system of leasing private property against the policy of the State as clearly contemplated by the Consolidated School Law.

2 The entire schools of the city are closed and parents, anxious for the education of their children and fortunate enough to be able to send them elsewhere, are doing so. Those less fortunately situated are roaming the streets of the city.

I shall not attempt, in these proceedings, to fix the blame for these unfortunate and unnecessary conditions. Each is, in itself, disgraceful; both should be remedied at once.

The most efficient remedy, however, in my judgment, does not at this time consist in removing from office any members of the board of education.

The schools in the city of Watervliet are, by the charter of that city, under the local management of a board of education created in its personnel by the selection of members of the two leading political parties in equal numbers, with the avowed purpose of making them *bipartisan*. Whatever may have been the operation elsewhere of this effort of modern legislation to keep politics out of the schools by this method of bipartisan boards, the direct result in this city has been to inject politics into the school to the extent that every other consideration has been lost sight of — even the school itself. It is earnestly hoped that at an early day some legislation may be enacted that will render the present conditions impossible.

In the meantime, however, I am of the opinion that a remedy for the present unfortunate condition of affairs in this city exists.

The schools in the city of Watervliet are not local institutions in the sense that the citizens of the State at large have no interest therein, or the State authorities no control thereof. The Constitution of the State in article 9 thereof provides as follows:

"The Legislature shall provide for the maintenance and support of a system of free common schools wherein all the children of this State may be educated."

This constitutional requirement has been fulfilled by the Legislature of the State. It has provided, by general taxation, a fund exceeding four millions of dollars for the support of a *State* system of free common schools, of which amount the city of Watervliet receives from the State treasury the sum of nearly six thousand dollars. But *all* the children of the State can not be educated therein for the reason that those residing in the city of Watervliet are waiting upon the pleasure of the board of education of that city while they are engaged in determining and agreeing upon how many of the necessary teachers to be employed shall belong to either political party or of what religious denomination they shall be devotees, before necessary school buildings shall be supplied.

Not only does the State meet this requirement of the Constitution by providing this large fund for school purposes to be raised by general taxation, but it has provided for a State Superintendent of Public Instruction to enforce the constitutional mandate and its accompanying legislation.

The Consolidated School Law of the State places the supervisors of the entire common school system of the State under his control. He is charged with the duty of apportioning the public funds, and may withhold the whole or any part thereof from any district or city under certain conditions. He "must give to local school authorities such information and instructions as he shall deem conducive to the proper organization and government of the common schools, and the due execution of their duties by school officers." "Any person conceiving himself aggrieved in consequence of any decision made by any school officer concerning any matter under the Consolidated School Law, or any other act pertaining to the common schools, may appeal to him, and he is authorized and empowered to make all orders which may, in his judgment, be proper or necessary to give effect to his decisions."

The entire public common school system is thus under his supervision and management to the end that the constitutional requirement shall be complied with and its accompanying legislation made effective.

Even the charter of the city of Watervliet recognizes this power of the State Superintendent over all the common schools of the State providing in subdivision 10 of section 12 of title 5 therein that "the board of education in said city shall have, to the exclusion of all boards and officers, *except* the State Superintendent of Public Instruction of this State, the entire supervision and management of the schools of said city."

No community in the State can close its schools and refuse compliance with this provision of the organic law.

The common school system of the State is a *State* and not a *local* system. The citizens of the most remote section of the State have an interest in the schools of this city. They assist in maintaining them and they have a direct interest in their efficiency. The power delegated by the Legislature to the local school authorities of Watervliet through its charter is to *enforce,* not to *nullify* the mandate of the constitution.

This charter so far as it relates to the common schools therein must be read and interpreted in connection with the general school law of the State. It is supplemental only to that. If the local school authorities refuse to comply with the provisions of these statutes they must be compelled to do so by the courts. If they refuse and are not compelled to do so, ample authority is by the general school law vested in the State Superintendent to open the schools of said city.

I shall not hesitate to exercise this power if the school authorities of that city persist in their neglect and refusal to perform the duties of their office.

Without, therefore, passing at present upon the question as to which of the parties to this appeal is censurable for the condition of school affairs now existing in that city, I hereby order and direct the board of education of the city of Watervliet to provide the necessary equipment of qualified teachers, janitors and necessary employees, and to open the common schools of that city to the pupils residing therein *on or before the 4th day of October 1897.*

The board of education of the city of Watervliet, having wilfully refused to comply with the foregoing decision and order of September 27, 1897, the State Superintendent of Public Instruction, on October 4, 1897, made the following order:

In the matter of the opening of the schools in the city of Watervliet by the State Superintendent of Public Instruction.

Having made and entered on the 27th day of September 1897, an order directing the board of education in the city of Watervliet to employ sufficient qualified teachers, janitors and employees, and having directed them to open the public schools for the city of Watervliet on or before the 4th day of October 1897; and said board of education having wilfully refused to comply with the terms of said order and direction, and said schools in said city yet remaining closed and no teachers, janitors, or other necessary employees having been employed or appointed by said board, now, therefore, I do hereby order and direct Mr A. M. Wright to proceed to the city of Watervliet and organize the school system of said city as temporary superintendent of schools with the following corps of qualified teachers and the persons herein designated as janitors and librarian, each of whom is herein temporarily appointed to the position and at the annual compensation designated opposite each respective name, in this order, namely:

Frank D. McGowan, librarian, $150 per year; Charles E. Trowbridge, truant officer, $400 per year; Michael F. Wood, truant officer, $400 per year; Mary F. Fitzgerald, drawing teacher, $480 per year; Sarah E. Forsyth, principal, $600 per year; Jane Kennedy, assistant, $480 per year; Rose Mary McClare, teacher, $432 per year; Harriet A. Lacy, teacher, $432 per year; Susie A. Nugent, teacher, $432 per year; Chyllean P. Luther, teacher, $432 per year; Henrietta R. Lyons, teacher, $432 per year; Mary Dillon, janitress, $325 per year; Ellen J. Le Maire, principal, $600 per year; E. Jennie Morey, assistant, $480 per year; Mattie Mooney, teacher, $432 per year; Anna Von Lehman, teacher, $432 per year; Mary F. Taylor, teacher, $432 per year; Alice Crummy, teacher, $432 per year; Samuel Van Vranken, janitor, $325 per year; Elizabeth R. Rogan, principal, $600 per year; Carrie Pratt, teacher, $432 per year; Thomas E. Shaughnessy, janitor, $125 per year; Julia Cullen, principal, $600 per year; Mary Healey, assistant, $480 per year; Agnes Storen, teacher, $432 per year; Teresa Hillis, teacher, $432 per year; Nellie A. Boyle, teacher, $432 per year; S. Eugenia C. Buck, teacher, $432 per year; Middey Seeney, janitor, $325 per year; Maggie B. Costello, principal, $600 per year; Nettie Smith, assistant, $480 per year; Jane G. Fleming, teacher, $432 per year; Mary K. Hennessy, teacher, $432 per year; Mary A. Walsh, teacher, $432 per year; Wm. P. O'Brien, janitor, $325 per year; Mary C. Occumpaugh, assistant, $480 per year; Charles Bell, janitor, $100 per year; Jennie A. Van Hoesen, assistant, $480 per year; Charles F. Dabney, janitor, $100 per year; George Hunter, janitor of office, $50 per year.

Said teachers holding proper certificates and being otherwise qualified for the positions to which they are herein assigned and appointed, and having been heretofore employed in the schools of said city by the local school authorities thereof with one exception, said appointments are to continue until the local school authorities of said city shall designate qualified teachers as their successors.

I do also further order and direct the board of education of said city to immediately open the school buildings and the necessary rooms, desks and closets therein to the above-named teachers and place at their disposal the usual and proper furniture and supplies, including fuel and school apparatus; and as often as at the end of each calendar month during the continuation of the services of each teacher, janitor and the librarian herein designated to audit and pay to each thereof an equal one-eighth part of the annual compensation herein designated to be paid to each.

In witness whereof, I have hereunto affixed my hand and official seal at the
[L. S.] Capitol in the city of Albany, N. Y., this 4th day of October 1897.

CHARLES R. SKINNER
State Superintendent

4487

In the matter of the appeal of Archibald Fulton and Frederick W. Hulsebus from proceedings of annual school meeting held August 4, 1896, in union free school district no. 6, town of Northfield, Richmond county.

In union free school districts other than those whose limits correspond with those of any incorporated village or city, at the annual school meeting therein the vote to make appropriation for school purposes and to levy taxes therefor, must be taken by ballot or ascertained by taking and recording the ayes and noes of the qualified voters attending and voting at such meeting. Where at any such meeting the clerk is instructed by a viva voce vote to vote for or against any such appropriation, such proceedings were not in accordance with the provisions of the school law; that a vote to increase or diminish the number of members of the board of education of any such union free school district, taken viva voce, directing the clerk to cast a ballot for such increase or diminution, is not in accordance with the provisions of the school law. Where the board of education consists of three members, and an increase of the number of members thereof to five was not made legally, the election of five trustees at such meeting, was illegal and void.

Decided October 14, 1896

George Sheridan, jr, attorney for appellants
Lot C. Alston, attorney for respondents

Skinner, *Superintendent*

This appeal is brought by the appellants as qualified voters of union free school district no. 6, town of Northfield, Richmond county, in the above-entitled matter, as alleged by them in their appeal, "from the several actions in the annual meeting of the said union free school district no. 6, held at the schoolhouse, August 4, 1896." Said appeal contains the following specific actions of said meeting appealed from:

1 From the action of said meeting purporting to increase the number of members of the board of education to five.

2 From the action of said meeting in the pretended election of the following named persons as members of the board of education of said union free school district, and for the term of time set opposite the name of each, as follows: William H. Prall three years, E. C. Sheridan three years, W. J. Scott two years, C. H. Ingalls two years, J. W. Wortz one year.

3 From the action of said meeting in voting the items of the budgets submitted by the trustees to the meeting for appropriations necessary to conduct the school in the district during the school year of 1896–97.

Annexed to the appeal is what purports to be a copy of the records of the action and proceedings of said annual meeting as kept and recorded by Arthur W. Deas, as clerk of the said school district and of said meeting.

An answer to the appeal has been made by Messrs Wortz, Ingalls, Scott, Sheridan and Prall as qualified voters of said district.

The respondents in their answer do not controvert the statements as to the action and proceedings had and taken at such annual meeting as stated in the appeal, and in the aforesaid copy of the records of the meeting annexed to the appeal, relative to the proposition to increase the members of the board of education to five, the assumed election of the five persons as members of said board, and in appropriating money and authorizing the levy of taxes for the same; or in other words, the respondents herein admit that the vote upon the motion or proposition presented at said annual meeting to increase the number of members of the board of education from three to five, and the determination of the qualified voters present and voting thereon, was not ascertained by taking and recording the ayes and noes, that is, by taking and recording the name of each person who voted thereon and setting opposite to each whether he or she voted aye or no: that the respondents admit that a ballot was taken at said meeting for five persons as members of the board of education of said district and that Messrs Prall, Sheridan, Scott, Ingalls and Wortz received a majority of the votes cast upon such ballot; that the action and proceedings of said meeting in the voting of the items of appropriations and the levy of taxes therefor did not comply with the provisions of the school law.

The contention of the respondents seems to be:

1 That although the appropriations were not voted by ballot or by taking and recording the ayes and noes, they do not see what good purpose will be served or how the district will be benefited by having the appropriations set aside, or what good motive prompted the appeal from this vote.

2 That the action of the district meeting in increasing the number of trustees from three to five was a substantial compliance with the law.

3 That the action of the meeting increasing the number of members of the board of education from three to five, having been a substantial compliance with the law, and five members of said board having been voted for by ballot, they were legally elected as members of said board. The respondents further con-

tend that, as the appeal herein was not brought within thirty days after the proceedings were had from which the appeal is taken, it was not brought in time, nor taken in good faith, but only for the purpose of annoying the persons claiming to have been elected as trustees, and gratifying the spite and malice of a defeated candidate and his principal supporters.

In answer to the first contention above stated, I would state that in section 10, article 2, title 8 of the Consolidated School Law of 1894, and its amendments, relative to union free school districts other than those whose limits correspond to an incorporated village or city, it is enacted, that on all propositions arising at said meetings involving the expenditure of money, or authorizing the levy of a tax or taxes in one sum or by instalments, the vote thereon shall be by ballot, or ascertained by taking and recording the ayes and noes of such qualified voters attending and voting at such meetings. . . . And whenever a tax for any of the objects hereinbefore specified shall be legally voted, the board of education shall make out their tax list, etc. In section 18, article 4, title 8 of said Consolidated School Law it is enacted that it shall be the duty of the board, at the annual meeting of the district, besides any other report or statement required by law, to present a detailed statement in writing of the amount of money which will be required for the ensuing school year for school purposes, exclusive of the public moneys, specifying the several purposes for which it will be required, and the amount for each, etc. In section 19, same article and title, it is enacted that after the presentation of such statement, the question shall be taken upon voting the necessary taxes to meet the estimated expenditures, and when demanded by any voter present, the question shall be taken upon each item separately, and the inhabitants may increase the amount of any estimated expenditure, or reduce the same, except for teachers' wages and the ordinary contingent expenses of the school or schools. At said annual school meeting the trustees presented a detailed statement in writing of the moneys required for the ensuing year for school purposes. The school law there required that the qualified voters present who wished to vote upon making appropriations and authorizing the levy of a tax for said sums should either by their ballots, or having their wishes ascertained by taking and recording the name of each qualified voter present who desired to vote, and whose vote was received, and setting opposite the name of each person who voted, whether he or she voted aye or no. If, on the presentation of such statement, no voter present demanded that the question should be taken on each item separately, the vote could be taken in the manner above stated upon the aggregate amount contained in said statement as needed for such school purposes.

Prior to chapter 500 of the Laws of 1893 becoming a law, there was no provision of the school law designating the manner of voting upon propositions arising at school meetings involving the expenditure of money, or authorizing the levy of a tax or taxes, and the vote thereon was usually taken viva voce. A multiplicity of appeals was taken from the action of school meetings in voting such taxes, or from the tax list issued by the school authorities on the ground

that unqualified persons voted, there being no opportunity afforded on viva voce to challenge a vote, or to ascertain whether the persons voting were qualified voters or not. In addition, numerous suits were brought in the courts against collectors in enforcing such taxes.

It is clear that the action of said annual school meeting on voting the appropriation and authorizing the levy of a tax therefor was not in accordance with the school law, and not being legally voted, the board of education of the district did not have legal authority to make out a tax list. The "good purposes" served by the appeal herein, in having the action of said meeting relating to such appropriations and the levy of the tax set aside, will enable the qualified voters of the district to vote such appropriations and tax in the manner directed by the school law, and prevent the issuing of an illegal tax list, and the appeals therefrom by taxpayers to this Department, and suits against the collector in enforcing such illegal tax list.

The contention of the respondents herein that the action of the said meeting, increasing the number of trustees from three to five, was a substantial compliance with the law, is not well taken. Prior to the passage of chapter 482, Laws of 1875, the power to increase or diminish the number of members of the board of education of any union free school district, fixed at the meeting establishing such district, did not exist. In subdivision 28, section 1, chapter 482, Laws of 1875, it was, among other things, enacted that boards of supervisors in this State were empowered to authorize boards of education in any union free school district to increase or diminish the number of members of said boards. This provision of law remained in force until the passage of chapter 686 of the Laws of 1892, when the power so as aforesaid given to boards of supervisors, was taken away, and until the Consolidated School Law of 1894, chapter 556 of the Laws of 1894 went into effect, namely, on June 30, 1894, there was no provision of law which permitted the qualified voters of a union free school district, or a board of education thereof, or any one, to increase or diminish the number of members of any board of education of any union free school district.

In section 31, article 5, title 8 of the Consolidated School Law of 1894, which became a law on June 30, 1894, it was enacted that at any annual meeting held in any union free school district whose limits do not correspond to those of any incorporated village or city, the qualified voters may determine by a majority vote of such voters present and voting, to be ascertained by taking and recording the ayes and noes, to increase or diminish the number of members of the board of education of such district. If such board shall consist of less than nine members, and such meeting shall determine to increase the number, such meeting shall elect such additional number so determined upon, and shall divide such number into three several classes, the first to hold office for one year, the second two years, and the third three years.

The power of the qualified voters of union free school district no. 6, Northfield, to increase the number of members of its board of education from three,

as fixed by the meeting that established such union free school, to five, is given by the provisions of law above cited, and must be exercised pursuant to such provisions.

What do such provisions require? They require, first, that the action of the voters of the district shall be taken at an annual school meeting of the district; second, that the motion or proposition increasing said number to five shall be determined by a majority of such voters present and voting, and such majority shall be ascertained by taking and recording the ayes and noes of such voters, that is, taking and recording the name of each person voting and setting opposite to the name of each such person whether such person votes aye or no; third, having determined to increase the number of members of said board by the addition of two, to elect such members by ballot, and then divide the said two into classes, one to hold one year, and one two years.

What did the said annual meeting do, relative to the proposition to increase the membership of the board of education of the district? Mr Middlebrook offered a motion that the board of trustees be, and they are hereby increased in number from three to five. Mr S. F. Rawson seconded the motion, and suggested that the clerk be authorized and directed to cast one ballot in favor of increasing the board of trustees to five members; the motion was then altered to include the suggestion, and the meeting unanimously voted (by a viva voce vote or by acclamation) in favor of it. The clerk, Mr A. W. Deas, then cast one ballot in favor of increasing the board of trustees to five members, and the chairman announced one ballot in favor of the motion and none in the negative, and then declared the board of trustees increased to five members. No election of said two additional members followed, nor were such two members divided into classes, the one to serve one, and the other two years.

The only act done by the said meeting that was in compliance with the provisions of the statute was in the motion or proposition to increase the number of members of said board, and instead of proceeding to vote upon the motion as the statute required, they proceeded in the manner above stated, that is, by the casting of one ballot by the clerk of the meeting.

The respondents in their answer, and their counsel in his brief, allege that this matter of the increase of the number of members of the board of education had been under discussion in the district for a long time and everybody agreed to it; that it was not sprung on the meeting suddenly and rushed through without giving a chance for the opposition that it was generally believed that both of the appellants favored and voted for it; that the appellants participated in a caucus on the nomination of five trustees, one of them being on the ticket so nominated; that the vote authorizing the secretary to cast a ballot for such increase was unanimous.

Assuming all such allegations to be true, the facts alleged are no answer or defense to the facts herein established, that said meeting did not express its desire to make such change and increase in the manner required by the statute, and not having done so, its action in that regard was illegal.

It is clear that said action of said meeting on the proposition to increase the number of members of the board of education was not a substantial compliance with the law.

In my decision in appeal no. 4465, on September 14, 1896, which appeal was taken from the action of the annual school meeting held in union free school district no. 3, town of Castleton, Richmond county, in attempting to increase the number of members of the board of education, where the vote thereon was taken by acclamation, I held that such action was illegal and void, for the reason that such vote was not taken in the manner prescribed by the school law. As in the action of the meeting, from which the appeal herein is taken, in its attempt to increase the number of members of the board of education the vote was not taken in the manner prescribed by the school law, I follow the decision in no. 4465 and hold that such action was illegal and void. The difference in the manner in which the vote was taken in district no. 3, Castleton, and district no. 6, Northfield, does not change the fact that in neither of said districts was such vote taken as prescribed by the school law.

The contention of the respondents herein, that the action of this meeting increasing the number of members of the board of education from three to five, having been a substantial compliance with the school law, and five members of said board having been voted for at said meeting by ballot, they were legally elected as members of said board, is not well taken.

I hold that the increase of the number of members of the board of education was not legally made, and therefore the meeting could not legally elect five members of said board, as said board at the time the said meeting was held and the vote taken, consisted of but three members.

It is clear that said annual meeting could legally elect but three trustees of the board of education, namely: One for the full term of three years in place of C. H. Ingalls, whose term expired on the first Tuesday of August 1896; one to fill the unexpired term of Charles H. Vail, and one to fill the unexpired term of George H. Janneman, each of whom was, on July 8, 1896, removed by me from office as trustee or member of said board. It does not appear clearly when the terms of said Vail and Janneman respectively would expire. The ballot should have had stated thereon the name of one person and that one for the full term, and also the names of two other persons to fill the unexpired terms of Vail and Janneman, and the terms respectively for which such persons were to serve.

It is claimed the meeting elected two trustees for three years, two trustees for two years, and one trustee for one year. It is impossible to say or decide which of the two elected for three years, if either, was elected in place of Ingalls, whose term expired on the day of the meeting, or which two of the other three were elected to fill the unexpired term of Vail and Janneman. The five persons claimed to have been elected for the term of time respectively, as stated in the minutes of the meeting, were not legally elected as such, even assuming that the increase of the members of said board was legally adopted. If the members of the board had been increased to five it was the duty of the meeting to elect

one for a full term of three years and two to fill, respectively, the unexpired terms of Vail and Janneman, and the additional two divided into two classes, one for one year, and one for two years. Assuming that the unexpired terms of Vail and Janneman were one and two years, the meeting could have legally elected one trustee for a full term of three years; two trustees, one for one year and one for two years to fill such unexpired terms; and two additional trustees, one for one and one for two years.

It is clear that the five persons claimed to have been elected trustees of the district at the annual meeting are not, nor is any one of them, *de jure* trustees or a trustee of the district. Whether such persons are, or any of them is, *de facto* trustees or trustee, in or of said district, it is not necessary for me to decide herein.

As to the contention of the respondents herein, that the appeal herein was not brought within thirty days from the date of the annual meeting, and should, therefore, be dismissed, I would state that title 14 of the Consolidated School Law of 1894, relating to appeals to the State Superintendent, does not prescribe the time within which such appeals must be brought, but gives to him the power to regulate the practice therein. Pursuant to such power said Superintendent has established his rules regulating the practice in such appeals, and in rule 3 it is provided that the original appeal and all papers be annexed thereto, with proof of service of copies as required by rules 3 and 4, must be sent to the Department of Public Instruction within thirty days after the making of the decision or the performance of the act complained of, or within that time after the knowledge of the cause of complaint came to the appellant, or some satisfactory excuse must be rendered for the delay.

The State Superintendent has the power to extend the time in which an appeal may be brought, to alter, modify or change the rule made by him relating to the time in which such appeal may be brought or to receive, entertain and decide an appeal brought after the thirty days, provided an excuse, satisfactory to him, is given for the delay. The appellants herein, in the affidavit of verification to this appeal, state that the first knowledge that they had that the acts complained of by them were illegal was upon reading a copy of my decision in the "New Brighton school appeal" (decision no. 4465), relative to acts similar to those herein appealed from, decided September 14, 1896. The reason given by the appellants for the delay being satisfactory to me, I received said appeal. I was also satisfied that by entertaining the appeal and deciding upon the legality of the acts appealed from, the school district would be saved from appeals taken from the acts of the persons claiming to be the trustees of the district.

The appellants herein while appealing from the several actions of said annual meeting, do not appeal specifically from the election of Arthur W. Deas as clerk of the district. The action of the meeting in the election of a clerk of the district, appears to be as follows: Mr Arthur W. Deas was nominated for clerk of the district and there being no further nominations, on motion the meeting unanimously voted that the chairman be authorized and directed to cast one

ballot in favor of Mr Deas; this being done the tellers announced one ballot cast in favor of Mr Deas and none in the negative.

This Department has held, since the school law has required that school district officers shall be elected by ballot, except in a few instances in which it has been indisputably established that all the voters present desired the election of a person nominated for a district office, and no voter asked that a ballot be taken, that to comply with the provisions of said law the polls should be open, and the vote of every person present qualified to vote who desired to vote, received (see decision no. 4375); that the delegation of power to one person by a vote taken by acclamation or viva voce, to cast a vote for a district officer is not a compliance with the provisions of the school law relative to the election of district officers.

The appeal herein alleges that no inspectors of election at said annual meeting were appointed or elected, and none of the members of the board of education although present, acted as said inspectors. Under the school law the annual meeting of a union free school district should organize by the election or appointment of a chairman, and the clerk of the district, if present, should act as clerk of the meeting; but if the clerk is absent a clerk of the meeting should be elected or appointed; two inspectors of election should also be elected or appointed. The members of the board of education do not act as inspectors of election except at the election of members of the board and the clerk of the district, held in districts where the number of children is over three hundred and such election is held on the Wednesday next following the day designated by law for holding the annual meeting of the district. It appears that at said annual meeting a chairman was elected, and that Clerk Deas was elected clerk; that certain proceedings were taken, including the nominations for trustees, when the chairman appointed two inspectors of election or tellers and two watchers. There was no necessity for electing a clerk, the clerk of the district being present at the meeting; the inspectors of election should have been appointed as soon as the meeting was organized, and the school law does not recognize any school officers of a school meeting as "watchers."

I decide: *First.* That the action and proceedings of said annual meeting relative to appropriating money and authorizing the levy of a tax or taxes for the items contained in the statement of the board of education required for school purposes, or for the appropriation of money to pay any other item presented to the meeting and authorizing a tax to pay the same, were, and each of them was, illegal and void.

Second. That the action and proceedings of said annual meeting relating to, and upon the motion or proposition to increase the number of the members of the board of education of said district were, and each of them was, illegal and void; that the five persons voted for and declared by the chairman of said meeting to have been elected as such members were not, nor was any one of them, legally elected, nor was any person at such meeting legally elected a member of the board of trustees or board of education of said district.

So much of the appeal herein as is specifically taken from the action and proceedings of said annual meeting in appropriating money and authorizing the levy of a tax or taxes, and increasing the number of the members of the board of education of said district from three to five, and in the election of five members of the board of education of said district or any member of said board, is sustained.

It is ordered, That all actions and proceedings had and taken at the annual school meeting held on August 4, 1896, in union free school district no. 6, town of Northfield, Richmond county, relative to the following matters, namely: Appropriating money and authorizing the levy of a tax or taxes for the support of the schools of said district for the school year commencing August 1, 1896, as contained in the statement of the board of education of said district, presented to and read at said annual meeting, or any other appropriation made or authorizing the levy of a tax to pay the same; all actions and proceedings had and taken upon the motion or proposition to increase the number of members of the board of education of said district from three members to five; all actions and proceedings had and taken in the election or alleged election of J. W. Wortz, C. H. Ingalls, W. J. Scott, E. C. Sheridan and W. H. Prall, or any one of them, as trustees or members of the board of education of said district, be, and the same are, and each and all of said actions and proceedings of said annual meeting hereinbefore specified, is and are, hereby vacated and set aside as illegal and void.

It is further ordered, That Arthur W. Deas, an inhabitant in, and qualified voter of, said union free school district no. 6, town of Northfield, Richmond county, without unnecessary delay, call a special meeting of the inhabitants of said district, qualified to vote at school meetings in said district, for the purpose of acting upon the statement presented by the board of education of said district to the said annual meeting of said district held on August 4, 1896, of the sum or sums required to be raised by a tax or taxes for the support of the schools of said district for the school year commencing August 1, 1896, and also to elect three trustees or members of the board of education of said district, namely: One trustee for the full term of three years in the place of C. H. Ingalls, whose term of office as trustee expired on August 4, 1896; and one trustee to fill the unexpired term for which Charles H. Vail was elected, and one trustee to fill the unexpired term for which George H. Janneman was elected, to the end that said board of trustees or board of education of said district shall consist of three members.

That notice of such special meeting be given by said Arthur W. Deas in the manner prescribed for giving notice of meetings by boards of education of union free school districts as contained in section 10, article 2, title 8 of the Consolidated School Law of 1894, and the amendments thereof.

BRANCH SCHOOLS

4164½

In the matter of the appeal of William S. Barber v. Stephen M. Pratt, trustee, school district no. 2, town of Bolton, Warren county.

Whenever, in any remote locality of the district, a number of scholars, sufficient to make a respectable school, are debarred, from the fact of such remoteness, from attending school, the establishment of a temporary branch school will be directed.

Decided February 28, 1893

Crooker, *Superintendent*

This is an appeal from the action and decision of the respondent as trustee of school district no. 2, town of Bolton, Warren county, in refusing to establish a temporary or branch school in the part of said school district known as the "Robinson neighborhood."

It appears from the papers filed herein that there are about 123 children of school age residing in said district; that the district schoolhouse has two rooms, each of which is capable of holding about 48 pupils; that there are about 26 children of school age residing in that part of said district known as the "Robinson neighborhood"; that about 17 of such children are compelled to go about 2½ miles over steep hilly roads to attend the school in the schoolhouse of said district; that said roads are badly drifted in winter season, and that it is difficult in inclement weather for such pupils to attend the school at said schoolhouse; that the assessed valuation of said district is about $218,000; that there was a temporary branch school conducted last year in said neighborhood for a period of ten weeks at a cost of eighty-five dollars; that a suitable room or building for such temporary branch school can be hired for a reasonable sum, and the expense of procuring necessary furniture, etc., for said school will be small.

The school commissioner of the commissioner district in which said school district is situate, is of the opinion that as the school in the district is a graded school with two teachers, to take away one of said teachers or to take from the school a portion from each department to establish the branch school would not be for the best interests of the pupils. It appears, however, from the certificate of said teachers that the entire attendance in one of said departments, of pupils from the Robinson neighborhood, for the present school year and between September and December 1892, aggregated but 59 days, and that in the higher department there has been no attendance of pupils from said neighborhood since the beginning of the school year. Should a branch school be established the trustee should employ a teacher for the same, and not transfer either of the teachers now employed.

It appears from the papers filed herein that at some time during the progress of this appeal, an agreement was arrived at between the appellant and respondent,

by which the respondent was to establish such branch school, but from a reason, which does not clearly appear, the respondent declined to do so.

By section 50 of title 7 of the Consolidation School Act of 1864, power is given to the trustees of school districts, whenever it shall be necessary for the due accommodation of the children of the district, to hire temporarily, any room or rooms for the keeping of school therein, and any expenditure made or liability incurred in pursuance of said section shall be a charge upon the district. This Department has the power, upon appeal, to review the decision of trustees either in establishing or refusing to establish a temporary branch school in any district. This Department has held that whenever, in any remote locality of the district, a number of scholars sufficient to make a respectable school are debarred, from the fact of such remoteness, from attending school, the establishment of a temporary branch school will be directed. It seems clear to me from the fact of the number of children residing in said Robinson neighborhood; their distance from the present schoolhouse; the difficulty in an inclement season of reaching such schoolhouse; and the assessed valuation of the district that a temporary branch school should be maintained, as asked for by the appellant.

The appeal herein is sustained.

It is ordered, That the trustee of school district no. 2, town of Bolton, Warren county, be, and he hereby is, directed to forthwith employ a competent qualified teacher, and hire a schoolroom and establish a temporary branch school in that part of said school district known as the "Robinson neighborhood," and that such temporary branch school be maintained by him for a period of not less than 12 weeks during the present school year.

Discretion of a trustee in establishing branch school overruled.
Decided March 31, 1859

Van Dyck, *Superintendent*

On an appeal from the action of the sole trustee in sustaining two schools in the district, as public schools, and alike entitled to share in the public money appropriated to said district, the following facts appear: That the district is about 3 miles in extent from north to south, and that the schoolhouse is situated near the center. It further appears that most of the children reside in the northern part of the district, while the population or voters of the district, interested in keeping the school at the center, are in the majority. The residents of the north part of the district, unable to secure a change of site, have maintained, during some portion of the year, for some time past, a school in their vicinity, and have received toward its support a portion of the public money. At the last annual meeting, it was voted that the school be kept in the "brick schoolhouse," near the center of the district; but the trustee also employed a teacher to teach the school in the north part of the district, and from this proceeding the present appeal is brought.

The size of the district, the number of pupils, the condition of the district schoolhouse, are nowhere urged as conditions giving rise to this proceeding. I can not find, in the conditions presented, a necessity for the establishment of two schools in that district. The trustee himself concedes that there is no necessity for two schools in the district, except that created by feeling in the north, of opposition to the central school. If this feeling is sufficiently strong to cause them to sustain a private school, there is no help for it; but there is no sufficient reason, to my mind, for fostering and cherishing this spirit of opposition, by helping to support the school by making it a public charge.

It is my opinion, therefore, that the trustee has acted without due discretion, and his action in the matter is hereby disapproved.

4341

In the matter of the appeal of Mordecai Casson v. William C. Casson, trustee, school district no. 4, town of Tuscarora, Steuben county.

Where it appears that a branch school is necessary for the due accommodation of children living in that portion of the district remote from the schoolhouse of the district, and that said district is abundantly able financially to sustain such branch school without being burdensome, it is the duty of the trustee or trustees of said district to establish such branch school.

Decided March 15, 1895

Crooker, *Superintendent*

This appeal is from the order or decision of the trustee of school district no. 4, town of Tuscarora, Steuben county, to hire a teacher and continue to maintain a branch school in said district. An answer by the trustee of said district to the appeal herein has been received. The principal reason given in answer for not continuing the branch school is because two-thirds of the inhabitants of the district are opposed to it.

It appears from the papers that said school district has real and personal property of the aggregate assessed valuation of about $44,250; that the whole number of children of school age residing in said district is about 36, of which about 22 attended the winter term; that 10 scholars residing in the northeast part of said district attended the branch school held in the locality, commencing November 5, 1894; that the children living in that part of said school district in which said branch school has been maintained, are required to travel to reach the schoolhouse in said district 2 miles at least, and upon roads impassable portions of the time in winter.

It also appears that early in the present school year the appellant herein and School Commissioner Harrison visited the respondent herein, and the appellant requested said respondent as trustee of said district to establish a branch school in that part of said district, in which appellant resided; that the appellant stated to the respondent that he and others residing in that part of said district would

build a suitable building in said locality for a schoolhouse upon condition that the respondent would hire a teacher and maintain a school in such locality for 32 weeks during the present school year; that said Commissioner Harrison recommended that said branch school be established; that the respondent consented and agreed to establish such branch school upon the condition then and there stated; that thereupon the appellant herein and others residing in his vicinity erected a building 16 by 24 and 13 feet high — balloon frame — sheathed, papered and sided on the outside, and ceiled inside — painted outside and varnished inside, and furnished the same with Paragon (chair) seats, table for teacher, blackboard, stove etc., at an aggregate cost of $300; that the respondent employed a qualified teacher for 16 weeks and on November 5, 1894, established and opened a branch school in said building; that such branch school was maintained for 65 days exclusive of holidays, and the teacher's roll shows 10 scholars with 620 days' attendance, averaging 9 13-33; that respondent refused to employ a qualified teacher and to continue and maintain a branch school in said locality and building. The respondent alleges in his answer to the appeal herein that he agreed to hire a teacher for said branch school for 32 weeks with the understanding that the school district would receive $100 additional public money to help pay teacher's wages.

Under the provisions of section 6, title 2 of the Consolidated School Law, said school district is entitled to distributive portion or district quota of $100 for each qualified teacher or successive qualified teachers who shall have taught a school in said district for 160 days of school, inclusive of legal holidays that may occur during a term of school and exclusive of Saturdays, during the school year commencing August 1, 1894, and ending July 31, 1895. Should a qualified teacher or successive qualified teachers, during the present school year, teach a school in said branch school for a period of 160 days, inclusive of legal holidays that may occur during the term of school and exclusive of said Saturdays, said district will be entitled to have and receive in the next apportionment the sum of $100.

Under the provisions of section 50, article 6, title 7 of the Consolidated School Law of 1894, it is the duty of the trustee or trustees of every school district, and they shall have the power, whenever it shall be necessary for the due accommodation of the children of the district, by reason of any considerable number of said children residing in portions of said district remote from the schoolhouse in said district, thereby rendering it difficult for them in inclement weather and winter to attend school at such schoolhouse, etc., etc., to establish temporary or branch school or schools in such place or places in said district as shall best accommodate such children, and hire room or rooms, etc., etc.; and any expenditure made or liability incurred shall be a charge upon said district.

By the above provisions of the school law it is mandatory upon the trustees to establish the temporary or branch school, and the qualified voters of the district have no power in the matter.

It is clear, under the facts established, that a branch school is necessary for the due accommodation of the children living in the northeast portion of said

district. Relying upon the promise of the respondent a comfortable building has been erected and furnished for said school without cost to the district, and there can not be, aside from teachers' wages, but a small expense to the district to maintain said school, and it appears that the district is abundantly able financially to sustain such branch school without its being a burden. If the school is not continued the district will not be entitled to any part of the teacher's quota of $100 from the public money.

The appeal herein is sustained.

It is ordered, That the trustee of school district no. 4, town of Tuscarora, Steuben county, forthwith employ a qualified teacher to teach in said branch school, and open, continue and maintain said branch school for a period during the remainder of the present school year, that, together with the number of days during the present school year that said school has been maintained, the said branch school shall have been maintained and taught by a qualified teacher or successive qualified teachers for at least 160 days of school, inclusive of legal holidays that may occur during the term of school, and exclusive of Saturdays.

5178

In the matter of the appeal of Jennie W. Mowell v. William R. Sliter, sole trustee of school district no. 9, town of Hardenburg, Ulster county.

When a district has maintained a branch school for two years and at the close of that period conditions in the section where such school has been held are the same as they were during the period such branch school was conducted, it is proper and legal for the retiring trustee to make the same provision for the continuance of such school during the ensuing year as he may under the law make for the continuance of the regular school of the district.

A teacher acts entirely within her legal rights in closing school until fuel is provided so that the schoolroom can be placed in a safe and comfortable condition for school purposes.

Decided February 10, 1905

Draper, *Commissioner*

On July 28, 1904, Joseph E. Scudder, trustee of school district no. 9, town of Hardenburg, county of Ulster, entered into a contract with Jennie W. Mowell, the appellant herein, under the terms of which it was agreed that she should teach the branch school of said district for a period of 32 weeks from September 12, 1904, at a salary of $10 per week. The term of office of Trustee Scudder expired at the annual meeting August 2, 1904, or five days after such contract was made. At the annual meeting William R. Sliter, respondent herein, was elected trustee. The annual meeting also voted not to maintain a branch school. On September 12, 1904, the date fixed in the contract between Trustee Scudder and Miss Mowell for the opening of the branch school, Trustee Sliter appeared at the schoolhouse in which such branch school had been conducted and forbade Miss Mowell to open such school, and informed her that he would not pay her if she did open it and teach therein. Miss Mowell, however, opened the school

and has been teaching there since, and the respondent as trustee has refused to pay the salary agreed upon by the contract executed by his predecessor, Mr Scudder. The contention of the respondent is that such branch school was unnecessary and that Trustee Scudder did not possess legal power to determine that a branch school should be maintained in the district during the year following the expiration of his term of office as trustee.

It appears that the section of the district in which this branch school is maintained was formerly a separate school district; that such district was dissolved and annexed to the district of which it now forms a part.

In respondent's answer reference is made to an appeal decided by this Department in 1902, refusing to direct the trustee of this district to establish a branch school for that section of the district in which the present branch school is operated. The contention of respondent is that by such decision this Department held that a branch school should not be established at this point and that such decision was final and binding upon the district, and that to maintain such branch school would be a direct violation of that decision. An examination of that decision does not sustain respondent's contention. The pleadings in that appeal shows that a petition for such branch school was filed with the trustee January 28, 1902. On January 30, 1902, the trustee gave the petitioners a written answer refusing to establish the school. February 27, 1902, an appeal from the refusal of the trustee to establish such school was filed at this Department. The pleadings in such appeal were not completed until May 20, 1902. It was then near the end of the school year. This Department dismissed the appeal on that ground and on the further ground that the old schoolhouse did not appear to be in a fit condition for use; that it could not be repaired in time to open school that year, and that a suitable room for school purposes could not be obtained. In dismissing such appeal this Department suggested that the whole question be taken up at the annual meeting and some solution reached. This Department did not undertake to pass upon the necessity of establishing such school, nor is such question properly before this Department now for determination. It is not improper to add, however, that in the appeal of 1902, it was shown that the children in this section of the district in question, known as Tray Valley, were about two miles from the schoolhouse by a path across the fields or woods and that by the regular highway the distance was much greater.

The pleadings in the appeal now under consideration show that a branch school was maintained for this section of the district in 1902–3 and also in 1903–4. It is also shown that such school has been held in the old schoolhouse of the dissolved district.

Only two questions are to be determined in this appeal. These are: Did the trustee, Joseph E. Scudder, possess the legal right to hire a teacher for this branch school on July 28, 1904, for the ensuing year? If he possessed that right, did Miss Mowell perform the service required under her contract?

Subdivision 9 of section 47 of title 7 of the Consolidated School Law provides that it shall be the duty of the trustee "to employ all teachers in the dis-

trict school or schools . . . and to designate the number of teachers to be employed; to determine the rate of compensation to be paid to each teacher, etc." The power to employ teachers and to determine the number of teachers, rests solely with a trustee and that officer in the exercise of such duty is not subject in any way whatever to the action of a district meeting. This same section of the law also authorizes a trustee to contract with a teacher for one year in advance. Section 50 of the same title of the Consolidated School Law also confers on trustees the power to establish branch schools. The provision of law on this point is as follows: "Whenever it shall be necessary for the due accommodation of the children of the district, by reason of any considerable number of said children residing in portions of said district remote from the schoolhouse in said district, thereby rendering it difficult for them in inclement weather and in winter to attend school at such schoolhouse, or by reason of the room or rooms in said schoolhouse being overcrowded, or for any other sufficient reason the due accommodation of such children can not be made in said schoolhouse, they shall establish temporary or branch school or schools in such place or places in said district as shall best accomodate such children, and hire any room or rooms for keeping said temporary or branch school or schools, and fit up and furnish said room or rooms in a suitable manner for conducting such school or schools therein. Any expenditure made or liability incurred in pursuance of this section shall be a charge upon the district." This Department has uniformly held that whenever any of the above conditions exists it is not only within the power of the trustee to establish a branch school, but it is his duty to establish one. A district meeting can not limit or interfere with the power or duty of a trustee on this question. When a district has maintained a branch school for two years and at the close of that period, conditions in the section where such school has been held are the same as they were during the period such branch school was conducted, it is proper and legal for the retiring trustee to make the same provision for the continuance of such school during the ensuing year as he may under the law make for the continuance of the regular school of the district. Of course a trustee can not provide for a branch school unless a necessity exists for the establishment of one. If a trustee exceeds his power in this respect the same relief may be granted that is provided for in any other case in which a trustee exceeds his power. The party attacking the action of a trustee in establishing such school must show conclusively that a necessity for its establishment did not exist. The respondent in this appeal has failed on this point.

In view of the provisions of law, above cited, and of the circumstances in this particular case, I am of the opinion that Trustee Scudder acted strictly within his legal rights in employing two teachers for this district for the current year and that the contract with Miss Mowell, as teacher of the branch school, was legal, and binding upon the district.

It appears that Miss Mowell reported at the schoolhouse in the district where the branch school had been held for two years. The respondent claims

that she should have reported to him and not at the school building. Her contract specifically stated that she was to teach the branch school and she properly reported at the building where such school had been conducted. The trustee expected her to report at such building as he went there himself to meet her and to prevent her from opening the school.

The respondent also contends that this appeal should be dismissed on the ground that a question of damages is involved and he cites several decisions of this Department in which it has been held that a question of damages is one to be determined by the courts and not by this Department. I am familiar with these decisions and know that such has been the uniform ruling of this Department on appeals involving the assessment of damages. This appeal, however, does not involve that question. This is an appeal to enforce the payment of salary for services performed. It is not an appeal for an adjudgment of damages for breach of contract. The cases cited by the respondent on this point relate to those where teachers had made legal contracts, but had been prevented by trustees from performing the services required under such contracts. The appellant in this appeal not only made a legal contract but entered upon the performance of her part of such contract and is still rendering service in the performance of such contract. It is a case which should not go to the courts but which should be heard before the Commissioner of Education.

The respondent also claims that if the contract was legally made and binding upon the district it was invalidated by the acts of Miss Mowell in November by closing school two or three days without his permission. Appellant states, and it is not denied by the respondent, that she asked him for the privilege of closing school on these days and he replied that he did not care what she did. He therefore gave her discretionary power in deciding on the wisdom of closing school on those days. The appellant also states, and this is not denied by respondent, that on the days school was thus closed there was no fuel at the schoolhouse and that she was compelled to close school. This was proper cause for closing school. The teacher acted entirely within her legal rights in closing school until fuel was provided so that the schoolroom could be placed in a safe and comfortable condition for school purposes.

Respondent also alleges that Trustee Scudder had a pecuniary interest in the contract with Miss Mowell. He alleges that when Scudder wrote Miss Mowell about contracting for this school he also wrote her that he would board her at $2.50 per week. There was nothing improper in this. Teachers usually desire to know what board will cost in a community before contracting to teach therein. It is not shown that Scudder imposed the condition that Miss Mowell should agree to board with him if he contracted with her to teach. It is not shown that she was not at liberty to make such arrangements as she might desire in relation to the question of board. The respondent has failed to sustain this allegation.

It is clearly shown that appellant made a legal contract for 32 weeks from September 12, 1904, at a compensation of $10 per week, payable at the end of

each 30 days, and that she has in good faith performed all the obligations by which she was bound under such contract. The contract was binding upon the district and the appellant must be sustained in her claim and must be paid for her services.

The appeal herein is sustained.

It is ordered, That William R. Sliter, trustee of school district no. 9, town of Hardenburg, county of Ulster, pay the said Jennie W. Mowell any and all salary now due to her for services as teacher of the branch school of said district, under the said contract executed July 28, 1904, and that after paying her the amount now due he shall also pay her any and all salary as the same shall become due and payable under the terms of the said contract.

It is further ordered, That if there are not funds of the district available for the purpose of paying such salary of Jennie W. Mowell or any part of it, the said Trustee Sliter shall raise by tax on the taxable property of the district as the Consolidated School Law provides, any and all moneys necessary to pay such salary.

5402

In the matter of the appeal of Frank Sherman for a branch school in district no. 1, town of Caroga, Fulton county.

Establishment of branch school. A trustee may establish a branch school whenever the conditions prescribed by the Education Law, section 196, subdivision 5, are found to exist without regard to the previous act of a district meeting. His determination as to the establishment of such school will not be disturbed on appeal unless it be shown by a fair preponderance of evidence that the prescribed conditions do actually exist.

Number of children to be accommodated. Unless a considerable number of children are to be accommodated by a branch school it should not be established, notwithstanding the remoteness of their residence and the hardships to be endured by them in reaching the main schoolhouse. A branch schoolhouse should not be established to accommodate the three children of a single taxpayer.

Decided March 4, 1909

Dudley & Dennison, attorneys for appellant
N. H. Anibal, attorney for respondent

Draper, *Commissioner*

The petitioner herein complains of the action of Burtelle Foster, trustee of school district no. 1 of the town of Caroga, county of Fulton, in refusing to establish a branch school in such district. It appears from the affidavits submitted that Frank Sherman, the petitioner, resides about 4 miles from the schoolhouse in such district. There is some conflict in the pleadings and affidavits as to the character of the road between the home of the petitioner and the schoolhouse. It is apparently an Adirondack road, comparatively little traveled, and 2 or 3 miles of it through the forests. In an ordinary Adirondack winter, a journey over it twice a day for a distance of 4 miles would tax the endurance of children

of 7, 11 and 12 years, the ages of the children of the petitioner. In any event, there does not seem to be much question about the remoteness of the petitioner's location from the schoolhouse in his district. If this were the only question involved a decision might well be rendered in his favor.

This case must be decided, however, with a view of carrying out the purpose and intent of the law applicable thereto. By subdivision 5 of section 196 of the Education Law of 1909 (former Consolidated School Law, title 7, section 50) the trustee is clothed with full discretionary power to establish a branch school "whenever it shall be necessary for the due accommodation of the children of the district, by reason of any considerable number of said children residing in portions of said district remote from the schoolhouse in said district." This power may be exercised by him whenever the conditions prescribed are found to exist, without regard to the previous act of a district meeting. It is for the trustee to determine in the first instance whether such conditions exist. His determination is subject to review upon an appeal brought to the Commissioner of Education, but unless it be shown by a fair preponderance of evidence that the prescribed conditions do actually exist, and that he nevertheless refuses to establish a branch school his determination will not be disturbed. The petitioner has three children, all of compulsory school age. At the time the petition was filed another family resided in the same portion of the district with two children of less than 8 years of age. The father runs a summer hotel which is open from spring until fall; the remainder of the time the family is not in the district. The petitioner in effect asks, therefore, for a branch school for the sole accommodation of his own three children. The number of such children can not be said to be "considerable," within the meaning of the statute. It was not the purpose of the law to require a branch school with a separate teacher for so few children, especially when they all belong to the same family. Unless a considerable number of children are to be accommodated by the school it should not be established notwithstanding the remoteness of the children and the hardships to be endured by them in reaching the main schoolhouse. The children of the petitioner are entitled to the benefits of the school in the district, but the trustee may not be compelled to take the school to their door. There is also a parental obligation resting upon the petitioner to give his children educational advantages. He should not be permitted to shift this burden upon his neighbors. If his business takes him into a remote district and his family goes with him, his children must either suffer the hardship of attending a school located a long distance from their home, or must be given equivalent instruction at home. When other families go into the same remote district where the petitioner now resides so that a considerable number of children would be accommodated by the establishment of a branch school, then the trustee may reasonably be required to establish such school. It is not necessary for a determination of this appeal to decide what number would be a "considerable number," within the meaning of the statute. Neither three nor five is sufficient.

The petition herein is dismissed.

5405

In the matter of the appeal of Anthony Swint from an order of the trustees of school district no. 11, town of Guilderland, county of Albany.

Pupils to attend branch school; duties of trustees. Where a branch school is established as provided by law, the trustees may set off a certain part of the district and insist that the pupils residing therein shall attend such school. The trustees should reasonably exercise such power with a view of carrying out the evident purpose, that is, the accommodation of those pupils who reside in portions of the district remote from the main schoolhouse. It is not reasonable to compel pupils to attend a branch school where it appears that they reside at a place more conveniently accessible to the main schoolhouse.

Decided May 3, 1909

Stern & Hirschfeld, attorneys for appellant

Draper, *Commissioner*

The appellant appeals from an order given by the trustees of school district no. 11, town of Guilderland, county of Albany, directing the appellant to send his children to the branch school instead of the main school in such district. The petitioner alleges that he has three sons of the ages of 8, 14 and 16, and one daughter of the age of 11. The branch school is on the other side of the Western turnpike from the residence of the appellant and is apparently in an almost opposite part of the district. The road leading to such branch school from the residence of the appellant runs through the sand plain, sometimes through woods, and is at all times of the year a difficult road to travel, either on foot or in vehicles. The distance between the appellant's residence and the branch school is about 2 miles, and that between such residence and the main school is about 1⅔ miles. The main school is upon the Western turnpike, about four-fifths of a mile from the point of connection with the road leading to the residence of the appellant. The appellant lives about four-fifths of a mile from this point. The Western turnpike is a main road leading into the city of Albany. It is frequently traveled and the appellant's business requires him to go over this road nearly every day.

From the facts stated it clearly appears that the attendance of appellant's children at the branch school, as directed by the trustees, is much more difficult than such attendance at the main school. Trustees may establish branch schools (1) for the accommodation of children residing in portions of the district remote from the schoolhouse therein; (2) where the room or rooms in such schoolhouse are overcrowded, or (3) where for any other sufficient reason the due accommodation of the children of the district can not be made in such schoolhouse. The branch school in this district was established for the first purpose above specified. There was a considerable number of children to be accommodated by such school all residing within a reasonable distance therefrom. From evidence on file in this Department it appears that there are 24 pupils registered as attending such school which is all that can be accommodated therein.

Where a branch school is established as provided by law, the trustees may set off a certain part of the district and insist that the pupils residing therein shall attend such schools. This discretionary power necessarily coexists with the power to establish the school. But it should be reasonably exercised with a view of carrying out the evident purpose of the law, that is, the accommodation of those pupils who reside in portions of the district remote from the main schoolhouse. It would not be a reasonable exercise of this power to compel pupils to attend a branch school where it appeared that they resided at a place more conveniently accessible to the main schoolhouse. This is especially so where both schoolhouses are overcrowded, as appears in this case.

The children of the appellant and the other pupils residing in his immediate neighborhood should be permitted to attend the main schoolhouse.

If such schoolhouse is inadequate to suitably accommodate all these children, it is the duty of the district to increase its size or to erect a new schoolhouse so as to afford reasonable school facilities. The qualified electors of the district should be given an opportunity to determine which of these courses should be followed and the trustees should immediately call a special meeting for such purpose.

The order of the trustees directing the children of the appellant to attend the branch school is unreasonable and should be set aside. I am informed that there are other children in the immediate neighborhood of the appellant who also have been directed to attend the branch school. The principles declared in this decision would apply to them, but the action of the trustees in respect to them not being at issue in this appeal I can not at this time make any formal order as to which school such pupils should attend. It is suggested, however, that the trustees treat such pupils as though they were within the scope of this appeal, and permit them to attend at the main schoolhouse.

The appeal is sustained.

It is hereby ordered, That the notice or order of the trustees of school district no. 11, town of Guilderland, county of Albany, directing the children of Anthony Swint to attend at the branch school and not at the main schoolhouse in such district be set aside, and that the said trustees permit the children of the said Swint to attend the main schoolhouse in such district.

BUILDING COMMITTEE

3621

In the matter of the appeal of Henry C. Almy and others v. E. O. Rogers, as trustee of district no. 11, town of Wirt, county of Allegany, and others.

The district meeting appointed a building committee. *Held* that it could act only in an advisory capacity.

The trustee is the officer invested by law with the sole authority to carry out the directions of a district meeting.

Persons named as a building committee, who are not trustees, may be employed in their line of business by the trustees to do work for the district, unless otherwise directed by the district.

Decided July 19, 1887

Draper, *Superintendent*

This proceeding is an appeal by residents and taxpayers of school district no. 11, town of Wirt, Allegany county, from the action of the trustee of said district, and a building committee composed of the said trustee and two other residents of the district. The appellants aver that at a school district meeting, held September 21, 1886, it was decided to repair the schoolhouse, laying a new floor and ceiling the room, among other matters. A building committee was selected. It is claimed by the appellants that the meeting decided to use basswood for the ceiling, and to lay the new floor over the old one, and that the minutes of the meeting, as recorded by the clerk, are incorrect in that it does not appear therein that basswood was to be used for ceiling and the floor laid as above stated. It is further alleged that the job was not let to the lowest bidder, and that proposals were not asked for; that the work was done by the members of the building committee, except the trustee, and that it has not been done in a good and workmanlike manner, and is defective, and that unseasoned wood has been used.

The respondents, the trustee, district clerk, collector and the so-called building committee, in answer to the appeal, allege that the meeting did not give any directions as to how the work should have been let or executed, or as to what material should be used; that Messrs Hand and Case, of the building committee, were carpenters, and did the job by day's work by the trustee's direction, and as they understood the meeting to desire; that the material used was well seasoned and first-class material, carefully selected; that they used narrow hemlock for the ceiling, and maple for flooring; that the old floor was so uneven that a new floor could not be properly laid over it, and that the old floor was, therefore, removed to make place for the new.

They produce the affidavits of carpenters, builders and others who state that the work is properly done and the material used is suitable and proper.

Upon the application of the appellants, an order was granted, staying all proceedings for the enforcement of the tax list and warrant for the collection of the moneys needed to pay the expenses of this improvement pending this appeal.

Other questions concerning the tax list have been raised by subsequent pleadings, which I do not consider it necessary or proper to consider on this appeal, but shall confine myself to the issues raised by the original pleadings.

The evidence is very voluminous and conflicting. After careful reading I find the facts to be:

1 That the district meeting authorized the repairs which have been made to the schoolhouse.

2 The minutes, so far as directing what should be done, are correct.

3 Messrs Hand and Case were appointed to act with the trustees as a building committee.

4 The work has been properly and reasonably done; the schoolhouse has been measurably improved.

5 The district has been benefited by the work and should pay for the same.

Finding the facts as above, I hold:

The appointment of a building committee can not be sustained and is a nullity. The meeting has power to direct repairs, but the law invests the trustee with the sole power to carry out those directions. The building committee having no legal existence, its members, Messrs Hand and Case, could legally, and being competent workmen, properly enter into a contract with the trustee to do this work.

The appeal is overruled and the stay heretofore granted therein vacated.

The trustees can not be interfered with by any building committee appointed by the district. Decided August 20, 1868

Weaver, *Superintendent*

The decisions of the courts and the Department have been that no power is given to the inhabitants to invest a building committee with authority to contract for building a schoolhouse or to do any other act binding upon the trustees, without their assent. (6 Howard's Pr. R. 437; Code Pub. Inst. [ed. 1868] 139.)

The trustees are the authorized agents for carrying out the instructions of the district in respect to building, and in paying therefor, and they can not be superseded by any other set of men appointed by the district.

In this case, I am of the opinion that the trustees had authority to go on and complete the schoolhouse according to the plan adopted, and to levy taxes for the expense thereof without reference to any action on the part of the building committee [in assuming to audit the accounts pertaining to said building].

5227

In the matter of the appeal of William C. Smith from the action of the annual meeting of school district no. 2, town of Minden, Montgomery county.

An annual meeting may accept repairs made by a building committee if such repairs were authorized and the cost of the same is not exorbitant.

The action of the meeting in auditing bills for repairs will not be set aside on the sole ground that such repairs were supervised by a building committee instead of the trustee.

Decided December 5, 1905

George C. Butler, attorney for appellant
H. V. Borst, attorney for respondent

Draper, *Commissioner*

During the month of May 1905, a special meeting was held in school district no. 2, Minden, Montgomery county, to decide whether a new schoolhouse should be erected or the old building repaired. It appears that the meeting decided by nearly a unanimous vote to repair the old building. The meeting also instructed the chairman to appoint a building committee of three. The chairman of the meeting appointed as such committee Charles Bellinger, Charles Smith and Emmett Klock, all of whom were residents and taxpayers of the district. This committee employed mechanics and made such repairs as were authorized and deemed necessary. Bills for such repairs amounting to $113.74 were presented by the building committee to the annual meeting of the district held on August 1, 1905. The annual meeting audited these bills and authorized the trustee to raise a tax on the property of the district sufficient to pay the same.

The Consolidated School Law does not authorize the appointment of a building committee. Subdivision 5 of section 47, title 7 of the Consolidated School Law expressly imposes upon trustees the duty of making repairs to school buildings. Since the law makes this work the duty of the trustee a district meeting has not the power to delegate to a building committee such work. A building committee therefore has no legal standing and if one is appointed it can act in an advisory capacity only. The trustee was the proper person to employ mechanics, purchase materials and supplies and to supervise the construction work.

The necessity of the repairs which were made are admitted and appellant even alleges that they are insufficient and that the school accommodations are inadequate. It was within the power of the annual meeting to accept the repairs made by the building committee. It is not shown by the appellant that the cost of the repairs is excessive. The sole ground on which he contends the expenditure illegal is that such repairs were made under the supervision of a building committee instead of the trustee.

The remedy of appellant or any other aggrieved party from the action of the special meeting in appointing a building committee or from the action of such committee in assuming to take charge of repairs which it was not legally authorized to make was an appeal to the Commissioner of Education immediately after the special meeting or whenever the committee commenced to make the repairs.

The Commissioner of Education had full power to issue any orders necessary to restrain such committee from proceeding with such repairs while an appeal could be determined. The trustee should have proceeded to make any repairs authorized at the special meeting and he failed in the performance of his duties in permitting the building committee to make such repairs.

The appeal herein is dismissed.

3301

A district meeting can not delegate to a building committee the power to appoint a member of such committee to carry out the wishes of the district, in case the committee can not agree.

Decided January 15, 1884

Ruggles, *Superintendent*

Among other proceedings of the special meeting appealed from is the adoption of the following resolution: "That a committee of two be associated with the trustees as a building committee, with full power to repair said schoolhouse as in their judgment will best meet the wants and wishes of the district, with instructions, that if they can not agree to act together, they shall choose one of their number to so act.

The adoption of this resolution at said meeting, for the appointment of a building committee with full power to repair said schoolhouse, will be sustained only so far as such committee acts in an advisory capacity with the trustee; the latter portion of the resolution, which instructs the committee that if they can not agree to act together they shall choose one of their number to carry out the wishes of the district, is invalid. The trustee is the agent of the district accredited by the law for this purpose.

The instruction contained in said resolution, to which reference has been made, is hereby set aside.

CONTRACT SYSTEM

5219

In the matter of the petition of Henry Nulty that provision be made for the transportation of his child from his home in school district no. 7 of the town of Easton to district no. 5 of said town.

The moral and legal obligation rests upon every parent to give his child the advantages of the school facilities afforded by our system of public education. He should do this even at great inconvenience and expense if necessary. He should not expect remuneration nor should it be given for such trouble as may reasonably be expected of a parent to enable his children to attend school.

To vote compensation to a parent from the public funds for taking his child to and from school was not intended under the contract law.

Payment to a parent for conveying his children to school comes dangerously near being an improper consideration to influence his vote in favor of the contract system when it might be more desirable to maintain a home school.

The intent of the law in providing transportation is that it should be regular and daily; that individual parents should not derive pecuniary advantage from it; and that nothing should be left to parental convenience or caprice.

The general rule should be that one person of proper character, furnishing suitable accommodations, should be regularly employed and the contract for transportation should be awarded, after opportunity for competition, to the most reliable party who will furnish the best transportation at the lowest cost to the district.

Decided October 31, 1905

William E. Bennett, attorney for respondent

Draper, *Commissioner*

The appellant herein is a resident of common school district no. 7, town of Easton, Washington county. He has a son who will be 7 years of age November 23, 1905. For several years this district has contracted with school district no. 5, Easton, Washington county, under the provisions of title 15 of the Consolidated School Law for the education of its children. The distance from the home of appellant to the schoolhouse in district no. 5, Easton, is 4½ miles. The 7 year old son of appellant must therefore travel 9 miles daily in order to regularly attend school under the contract between these two districts.

At the annual meeting of school district no. 7, Easton, in August 1904, a resolution was adopted authorizing the trustee to contract for the education of the children of that district in "district no. 5, Easton, or some other district in the town of Easton." The trustee of district no. 7 was therefore given discretionary powers as to the district in the town of Easton with which he should contract. It appears that he made a contract with district no. 5, Easton. At the annual meeting of district no. 7 in August 1905 a motion was adopted providing that the resolution of the annual meeting of 1904, authorizing the trustee

to contract, should hold good for the ensuing year. The resolution of 1904 was also read by the clerk. The trustee for the current year therefore had the power to contract with district no. 5, Easton, or with any other district in the town of Easton. No one knew for a certainty at the time of the annual meeting of 1905 with what district the trustee would make a contract for the ensuing year. That was to be determined later by the trustee. He made such contract in due time with district no. 5, Easton.

The annual meeting of 1905 also adopted a motion providing that $10 for each child attending school under the contract system should be paid to the parent or guardian of such child for its transportation for the entire year. It was also provided that if a child did not attend school the full year the allowance made for its transportation should be in proportion to the time such child did attend.

The attorney for respondent asks that the appeal be dismissed on several grounds. These grounds are all technical and are not supported by substantial reasons. He contends that the proceeding is not an appeal but a petition. In this he is wrong. Appellant does state in the title of the proceedings that he petitions for provision for transportation for his child, but in his notice of appeal to the Commissioner of Education it is specifically stated: "The petitioner and appellant hereby appeals to you etc." The entire proceeding is in the nature of an appeal as defined by law and must be considered as such.

It is also claimed that the appeal should be from the action of the annual meeting and not from the action of the trustee, and that such appeal was not brought within the 30 days limit fixed by the rules. The grievance of appellant does not date from the action of the annual meeting. Appellant did not know what transportation would be necessary for his child until he knew with what district a contract had been made. It is undisputed that the trustee had authority under the resolution of the annual meeting to contract with any district in the town of Easton. Appellant could not therefore know of the sufficiency of the transportation authorized by the annual meeting until he knew with what district a contract had been made and where his child would be required to attend school. It is not shown in the pleadings that more than 30 days occurred between the date on which knowledge of such contract having been made came to appellant and the date on which the appeal was filed. The trustee is, under the law, the proper person to provide for transportation when it is authorized and the appeal might therefore be properly taken from the action of the trustee or of the annual meeting. We must therefore hold that the appeal is properly before this Department and must be considered on its merits.

The law authorizing the contract system provides that all contracts must be approved by the Commissioner of Education. This Department has refused to approve such contracts whenever the distance from the homes of any of the children to the schoolhouse at which they are required to attend school thereunder is too great for them to walk to and from school daily unless proper provision is made for their conveyance.

Section 19, title 7 of the Consolidated School Law as amended by Laws of 1905, chapter 175, authorizes a district to levy a tax to provide transportation for

any or all children to the school which they must attend under a contract. It also provides that any portion of the public money apportioned a district may be used in payment of such transportation. Under this section the district meeting is to authorize the trustee to provide transportation and to vote a tax to raise necessary funds and the trustees of the district must then contract for the conveyance of the children.

Attorney for respondent is wrong in his contention that trustees must contract in accordance with rules provided by the district meeting. The district meeting simply authorizes the contract for transportation and it is then the duty of trustees to make such contracts and to prescribe rules to govern the conveyance of children.

The pleadings show that it has been the custom in this district for several years to allow the parents of children attending school under contract the sum of $10 for each child. This custom appears quite common in districts operating under the contract system. It is one to be severely condemned. The moral and legal obligation rests upon every parent to give his child the advantages of the school facilities afforded by our system of public education. He should do this even at great inconvenience and expense if necessary. He should not expect remuneration nor should it be given for such trouble as may reasonably be expected of a parent to enable his children to attend school. It is difficult to understand on what mathematical basis a computation is derived by which it is determined that a parent is entitled to $10 for getting his children to and from school daily for one year. In most cases the parent is to no additional effort or trouble whatever. The $10 is so much gain. When this course is pursued and transportation is not provided but should be, the plan operates as a hardship upon the child. This method of providing transportation is therefore demoralizing if not corrupting. It has no authority of law. Proper and comfortable transportation can usually be provided for all the children in a district for the amount paid the several parents by employing one suitable person. Transportation is not to be provided unless it is necessary. Whenever it is necessary it must be provided. When it is provided it must be comfortable and suitable and of such character as to warrant the belief of parents that no harm will result therefrom to their children. It is necessary to provide proper transportation in this district and particularly for the Nulty boy if the contract with district no. 5, Easton, is to stand approved. Such transportation has not been provided. Respondent claims that one Pierce, a neighbor of appellant, has offered to permit appellant's son to ride to school with his son. The age of Pierce's son is not given and we are unable to determine whether or not he is a proper person to be charged with the responsibility of taking the 7 year old son of appellant to and from school daily.

The action taken by the annual meeting in relation to the transportation of children was not such as the law contemplates in such cases. The district meeting should have authorized the trustee to provide transportation in necessary cases and should have voted a tax for such sum as was necessary to meet the expenses of such transportation.

To vote compensation to a parent from the public funds for taking his child to and from school was not intended under the contract law. Payment to a parent for conveying his children to school comes dangerously near being an improper consideration to influence his vote in favor of the contract system when it might be more desirable to maintain a home school. A school district should maintain a home school unless it clearly appears that the district is too weak financially and numerically to do so. Even then it should be clearly shown that the educational facilities of the district will be improved by contracting and that it may be done without imposing undue hardships upon the children required to attend school under such contract. Beyond that the intent of the law in providing for transportation was that it should be regular and daily; that individual parents should not derive pecuniary advantage from it; and that nothing should be left to parental convenience or caprice. The general rule should be that one person of proper character, furnishing suitable accommodations, should be regularly employed, and the contract for transportation should be awarded, after opportunity for competition, to the most reliable party who will furnish the best transportation at the lowest cost to the district.

School districts which are unwilling to provide suitable transportation must not operate under the contract system but must maintain a home school. The propriety of requiring a child 7 years of age to travel 9 miles daily to attend school must be seriously questioned. Unless substantial reasons are given for contracting in a district having such cases the wisdom of maintaining a home school is apparent.

The respondent claims that the Nulty boy is only 7 years of age and not under the provisions of the compulsory education law and the district should not, therefore, be required to provide transportation for him. This statement should not be passed unnoticed. The law fixes the school age between 5 and 21 years. All persons between these ages are entitled by law to attend the school in the district in which they reside. When a district contracts for the education of its children it is regarded as maintaining a home school. This boy is therefore entitled to all the privileges in the school of district no. 5, Easton, that he would be entitled to in his home school were one maintained in the district.

The appeal herein is sustained.

It is ordered, That George W. Van Buren, trustee of school district no. 7, Easton, Washington county, shall within five days from the date hereof, issue a call for a special meeting of said district by giving notice thereof as provided in sections 2 and 6, title 7 of the Consolidated School Law for the purpose of authorizing the trustee to provide necessary transportation for the children of said district who are required to attend school in district no. 5, Easton, by virtue of a contract made by said trustee with said district no. 5, Easton, on August 1, 1905, and also to vote the necessary appropriation therefor.

It is also ordered, That if the special meeting of said district no. 7, Easton, Washington county, authorized herein, shall fail or refuse to authorize the trustee to provide such necessary transportation and to make the necessary appropria-

tion therefor, the said Trustee Van Buren shall immediately report the same to me and shall thereupon immediately open a home school in said district no. 7, Easton, as provided by the Consolidated School Law.

5241

In the matter of the appeal of W. F. Dening from the proceedings of school district no. 13, town of Champion, county of Jefferson.

The settled policy in relation to the contract system is that districts which contract must provide proper and suitable transportation for children who live so far from the schoolhouse which they must attend as to be unable to walk to and from school daily.

Decided February 21, 1906

W. B. Van Allen, attorney for appellant

Draper, *Commissioner*

The annual meeting of this district authorized the adoption of the contract system instead of maintaining a home school. No provision was made for the transportation of pupils. The trustee made a contract with the West Carthage district. The appellant herein lives 2 miles from the schoolhouse of the West Carthage district. He has two daughters, one 14 years of age and the other 12 years of age. These children are delicate and each is afflicted with hernia. The older of these girls has been compelled to wear a truss although she does not at the present time. The younger girl has for some time and does now wear a truss. Because of their delicate constitutions and of their affliction they are physically unable to walk from their home to the West Carthage schoolhouse each morning and return at night. This would necessitate their traveling 4 miles each day in order to attend school. There is no dispute in this appeal as to these facts.

The contention of respondent is that the district has offered to pay appellant a reasonable sum for conveying his children, but has not been able to agree with appellant on the amount which should be paid. Respondent further contends that appellant should convey his children to school himself if they are unable to walk. In each of these contentions respondent is wrong. In appeal no. 5219, decided by me October 31, 1905, I held as follows:

To vote compensation to a parent from the public funds for taking his child to and from school was not intended under the contract law.

Payment to a parent for conveying his children to school comes dangerously near being an improper consideration to influence his vote in favor of the contract system when it might be more desirable to maintain a home school.

The intent of the law in providing transportation is that it should be regular and daily; that individual parents should not derive pecuniary advantage from it; and that nothing should be left to parental convenience or caprice.

The general rule should be that one person of proper character, furnishing suitable accommodations, should be regularly employed and the contract for transportation should be awarded, after opportunity for competition, to the most reliable party who will furnish the best transportation at the lowest cost to the district.

The settled policy in relation to the contract system is that districts which contract must provide proper and suitable transportation for children who live so far from the schoolhouse which they must attend as to be unable to walk to and from school daily. In this case I must hold that transportation is necessary and that the trustee should provide it for the remainder of the current school year.

The appeal herein is sustained.

It is ordered, That Orrin Phillips, trustee of said school district no. 13, town of Champion, Jefferson county, be, and he hereby is, ordered to provide proper and suitable transportation for the two children of W. F. Dening from their home to and from the West Carthage schoolhouse, for the remainder of the current school year.

5427

In the matter of the appeal of D. B. Abrams et al. from the action of special meeting of school district no. 14, Johnstown, Fulton county, in refusing to make a contract with the board of education of Gloversville.

Action of district meeting in refusing to contract will not be disturbed. (Education Law, 1909, § 600) The statute (Education Law, 1909, § 600) clearly intends that the voters of a district shall determine whether contracts shall be made with other districts for the instruction of pupils, or such pupils be instructed in the home school. If the voters have had a fair opportunity to express their views as to this question the Commissioner of education will not intervene on an appeal to overthrow the will of a majority.

Policy of Department in favor of maintenance of home school. It has been the policy of the Department to encourage the maintenance of home schools; the Commissioner of Education has refused to approve contracts for the instruction of pupils out of the district where it is apparent that the best educational interests of the district would not be thereby promoted. It would not accord with this policy to compel a district to contract for the instruction of all or part of its pupils against the will of a majority of the legal voters of the district, fairly expressed at a legal meeting.

Decided December 16, 1909

William A. Macdonald, attorney for appellants
Wood & Mader, attorneys for respondents

Draper, *Commissioner*

This appeal is brought by D. B. Abrams and others from the action of a special meeting held in district no. 14 of the town of Johnstown, county of Fulton, on the 24th day of August 1909, in refusing to make a contract with the board of education of the city of Gloversville for the instruction of a portion of the pupils residing in said district no. 14. The appellants and respondents appeared by counsel and made oral arguments in support of their contentions. It appears that the appellants reside in that portion of district no. 14 lying near the boundary line of the city of Gloversville, and it is probably true that their children may attend the schools in that city with less inconvenience than the

school in their own district. Contracts were made by such district with the city during the years 1906, 1907 and 1908. A resolution to continue this arrangement was submitted at the annual meeting and voted down. The trustee called a special meeting for the purpose of reconsidering the question, and it was again voted not to contract. It is thus apparent that a fair chance was given to all the qualified voters of the district to vote upon the question. No claim of unfairness in the vote is made by the appellants. They base their prayer for relief upon the hardships imposed upon their children by compelling them to attend the district school which is located from a mile and a half to two miles from where they live, and to reach which they are required to travel over a road which is exceedingly difficult during the winter months. There is not much question as to these facts. They are entitled to careful consideration on this appeal. But there is a question of law and policy involved which impedes the granting of the desired relief.

Section 600 of the Education Law provides for the instruction of all or a part of the pupils of a district under a contract with another district, or a city, when such district shall empower the trustee or board of education to make such contract "by a vote of a majority of the qualified voters present and voting thereon." Unless such contract is authorized the district must provide for all its pupils in its own school. The statute clearly intends that the voters of the district shall determine whether contracts shall be made with other districts or the pupils be instructed in the home school. When opportunity has been afforded such voters to fairly express their views as to this question, and it is decided that the pupils should be instructed in the home school, the Commissioner of Education should not intervene on an appeal to overthrow the will of the majority. It has been the policy of the Department to encourage the maintenance of home schools, and in the exercise of his power under the statute, the Commissioner of Education has refused to approve contracts for the instruction of pupils out of the district, where it was apparent that the best educational interests of the district would not be thereby promoted. It would not accord with this policy to compel a district to contract for the instruction of all or part of its pupils against the will of a majority of the legal voters of the district, fairly expressed at two meetings when the question was submitted. The appeal must therefore be dismissed.

The peculiar circumstances of this case seem to demand that some relief be afforded the appellants. Their children ought not to be required to walk from their homes to the school and back each day during the winter months. Although the appellants have not asked for such relief, it seems proper to suggest that the trustee make provision for conveying the pupils residing in the part of district no. 14, in which the appellants reside, and that such pupils be required to meet the conveyance furnished by the trustee at some conveniently accessible point. This conveyance should be provided during the winter months and until May 1, 1910.

It is also suggested that the school commissioner of the district be asked to consider the advisability of adjusting the boundaries of this and neighboring

districts with a view of establishing a single district along the boundary line of the city of Gloversville, the residents of which district would be best served by a contract made with the city for the instruction of its pupils. It would seem that a new district might be thus established without material injury to the districts from which its territory is taken. If such a district is formed the appellants should be placed in the new district, and they would therefore probably receive the privilege of attendance in the city schools.

The appeal herein is dismissed.

4499

In the matter of the appeal of R. H. Palmer and others v. Oscar H. Farrington and James S. Sloan, trustees, school district no. 9, town of Montgomery, Orange county.

Where at a school district meeting the vote upon a motion or resolution, empowering the trustee of the district to enter into a written contract with the board of education of an adjoining union free school district whereby all the children of the district may be entitled to be taught in the public schools of such adjoining union free school district, is not taken by ballot nor by taking and recording the ayes and noes of the qualified voters present and voting, such motion or resolution was not legally adopted, and the trustee or trustees of the district were not duly and legally empowered to make such contract.

Decided October 26, 1896

E. B. Walker, attorney for respondents

Skinner, *Superintendent*

The appellants in the above-entitled matter appeal from the refusal of the respondents herein, as trustees of school district no. 9, town of Montgomery, Orange county, to contract with the Walden High School, whereby all the children of said school district may be entitled to be taught in said Walden High School for a period of not less than 160 days in the school year of 1896–97, pursuant to a resolution empowering said trustees to make such contract for a sum of money not exceeding $275, adopted at the annual school meeting held in said district on August 4, 1896, as alleged by the appellants herein in said appeal.

The respondents herein have answered the appeal, and ask that the appeal be dismissed upon various grounds alleged therein, and deny each and every allegation contained in the appeal. The respondents allege that the vote on the motion or resolution set forth in said appeal was not by ballot or ascertained by taking and recording the ayes and noes of the qualified voters attending and voting at such district meeting; nor did such motion or resolution receive the vote of a majority of the qualified voters of said district; that at said meeting a vote as required by law was demanded but such demand was refused and ignored.

The records of the proceedings of the school meeting as recorded by the clerk of the district, relative to said motion or resolution, are as follows: "Resolution offered and seconded, that the trustees of school district no. 9 be required to enter into a contract with the board of education of Walden High School to teach the children of this district for ensuing year at a cost not to exceed $275. Carried."

That there is nothing in said records to show how the vote upon said resolution was ascertained, or the manner of voting thereon.

The appellants in their reply to the answer herein, concede that the vote upon said resolution was not by ballot nor by taking and recording the ayes and noes.

In section 14, article 4, title 15 of the Consolidated School Law of 1894, as amended by section 18, chapter 264 of the Laws of 1896, it is enacted that "whenever any school district adjoining a city or village, or adjoining any union free school district by a vote of a majority of the qualified voters of such district, shall empower the trustees thereof, the said trustees shall enter into a written contract with the board of education of such city, village or union free school district, whereby all the children of such district may be entitled to be taught in the public schools of such city, village or union free school district for a period of not less than one hundred and sixty days in any school year, upon filing a copy of such contract, duly certified by the trustees of such school district, and by the secretary of the board of education of such city, village or union free school district in the office of the State Superintendent of Public Instruction."

Subdivision 18 of section 14, article 1, title 7 of the Consolidated School Law of 1894, enacts that "in all propositions arising at said district meetings, involving the expenditure of money, or authorizing the levy of a tax or taxes, the vote thereon shall be by ballot or ascertained by taking and recording the ayes and noes of such qualified voters attending and voting at such district meetings."

The respondents herein, as trustees of school district no. 9, were not required to enter into a contract under the provisions of section 14, article 4, title 15, above quoted, unless said school district by a vote of a majority of the qualified voters of said district should empower them to do so. The motion or resolution empowering or requiring said trustees to enter into said contract, being a proposition arising at said school meeting involving the expenditure of money, the vote thereon should have been taken by ballot or ascertained by taking and recording the ayes and noes of such qualified voters attending and voting at such meeting.

I decide that said resolution requiring said trustees to enter into a contract with the board of education of Walden High School to teach the children of said district for the ensuing school year at a cost not to exceed $275, was not legally adopted, and that said trustees of said district have not, by a vote of a majority of the qualified voters of such district, been empowered to make said contract.

The appeal herein is dismissed.

5220

In the matter of the appeal of Cornelius Tellier and others from the action of the annual meeting and the trustee of school district no. 8, towns of Palmyra and Marion, Wayne county.

The law authorizing a trustee to contract for the education of the children of a district requires a majority vote of those *present and voting* and not a majority of all the voters of the district.

Money raised by tax authorized at an annual meeting "for school expenses for the coming year" may legally be used to meet any expenses incurred by the district when such district has adopted the contract system.

Decided October 31, 1905

Charles McLouth, attorney for appellants
Joseph Gilbert, attorney for respondents

Draper, *Commissioner*

Notice was given as required by law of the annual meeting for school district no. 8, towns of Palmyra and Marion, Wayne county, to be held August 1, 1905. The meeting was regularly held but was attended by only eight voters residing in the district. The meeting adopted a motion empowering the trustee to contract for the education of its children with the Marion union free school district. Under such instructions the trustee entered into a contract with the board of education of the Marion district and forwarded such contract to this Department September 1, 1905, for approval. The contract was in proper form but did not show what provision had been made for the conveyance of pupils or whether it was necessary to make such provision. The trustee was requested to supply information to this Department on that point. On September 7, 1905, he gave full information on that point showing that provision had been made for proper transportation. He was promptly advised on receipt of such information that the contract would be approved. Appellant and nine other legal voters and taxpayers of the district appeal from the action of the annual meeting in authorizing such contract and from the action of the trustee in making the contract. Attorney for appellant claims that under the law creating the contract system a district meeting can not authorize a trustee to make such contract except by a majority vote of *all the legal voters* of the district. The law does not contain such provision. Section 14, title 15 of the Consolidated School Law, as amended by the Laws of 1904, chapter 322, specifically provides that a "majority of the qualified voters present and voting thereon" may empower a trustee to make such contract. The vote authorizing the trustee to make the contract in question was a majority of those present and voting.

The second contention of the attorney for appellant is that the vote was not taken by ballot or by taking and recording the ayes and noes. He claims that a vote empowering the trustee to make a contract for this purpose involves an expenditure of district funds which necessitates the levying of a tax and that the vote must be taken by one of the two methods above stated. Under

the Consolidated School Law, on a proposition involving an expenditure of money or authorizing the levying of a tax, the vote must be by one of these methods. The official record of the proceedings of this meeting shows that an appropriation of $170 " for school expenses for the coming year " was made. The vote on this proposition was had by ballot as the law directs. The law also provides that a district which contracts for the education of its children shall be regarded as maintaining a home school. Public money is apportioned such district upon this basis. Any expense, therefore, incurred in providing for the education of children under the contract system must be regarded as the equivalent of an expense to maintain a home school. The $170 voted at the annual meeting " for school expenses for the coming year " is therefore available to meet any expenses incurred under the contract system. The law specifically provides that funds apportioned to a district operating under the contract system may be used to pay the tuition under such contract and also the transportation of pupils. As the funds needed to meet the expense of this contract have been provided as the law directs it is not necessary that the vote authorizing the trustee to contract shall be taken in the manner by which a vote to appropriate funds shall be taken.

It appears clear that the annual meeting was regularly and legally held and that such meeting regularly and legally empowered the trustee to contract with the Marion union school district. Under such instruction the trustee has made a contract for the education of the children of district no. 8 in the Marion union school district and he has also made a contract for the transportation of the children. The contract with the Marion union school district has been filed at this office, has met the requirements for such contracts and has been approved. The trustee appears to have acted in a candid open manner in the whole proceeding. He has acted clearly within his legal rights and duties. His action in making the two contracts in question has undoubtedly created a district liability which must not be overlooked in a determination of this appeal.

Appellants raise one point which demands careful consideration. They show that only eight of the legal voters were present at the annual meeting. It appears that the district has never before contracted but has always maintained a home school. It does not appear that it was generally known that the question of contracting would come up at the annual meeting. If the pleadings showed that any unusual hardship would result from the contract system, I should feel inclined to order a special meeting of the district and submit the question of contracting to that meeting for consideration.

It appears, however, that the Marion school is a large graded school in the village of Marion and maintains school for 40 weeks during the year. The school facilities are greatly superior to those of district no. 8. It also appears that district no. 8 extends into the village of Marion and to within one-quarter of a mile of its schoolhouse. Many of the children in district no. 8 live nearer to the schoolhouse in the village of Marion than to the schoolhouse in their own district. Several of the children residing in district no. 8 always attend

school in the Marion district and many would do so this year even if the contract in question had not been made. None of the children residing in district no. 8 will be required to travel an unreasonable distance with suitable conveyance provided. It does not appear that the children of district no. 8 will be subjected to any greater exposure or hardship in attending school in the village of Marion with transportation provided than they will be to attend school in their own district without transportation. In view of these reasons and the district liability existing under the contracts made by Trustee Smith, I think it is for the best interests of all concerned to refuse to interfere with the action regularly taken by the annual meeting.

The appeal herein is dismissed.

4926

In the matter of the appeal of Abram C. Howland and Herbert Oles v. Clark J. Beers, as trustee of school district no. 17, Walton, Delaware county.

Under section 14 of article 4, title 15 of the Consolidated School Law of 1894, as amended by said section 1, chapter 294, Laws of 1897, it is enacted that whenever any school district, by a vote of a majority of the qualified voters present and voting thereon, shall empower the trustees thereof, such trustees shall enter into a written contract with the trustees or board of education consenting thereto of any other district, village or city, whereby all the children of school age of such school district may be entitled to be taught in the public schools of such city, village or school district for a period of not less than 160 days in any school year. This Department rules that when such contract shall be executed, and the price fixed in the contract for tuition is less than the $100 district quota which the district will receive from the State, that the trustee may use the excess for the purpose of conveying such children to and from the school where they are taught, under such regulations as he may establish.

Decided January 31, 1901

Marvin & Hanford, attorneys for appellants
Neish & More, attorneys for respondent

Skinner, *Superintendent*

This is an appeal from the proceedings taken at a special meeting held September 6, 1900, in school district 17, Walton, Delaware county, empowering the trustee of the district to enter into a written contract with the trustees of school district 6, town and county aforesaid, whereby all the children of such district 17 may be entitled to be taught in the public school of such district 6 for not less than 160 days during the school year of 1900–1; and from the refusal of the trustee of school district 17 to furnish a conveyance for the children of the appellants respectively to and from their homes to the school in district 6.

Trustee Beers of district 17 has answered the appeal, and to such answer the appellants have made reply.

In section 14 of article 4, title 15 of the Consolidated School Law of 1894, as said section was amended by section 1 of chapter 294, Laws of 1897, it is enacted that whenever any school district, by a vote of a majority of the qualified voters present and voting thereon shall empower the trustees thereof, the said trustees shall enter into a written contract with the trustees or board of education consenting thereto, of any other district, village or city, whereby all the children of such district may be entitled to be taught in the public schools of such city, village or school district for a period of not less than 160 days in the school year; that upon the filing of a copy of such contract, duly certified by the trustees of such school districts, in the office of the State Superintendent of Public Instruction, such district shall be deemed to have employed a competent teacher for such period, and shall be entitled to receive one distributive district quota for the school year.

The object of said section 14 and the amendments thereof, is to permit school districts, weak financially or in total resident school population or both, to maintain their district organizations without maintaining a school therein, and to have all the children of school age taught in the school of an adjoining district or districts for at least 160 days in the school year, and thereby, to receive from the State a district quota of $100.

This Department has held that where a contract is made whereby all the children of school age residing in the district may be taught for at least 160 days in the school year in the school of some other district, the trustee has the legal authority to use the excess of the $100 quota, after paying for the tuition of such children, under the contract, for the purpose of conveying such children to and from the school where they are taught, under such regulations as he may establish.

It is established by the pleadings herein that a special meeting was duly held on or about September 5, 1900, in school district 17, Walton, Delaware county, for the purpose of deciding whether the children in such district should be taught in an adjoining district for the present school year; that the appellants herein were duly notified of such special meeting, but neither of them attended such meeting; that a motion was made at such meeting as follows: "Shall the children of school district 17, Walton, be taught in adjoining district?," and was voted on by ballot and adopted unanimously; that a motion was then made. "Shall the trustee of district 17 be authorized to contract with other districts for teaching the children of district 17?" and was voted on by ballot and unanimously adopted; that September 13, 1900, Trustee Beers entered into a contract with Trustee Halbert of school district 6, Walton, whereby all the children of school age residing in school district 17, Walton, may be entitled to be taught in the school of said district 6 for a period of not less than 160 days in the school year commencing August 1, 1900, at and for the sum of $2.50 for each child; that such contract was made in duplicate and one part thereof, as appears from the records of this Department, has been filed therein and duly approved.

It further appears that Trustee Beers, after consulting with the residents of district 17, having children of school age, as to the conveyance of such children to the school in district 6, September 15, 1900, entered into a written contract with one Samuel L. Halbert, a resident of district 6, whereby said Halbert agreed to convey all the children of school age, residing in said district 17, from the schoolhouse therein, to and from the schoolhouse in district 6, for and during each school day for the present school year for the sum of $125; that said Halbert commenced conveying such children under such contract on or about October 1, 1900, and has so conveyed them each school day since that date; that the distance between the schoolhouse in said district 17 and 6 is about 3¼ miles; that the time occupied in making the trip in the morning from the schoolhouse in district 17 to the schoolhouse in district 6 is from 30 to 45 minutes, and in returning in the afternoon from 40 to 60 minutes, according to the condition of the roads; that said Halbert uses a light spring wagon in pleasant weather, and a covered conveyance in stormy weather and such conveyances upon all trips are amply provided with robes and blankets.

It appears that the appellants are the only residents of district 17 who object to the conveyance of the children therein from the schoolhouse in the district, such appellants contending that such children should be conveyed from their homes to and from the school in district 6; that the appellant, Oles, resides about 1½ miles from the schoolhouse in district 17, and the appellant Howland resides about 100 rods nearer the said schoolhouse than the appellant Oles; that the children of the appellants are not required to walk a greater distance to attend the school in district 6 than they would if a school was maintained in the schoolhouse in district 17; that at the time of the special meeting in September in district 17 there were 13 children of school age residing therein, 3 of whom were then, and still are, attending the school in district 15; that since said special meeting 4 children have been added to district 17, but their parents are claimed to be transient residents; that not more than 12 children from district 17 will attend the school in district 6 at an aggregate cost to the district 17, for tuition for the present school year, of $30.

The records of this Department show that the average attendance of pupils at the school in district 17 for the school year of 1899–1900 was but 5; that the assessed valuation of property subject to taxation therein was $8075, and the amount raised by taxation to support the school was $102.88; that the school in district 6 had an average attendance of 46 pupils, with two teachers, and an assessed valuation of $112,148; that said district possesses a new and commodious schoolhouse, with a better school than that heretofore maintained in district 17.

From the facts established herein it is clear that the children residing in school district 17 are now provided with better school facilities at a much less expense than if a school had been maintained in such district, and can attend the school in district 6 without being required to walk any greater distance than they would be required if a school was maintained in the schoolhouse in district 17.

The appeal herein is dismissed.

4505

In the matter of the petition of Manly S. Dodge, for the removal from office of Jerome L. Westbrook, as trustee of school district no. 8, town of Van Etten, Chemung county.

Where at a school meeting a trustee of a school district is empowered to contract with the board of education of an adjoining free school district, for the education of the children of school age of the district, by a motion or resolution duly and legally adopted, and such trustee refuses or neglects to make a contract, he is guilty of a wilful violation or neglect of duty as such trustee, and is removed from office.

Decided October 31, 1896

Skinner, *Superintendent*

The petitioner in the above-entitled matter asks for the removal of Jerome L. Westbrook as trustee of school district no. 8, town of Van Etten, Chemung county, alleging that said Westbrook has been guilty of a wilful violation and neglect of duty as such trustee. An answer to said petition has been made by said Westbrook.

The following facts are established:

That the petitioner herein is, and has been since August 4, 1896, a qualified voter in said school district, and that said Westbrook is the trustee of said school district and has been such trustee since August 4, 1896; that on August 18, 1896, the petitioner herein delivered to and left with the said Westbrook as such trustee a petition signed by a majority of the taxable inhabitants and voters of said district, requesting said trustee to call a special meeting of said district for the purpose of considering the advisability of said district contracting with the adjoining union free school district no. 1, of the towns of Van Etten and Spencer, for the education therein during the present school year of the children of school age in said district no. 8, under the provisions of the school law; that on August 27, 1896, said Westbrook, as said trustee, called a special meeting of said district to be held on September 3, 1896, at 7.30 p. m., for the purpose of considering the advisability of making such contract as aforesaid and to provide means for the transportation of said children to and from said school, if such contract should be deemed advisable; that said special school meeting of said district as called by said Westbrook, was held on September 3, 1896, and a resolution offered for consideration at said meeting by the petitioner herein, that the trustee be directed, instructed and empowered to contract with the proper authorities of the Van Etten union free school district for the education of the children of school age in said district no. 8 during the present school year, and that said trustee be further directed, instructed and empowered to hire or otherwise secure transportation of the children to and from said union free school, and which resolution was put to a vote, which vote was by ballot, and adopted; that the said Trustee Westbrook has not entered into any written contract with the board of education of union free school district no. 1, towns of Van Etten and Spencer, as he was directed and empowered to do by the vote

of said special school meeting of said district no. 8, held on September 3, 1896. The respondent herein has failed to give any valid reason for neglecting and refusing to enter into said contract.

It further appears herein that, after said petition requesting him to call a special meeting was presented to said Westbrook, on August 12, 1896, he refused to call said meeting until a letter from this Department was shown to him, in which it was stated that when a respectable number of the voters of a district present a petition to the trustee to call a special meeting of the district for a proper purpose, it is the duty of such trustee to call said meeting. It further appears, as bearing upon the question as to whether said Westbrook was acting in good faith, and to carry out the wishes of the district, that after the petition was presented to him to call said special meeting, and before he called said meeting, he entered into a contract with a Miss Bennett to teach the school in said district for a period of 16 weeks, said school to commence on September 14, 1896.

It also appears that at the time of filing the petition herein, Miss Bennett was teaching the school, and that but one pupil attended. In and by section 14, article 4, title 15, of the Consolidated School Law of 1894, as amended by section 18, chapter 264, of the Laws of 1896, it is enacted that "whenever any school district adjoining a city or village, or adjoining any union free school district, by a vote of a majority of the qualified voters of such district, shall empower the trustees thereof, the said trustees shall enter into a written contract with the board of education of such city, village or union free school district, whereby all the children of such district may be entitled to be taught in the public schools of such city, village or union free school district for a period of not less than 160 days in any school year, upon filing a copy of such contract, duly certified by the trustees of such city, village or union free school district in the office of the State Superintendent of Public Instruction."

When any such school district shall, by a vote of a majority of the qualified voters thereof, empower the trustees thereof, it is mandatory upon such trustees to enter into said contract.

I decide that school district no. 8, town of Van Etten, by a vote of a majority of the qualified voters of said district, at the special meeting held therein on September 3, 1896, duly empowered the said Jerome L. Westbrook, trustee of said district, to enter into a written contract with the board of education of union free school district no. 1, towns of Van Etten and Spencer, whereby all the children of such district no. 8 may be entitled to be taught in the public schools of such union free school district no. 1 for a period of not less than 160 days in the school year of 1896–97; that it was mandatory on the part of said Westbrook to enter into said contract; that he has neglected and refused to enter into said contract, and that he, said Westbrook, as said trustee, is guilty of a wilful violation and neglect of duty, under the provisions of the school law. In section 13, of title 1, of the Consolidated School Law, it is enacted that "whenever it shall be proven to the satisfaction of the State Superintendent of Public Instruction, that any school officer has been guilty of any wilful violation or

neglect of duty, the said Superintendent may, by an order under his hand and seal, which shall be recorded in his office, remove such school officer."

The petition herein is sustained.

Whereas, it having been proved to my satisfaction that Jerome L. Westbrook, trustee of school district no. 8, town of Van Etten, Chemung county, has been guilty of wilful violation and neglect of duty as such trustee, under the Consolidated School Law, I do hereby remove said Jerome L. Westbrook from office as trustee of said school district no. 8, town of Van Etten, Chemung county.

5388

In the matter of the appeal of Fred H. Cross and Thomas Seymour from the act or decision of the voters of district no. 6, town of DeKalb, St Lawrence county, N. Y., at a special meeting held on Tuesday afternoon, February 18, 1908, at three o'clock and from each and every part thereof and from all acts and proceedings had in pursuance thereto.

In districts operating under the contract system parents must be reasonable in their demands for transportation of their children and must accept service which insures their children safe, comfortable and prompt passage to and from school. While trustees are required to provide suitable transportation for children they are justified in resisting unreasonable demands based upon personal feelings.

Decided May 23, 1908

George A. Adams, attorney for appellants
Abbott & Dolan, attorneys for respondent

Draper, *Commissioner*

This proceeding grows out of the action of school district no. 6, town of DeKalb, St Lawrence county, in voting to adopt the contract system instead of maintaining a home school. This is the third proceeding which has been before this Department during the past year as a result of this controversy.

At a special meeting of the district held on the 10th day of September 1907 the district authorized the trustees to contract for the education of its children pursuant to the provisions of article 4, title 15 of the Consolidated School Law. It appears that one of the children residing in district no. 6, DeKalb, could attend school in district no. 4, DeKalb more conveniently than in any other district and that the rest of the children residing in district no. 6 could attend school more conveniently in district no. 17, DeKalb. The trustee therefore contracted with these two districts. No provision was made at this special meeting for the transportation of these children. The child attending in district no. 4 was 9 years of age and had only 1 mile to walk to attend school. It did not appear to be necessary to provide transportation for such child. It appears from the contract filed at this Department that four children were to attend in district no. 17. Three of these were children of appellant Cross and one of appellant Seymour. The ages

of the Cross children were 14, 8 and 6 years, and the age of the Seymour child was 7 years. The distance which these children were required to travel was about 1⅓ miles. Owing to the tender ages of part of these children, the distance they were required to travel and the general condition of the roads, transportation was deemed necessary.

The trustee did contract for such transportation. In a former appeal this Department held that the provisions of such contract were defective and too indefinite. In deciding such appeal I directed the trustee to call a special meeting to consider the question of transportation and also directed that the district should provide suitable, *daily* transportation or open and maintain a home school.

Pursuant to this order a special meeting was held but was not conducted as the law directs. The facts were presented to this Department and under advice from the Chief of the Law Division the trustee called another special meeting for February 18, 1908. It is from the action of such meeting that this proceeding is brought.

Two questions are raised in this appeal:

1 It appears that the vote at the special meeting authorizing the trustee to provide transportation was carried by 13 to 11. It is alleged by appellants that five persons voted in favor of such proposition who were not qualified voters at that district meeting. The burden of proof on this question is upon appellants. They must show affirmatively by a preponderance of evidence that at least two of these persons were not qualified to vote at such meeting and that they voted on the affirmative side of such question. The evidence submitted is insufficient to sustain such proposition. It appears that the district attorney is conducting an investigation of this alleged illegal voting and that the whole question will be presented to the grand jury in June. It would be unwise to delay a determination of this proceeding until the evidence submitted on this question is before the court and available for use in this case. This proceeding should be determined before the close of school in district no. 17.

2 It is claimed that Thomas Golden, the person who contracted to convey the children to and from school is not a suitable person to perform such work and that he did not supply proper conveyances, blankets etc. This is the only question raised which on the record is entitled to serious consideration. It is not claimed that Golden is a man of moral delinquencies. It is not alleged that he is addicted to the use of intoxicating drinks or that his conduct toward any of the pupils was ever improper. It is claimed that on a certain occasion at the home of appellant Cross, Golden lifted the young son of appellant by the ears and that the child has been afraid of Golden since then. It is also claimed that on one occasion when Golden was not conveying the children to school under contract he overtook the children on their way to school and asked them to ride. After the children were in his conveyance it is claimed he ran his horses and frightened the children. It is shown, however, that since these occurrences appellant Cross has sent his children to the home of Golden and allowed them to remain there over night to enable said appellant and his wife to spend their even-

ing away from home or at places of entertainment. Evidence is introduced to the effect that he drove a spirited team of young horses and that he often drove his horses on a fast trot and sometimes one horse on a gallop. The evidence upon this point seems to be exaggerated but even at that it is unimportant. It does not establish that Golden is a bad man or a man who should not be trusted with such care of children as is required of a person who conveys them to and from school. It does not establish that he is an incompetent driver or unable to properly manage a team of horses. It is not shown that this team ever became unmanageable or that Golden was ever unable to manage any horse or team which he was driving. It must therefore be held that it is not established that Golden is an unfit person to convey children to and from school.

But one question therefore remains to be determined and that is, did Golden supply a suitable conveyance, properly equipped to convey these children to and from school? The horses, wagon, sleigh, blankets — the whole outfit — should have been such as to provide a safe and reasonably comfortable passage for the children and to protect them from undue exposure during cold and stormy weather. If he did not supply such equipment or if appellants were dissatisfied with the services rendered by the contractor, the facts should have been reported to the trustee and it then became the duty of that officer to require the contractor to provide suitable conveyance and render proper service. Appellants were required to be reasonable in their demands and to accept service which insured their children safe, comfortable and prompt passage in going the 1⅓ miles which they were required to travel to attend school. While the trustee was required to provide suitable transportation for these children he was justified in resisting unreasonable demands based upon personal feelings. When a majority of the voters of a district have adopted the contract system it is the duty of parents having children to send to school to cordially cooperate with the trustee and the party providing transportation in every reasonable effort to afford the children safe and comfortable conveyance.

In this case appellants were not willing to cooperate with the trustee or contractor Golden. Appellants were opposed to the district contracting for the education of their children. They desired a home school maintained. They had determined not to accept the service provided by the trustee. Their principal effort has been directed toward vacating the action of the district meeting in authorizing the contract system, upon technical grounds.

After the contract with Golden was authorized at the February meeting Golden drove to the home of Cross to take the children to school. Cross refused to let the children go. Cross claims that the sleigh provided by Golden was not a suitable one. The evidence is to the effect that the sleigh was a light pair of bobs and one mechanic swears that there is no better pair of sleighs in the town. The principal objection raised by Cross to the sleigh is that the seats did not contain " lazy-backs." I think the evidence establishes that the conveyance provided by Golden was a proper one and should have been acceptable to appellants. It may also be said that the action of this Department in directing the district to

provide transportation was extremely liberal. The distance which the children were required to travel to reach the schoolhouse in no. 17 was only 1⅓ miles. There are thousands of children throughout the rural districts who are required to walk much longer distances to attend school.

This appeal must therefore be dismissed.

5368

In the matter of the appeal of Fred H. Cross and Thomas Seymour from the act or decision of the voters of school district no. 6, De Kalb, at a special meeting held September 10, 1907.

Trustees are not required to contract for 160 days. Contracts may be made for a shorter period of time and school may be maintained in the district for a portion of the year. If the period of time covered by the contract combined with the period of time the home school is maintained equals 160 days the requirements of the law are satisfied.

If a district desires to operate under the contract system instead of maintaining a home school it must provide suitable transportation for children of tender years who are required to travel long distances to attend school.

Decided December 23, 1907

Hale & Adams, attorneys for appellants
Abbott & Dolan, attorneys for respondents

Draper, *Commissioner*

School district no. 6, De Kalb, at a special meeting held on the 10th day of September 1907, authorized its trustee to contract for the education of the children in the district instead of maintaining a home school. The trustee thereafter entered into contracts by which part of the children of such district were to receive instruction in no. 17, De Kalb, and part in no. 4, De Kalb. Copies of these contracts were duly filed in this Department.

Appellants were opposed to the contract system and desired to maintain a home school. They bring this proceeding to vacate the action of such special meeting in authorizing the trustee to contract with other districts. The grounds in substance upon which the proceeding is based are:

1 That two persons voting at such special meeting were not legal voters and that the proposition to contract was carried by a majority of *one* vote only.

2 That the term of school provided in school district no. 17, and after the date on which the contract was executed does not cover 160 days and the trustee of no. 6 could not contract for a less period of time than 160 days.

3 That the transportation of pupils provided by the trustee is insufficient and unauthorized.

Sufficient proof is not found upon the record to sustain the first contention. To vacate the action of the meeting upon the ground that the proposition was carried by illegal votes it must affirmatively be shown that sufficient illegal votes were cast in favor of the proposition to have carried such proposition. If the

evidence submitted should be regarded sufficient to hold that the two voters in question were not legally qualified to vote at such meeting it would also be necessary to show affirmatively that such persons voted in favor of the proposition to contract. Such fact is not established by the record.

The trustee is not required under the law to contract for 160 days. He might contract for a shorter period of time and maintain school for a portion of time in the district. If the period of time covered by the contract combined with the period of time a home school is maintained should equal 160 days the requirements of the law would be satisfied. The fact is however that the contract provides that the children of school district no. 6 shall receive instruction in district no. 17 for 160 days. District no. 17 is therefore obligated to maintain school for the children of no. 6 for the full period of 160 days.

It must therefore be held that the contracts in question were duly authorized and that they have been legally and properly executed.

There is however one question presented by appellants which should receive careful consideration. The appellants are within their legal rights in insisting that suitable transportation shall be provided their children. The distance from the homes of appellants to the schoolhouse in no. 17 is about 1⅓ miles and much greater than the distance from their homes to the schoolhouse in their home district. One of the appellant's children is only 6 years of age.

The State will pay a contracting district a sum equal to the amount paid for tuition and transportation of pupils, but not to exceed the amount of the district quota to which such district would be entitled provided it maintained a home school. This district has an assessed valuation of $23,231 and might therefore receive a district quota of $175. The contracts filed show that respondent has agreed to pay $32 for the instruction of the children of the district. It also appears that the trustee has contracted to pay $135 for the partial transportation which has been provided. The entire cost of the transportation and tuition is therefore paid by the State and the expense of operating the school in this district under the contract system is no cost to the taxpayers of the district.

It will not therefore operate as an injustice or hardship upon this district if the district is required to levy a tax in order to raise funds to provide proper transportation for its children. If a district desires to operate under the contract system instead of maintaining a home school it must provide suitable transportation for children of tender years who are required to travel long distances to attend school. I held in decision no. 5219 that such transportation should be regular and daily and that as a general rule one person of proper character, furnishing suitable accommodations, should be regularly employed and the contract should be awarded, after opportunity for competition, to the most reliable party who will furnish the best transportation at the lowest cost to the district.

It appears from the pleadings in this case that the party to whom the contract was awarded to convey these children to and from school is a proper person to perform such work and that he has suitable accommodations therefor. It does appear however that the contract does not require *daily* conveyance of children.

The children are to be conveyed "on such days as the weather is extremely cold and the roads are impassable by reason of the elements or at any time that any reasonable person might say it was unreasonable that children of tender age should walk."

This provision of such contract is defective. It is too indefinite and leaves the question of the necessity of transportation open to disagreement. A contract in such form is likely to breed dissatisfaction and contention. A parent might deem transportation necessary on a certain morning and request his children to wait for the conveyance. The party to convey the children might deem transportation unnecessary on that morning. Under such conditions children would be likely to get to school late and might not get to school at all. Contracts containing such conditions can not therefore be approved.

The trustee of district no. 6 De Kalb, must therefore provide transportation daily for these children or must open and maintain a school in such district. If the trustee had not been authorized to provide transportation he should call a special meeting of the district at once for the purpose of obtaining such authorization. Should the district fail to authorize such transportation it is the clear duty of the trustee under the consolidated school law to open the school in the district as soon as he is able to make suitable arrangements therefor.

So much of the appeal herein as relates to the insufficiency of the transportation furnished by the trustee is sustained.

It is ordered, That Melvin A. Fletcher, trustee of school district no. 6, town of De Kalb, shall immediately take such action as may be necessary to provide suitable transportation on each school day that school is in session in school district no. 17, De Kalb, for the children of district no. 6, De Kalb, who are required to attend school in said district no. 17, De Kalb, and that if such transportation is not provided on or before January 10, 1908, the said Melvin A. Fletcher shall open and maintain a school in district no. 6, De Kalb.

5375

In the matter of the appeal of Jacob B. Hildreth v. Daniel Ryant, sole trustee of school district no. 11, towns of Van Etten and Spencer.

When better facilities can be afforded by contracting with two or more districts instead of contracting with one district such policy should be pursued. The law encourages such policy by specifically authorizing it.

Decided January 27, 1908

Moreland & Thurston, attorneys for appellant
Cornelius O. Seabring, attorney for respondent

Draper, *Commissioner*

The annual meeting of school district no. 11, towns of Van Etten and Spencer, authorized its trustee to contract for the education of its children instead of maintaining a home school. Pursuant to such authorization respondent Ryant

contracted with school district no. 1, Van Etten. Appellant is a resident and taxpayer in school district no. 11. He has children of school age attending school. He resides 3½ miles from the schoolhouse of district no. 1. His children are therefore required to travel 7 miles daily in order to attend school. His children are within the compulsory school ages and must attend school. The distance from appellant's residence to the schoolhouse in district no. 16, Van Etten is only 1½ miles. If appellant's children could attend school in district no. 16 they would be required to travel only 3 miles each day to attend school, instead of 7 miles. Appellant has been desirous of having a contract made with district no. 16 so that his children could attend the school in that district. The trustee refused to make such contract on the ground that the annual meeting instructed him to contract with no. 1. The question received much attention through correspondence with the Law Division of this Department and also from the school commissioner of Chemung county. A special meeting of the district was held about November 19, 1907 to vote upon authorizing a contract with no. 16 and such proposition was defeated. It is claimed by respondent that district no. 1 is a graded school and affords better school facilities than district no. 16, but this is not sufficient ground under all the circumstances to justify the majority of the voters of the district, no. 11, to refuse to authorize a contract for appellant's children and other children residing near appellant with district no. 16. If a district does not desire to maintain a home school but in lieu thereof wishes to operate under the contract system, it is incumbent upon such district to provide the best school facilities possible for all the children of the district. If better facilities could be afforded by contracting with two or more districts instead of contracting with one district such policy should be pursued. The law encourages such policy by specifically authorizing it. If appellant and the other parents residing in his section of the district preferred to send their children to no. 16 and were willing to accept the school facilities afforded by such district, instead of sending them to the village school in no. 1, because it would relieve their children from traveling 4 additional miles each day in order to attend school, it was the duty of district no. 11 to authorize the trustee to contract with district no. 16.

I shall not vacate the action authorizing a contract with no. 1 nor shall I set aside such contract. A portion of the children residing in no. 11 can attend the school in no. 1 more conveniently than in any other district. It also appears to be the desire of their parents that they shall attend such school. It is unnecessary therefore to disturb such contract. The only action necessary in this proceeding is such as will give the children residing in the section of district no. 11 in which appellant resides school privileges which are reasonably accessible and satisfactory to their parents. This can be done by the district authorizing respondent Ryant to contract for the education of such children in district no. 16. If the district refuses to authorize such contract the trustee of district no. 11 must open a home school in such district.

The appeal herein is sustained.

It is ordered, That the trustee of district no. 11, towns of Van Etten and Spencer, Chemung county, call a special meeting of the legal voters of the district to authorize a contract with school district no. 16, Van Etten, for the education of the children residing in said district no. 11 whose parents desire them to attend school in district no. 16.

It is also ordered, That if such special meeting shall refuse or fail to authorize the trustee of district no. 11, Van Etten and Spencer, to make such contract with district no. 16, Van Etten, the said trustee of district no. 11, Van Etten and Spencer, shall thereupon employ a teacher and open and maintain a school in said district no. 11, Van Etten and Spencer.

ELECTIONS

5218

In the matter of the election of a member of the board of education of union free school district no. 6, town of Mohawk, Montgomery county.

The claim of right or title to the office of trustee will not be sustained when the very right itself rests upon either fraud, corruption, negligence, imposition or wrong.

An election resulting from sharp practice and in unfairness and injustice and not reflecting or representing the popular expression of those entitled to be heard, will be set aside and a new election ordered.

The accepted doctrine of popular elections is that the great body of the voters shall have notice *in fact* of the election. It is not necessary that the formal notice of an election required by the law shall be given or shall be brought to the attention of each voter, but did knowledge of the fact that such election was set to be held at a fixed time become known to the great body of the voters?

The paramount question in a proceeding to determine the title to the office of trustee is, Did the voters generally have an opportunity to legally express their choice for such trustee? The right of any individual to the office of trustee is subordinate to this great right of the legal voters.

Decided October 30, 1905

George M. Albot, attorney for appellant
J. S. Sitterly, attorney for respondents

Draper, *Commissioner*

This is an appeal to determine the right or title to the office of trustee in school district no. 6, town of Mohawk, Montgomery county. This is a union free school district whose boundaries do not coincide with the boundaries of an incorporated village or city. The incorporated village of Fonda is located within the school district. At present less than 300 children of school age reside within the school district. Since 1878 the annual meeting of this district has been held on Tuesday evening as required by law and the election of trustees on the afternoon of the following day. On July 3, 1905, the board of education issued the following notice:

ANNUAL SCHOOL MEETING

The annual school meeting of Fonda high school district no. 6, town of Mohawk, will be held in the school building on Tuesday evening, August 1, 1905, at 7.30 o'clock.

The annual election of one member of the board of education for three years will be held in the high school building on Wednesday, August 2d, from 12 o'clock noon until 4 p. m.

HARRY H. DOCKSTADER
GEORGE L. DAVIS
JOHN E. COOK
Board of Education

Dated, Fonda, July 3, 1905

This notice was published for four consecutive weeks in the *Fonda Democrat* and posted in several public places within the district. The annual meeting held on the evening of August 1st transacted the usual routine business which generally comes before such meetings, passed a resolution to change the time of election of trustees from the afternoon of the Wednesday following the annual meeting to the time of the annual meeting, and then proceeded to the election of a trustee for the ensuing three years. Several of those present protested against the passage of such resolution and of the election of a trustee at that time, claiming that the election was illegal and that such election should be held on the following afternoon in accordance with the official notice given by the board of education.

The district meeting proceeded, however, to the election of a trustee. It appears that 64 votes were cast of which number Bernard Conlan, appellant herein, received 61 and was thereupon declared elected trustee by the chairman. It also appears that those who protested against the election of a trustee at that meeting refrained from voting.

It has been the custom in this district for many years to hold a caucus immediately after the adjournment of the annual meeting to nominate a candidate for trustee to be voted for on the following afternoon. In accordance with that custom those present at the annual meeting who believed the election should be held on Wednesday and who had refrained from participating in the election of Tuesday evening, held a caucus after the adjournment of the annual meeting and nominated Harry H. Dockstader for trustee. The board of education conducted an election on the following afternoon in accordance with the provisions of section 14, title 8 of the Consolidated School Law. At such election 143 votes were cast, all of which were for the said Harry H. Dockstader and he was thereupon declared elected.

On August 2d the board of education held a meeting and organized by electing the said Harry H. Dockstader the president of said board. This meeting of the board of education was clearly illegal, as section 13, title 8 of the Consolidated School Law provides that the annual meeting of the board of education shall be held on the first Tuesday following the annual meeting. The proper time to hold such meeting was Tuesday, August 8, 1905, and on that date the board of education held its annual meeting and recognized the said Harry H. Dockstader as the regularly elected trustee. The board of education also again elected the said Dockstader as its president. The board of education also refused to recognize the appellant, Conlan, as the legally elected trustee of the district.

The present Consolidated School Law went into effect June 30, 1894. Previous to that date the election of trustees in all school districts having more than 300 children of school age and whose boundaries did not coincide with those of an incorporated village or city was held under the provisions of chapter 248 of the Laws of 1878, except certain districts organized under special acts or especially exempted from the provisions of said chapter 248. That law provided that the election of trustees in districts of this class should be held on the second

Wednesday of October between the hours of 10 o'clock in the morning and 4 o'clock in the afternoon. Subsequently the date of annual meetings in school districts was changed by the Legislature to the last Tuesday in August and later to the first Tuesday in August, and the date of election of trustees in districts of this class was accordingly changed to the Wednesday following the last Tuesday in August and later to the Wednesday following the first Tuesday in August. So it always occurred from 1878 to 1894 that the *annual meeting* was held on Tuesday evening and the *annual election of trustees* on the next day or Wednesday. In 1878 the hours of such election were changed so that thereafter the election was held between the hours of 12 m. and 4 o'clock in the afternoon.

Chapter 556 of the Laws of 1894, the Consolidated School Law, repealed chapter 248, Laws of 1878, and also repealed the chapter fixing the date of annual meetings. Since the enactment of the Consolidated School Law in 1894 it has been necessary for all school districts to hold their annual meetings and to elect their trustees at the time fixed and in accordance with the provisions of said Consolidated School Law. Section 13 of title 8 of that law provides that the annual meeting of all union free school districts whose boundaries do not correspond to those of an incorporated village or city shall be held on the first Tuesday of August. Section 5 of title 8 provides that the election of trustees in union free school districts whose boundaries are not the same as those of an incorporated village or city shall be held at the annual meeting. However, section 14 of title 8 provides that in union free school districts in which the number of children of school age exceeds 300 and whose boundaries are not coincident with those of an incorporated village or city, the election of trustees may be held on the Wednesday next following the date of the annual meeting. This section provides that districts desiring to hold the election of trustees on Wednesday may so determine by a majority vote to be ascertained by taking and recording the ayes and noes. This vote may be taken at an annual or a special meeting called for that purpose.

District no. 6, Mohawk, held its election of trustees from 1878 to 1894 on the Wednesday following the date of the annual meeting. The presumption is that during that period of time the number of children of school age residing in the district exceeded 300. This district is also a union free school district whose boundaries do not coincide with those of an incorporated village or city. The pleadings do not show whether at the time of the annual meeting in 1894 the number of children of school age residing in the district exceeded 300. If the number of such children did exceed 300 this district in common with all other districts of its class possessed the authority to decide to hold the election of trustees on Wednesday afternoon instead of Tuesday evening. But it was necessary for this district in 1894, or any other district of its class, if it desired to continue to hold its election of trustees on the afternoon following the annual meeting, to so decide by a majority vote as above stated at either the annual meeting or at a special meeting.

The records do not show that a vote was ever taken upon such proposition in this district. The board of education gave notice as required by law in 1894

that the annual meeting of the district would be held on Tuesday night and the election on Wednesday afternoon. The annual meeting was held and transacted the business which usually devolves upon such meetings. It then adjourned and immediately thereafter those in attendance upon such meeting held a caucus and nominated a trustee to be voted for on the following day. On that day the election was held. No objection was raised by any resident of the district to this proceeding. Each year from 1894 down to the year 1905 the annual meeting has adjourned, a caucus to nominate a trustee has immediately thereafter been held, and on the following afternoon the election of trustees has taken place. It is contended by the attorney for respondents that the action of the annual meeting in 1894 in adjourning without considering in any way the election of a trustee; the action of those in attendance upon the annual meeting immediately after its adjournment in holding a caucus and nominating a trustee; the action of the legal voters in holding an election on the following day and a repetition of these various steps each year thereafter, was a substantial compliance with the requirements of section 14 of title 8 of the Consolidated School Law. Since 1894 it has been necessary for this district, or any other district of its class, to show two essential things in order to legally hold its elections on the Wednesday immediately following the annual meeting, namely, that the district contained more than 300 children of school age and that the district had determined by a majority vote as the law directs to hold the election on Wednesday. It does not appear to my satisfaction that these conditions have been met as the law contemplates they should be.

If the election of Wednesday was irregular or illegal, was the election of Tuesday night regular and legal? The attorney for appellant contends that the pleadings do not raise the question of regularity of the election on Tuesday night. He contends that the only questions before this Department for determination are the regularity of the Wednesday election and the regularity of the action of the board of education in recognizing said Dockstader as the legally elected trustee of the district, and that this Department has not jurisdiction on the pleadings to determine the regularity of the Tuesday election. This contention is unsound. The appellant entitles this proceeding: "In the matter of the election of a member of the board of education of union free school district no. 6, town of Mohawk, Montgomery county." He states in his moving papers that he appeals "from all proceedings and determinations of said board at said last named meeting whereby this appellant was denied the right and privilege of sitting as a member and participating in the proceedings of said board as a lawfully elected member thereof." In the concluding paragraph of the moving papers the relief requested by appellant is "that the appellant be adjudged the duly and lawfully elected trustee or member of said board of education for the term of three years commencing August 1, 1905." He also files with his moving papers a copy of the proceedings of the annual meeting held on Tuesday night and makes the same a part of his pleadings. The appellant therefore directly raises the question of the regularity of the Tuesday election. He can not ask this Department to adjudge him the legally elected trustee without squarely

submitting for determination the regularity in every particular of his election. He contends that respondents do not question the regularity of the Tuesday election and that in fact they admit it. In this he is wrong. Respondents admit the proceedings taken at each meeting but they specifically deny that appellant was legally elected or that any of his lawful rights were violated. They set up the official notice given by the board of education to the effect that the election of trustee would be held on Wednesday, they show that this had been the custom of the district for twenty-seven consecutive years, and they show that an election was held on Wednesday and contend for the regularity and legality of the same. Thus do they deny and question the regularity of the Tuesday election. But the question as to what either party to this proceeding may specifically raise is not conclusive upon this Department. This Department is a tribunal to which appellant appeals for a judicial determination of his right or title to an office and this Department has not only the jurisdiction but it is its bounden duty to inquire into the regularity of every proceeding pertaining to the election upon which appellant bases his claim to the right for which he contends and to determine whether such right or title has been obtained as the law contemplates it should be.

For seventy years this Department has held that in actions involving the right to an office "it will inquire into the bonae fides thereof. Were the things done as such as it was proper to do at said meeting? Has any one been misled, imposed upon, or wronged? If mistakes and irregularities have occurred will the greater hardship be imposed upon individuals by setting aside or sustaining such acts? (*See* decisions 3534 and 4327.)

The courts of this State have always sustained this principle. In the case of The People v. Vail, Judge Bronson said: "Such proceeding reaches beyond those evidences of title which are conclusive for any other purpose, and inquires into and ascertains the abstract question of right. In legislative bodies which have the power to judge of their own membership, it is the settled practice, when the right of the sitting member is called in question, to look beyond the certificate of the returning officer; and I think a court and jury with better means of arriving at the truth, may pursue the same course."

In the leading case of The People v. Pease, the Court of Appeals of this State held: "In all cases where the proceeding is by quo warranto, or in an action of that nature, it is held that such proceeding is instituted to try the right to the office directly, and it is competent to go behind the certificate, which would otherwise be conclusive, to ascertain the real facts of the case. It is conceded that this proceeding is to ascertain the very right of the person to the particular office, and that by means of it any negligence, mistake or fraud of the inspectors or canvassers in their proceedings may be corrected. The truth may be inquired into and the right ascertained. As a general rule affirmative facts are not to be presumed, but must be proved by the party asserting them. The disposition of the courts in this State is to look through the formal evidence of the right to the right itself and to set aside the election of officers when necessary to promote the ends of justice." (27 N. Y. 45)

The Court of Appeals of this State in the case of Judson v. Thatcher held: "The defendant must show, before he can have judgment in his favor, that he has a legal title to the office. Possession is not, in such an action, evidence of his right; the burden is upon him of showing that his possession is a legal and rightful one."

Where, however, the action is brought on the relation of one claiming the office, the failure of the defendant to prove his title does not establish that of the relator. Upon that issue the plaintiffs have the affirmative, and the burden is upon them to maintain it.

The certificate of the proper officers is prima facie evidence of election to a public office. But the certificate, and the returns upon which it is based, are open to inquiry, and the returns will be corrected or set aside, so far as they are shown to be erroneous, if necessary to promote the ends of justice.

The inquiry as to errors in the returns is not confined to intentional frauds on the part of the inspectors of election officers. They may be impeached and set aside for error, whether that of the officer or arising from the interference or illegal acts of third persons. (55 N. Y. 525)

The pleadings show that the faction in control of the annual meeting and in favor of the election of Conlan passed the following resolution:

Whereas, It has been the custom for some years past, in school district no. 6 of the town of Mohawk, to hold the election for a member or members of the board of education on the Wednesday following the annual school meeting between the hours of 1 p. m. and 4 p. m.

Whereas, Said custom is unjust inasmuch as it disfranchises the greater number of the qualified electors of said district on account of their being unable to attend during the hours at which it has been held except at great loss and inconvenience to themselves, and,

Whereas, It is also directly contrary to the school election law which specifies that in all union free school districts, with a population of less than 300 children of school age, the election shall be held at the annual school meeting.

Therefore, it is hereby resolved, That at this and all subsequent meetings, until changed by a proper resolution, the election of a member or members of the board of education shall be the first order of business at said annual school meetings after organization and that any and all resolutions heretofore adopted affecting the time and place of the annual school election in this district are hereby rescinded.

Under section 14 of title 8 of the Consolidated School Law a district of this class which has been holding its elections under the provisions of such law may, by a majority vote, decide to change the time of such election from Wednesday to the time of the annual meeting. It appears clear that the faction favoring the election of Conlan believed that by passing the above resolutions they could proceed that night to the election of a trustee for three years. It does not appear that the faction favoring the election of Dockstader had any knowledge of the intention of the other faction and they had not attended the annual meeting as the official notice showed that the election would be held on Wednesday. The whole proceeding in voting to change the time of the election of trustee and the election itself may be properly looked upon as a scheme carefully planned to take advantage of those who might rely upon the official notice of the board and

remain away from the annual meeting believing as they rightfully should, that the election would be held on Wednesday and in accordance with the custom prevailing in the district for the twenty-seven preceding years. This Department has always held that when an annual meeting decides to change the time of an election under said section 14, title 8, from Wednesday back to the annual meeting, such decision does not become operative until the election of the following year. Due notice having been given that the election would be held on Wednesday the people interested in such election might remain away from the annual meeting expecting to vote on Wednesday and would thus be deprived of the right to express a choice for trustee. To hold otherwise would also open the road to many abuses which would result in great evil to the public school system. This policy is also in harmony with the trend of legislative thought for as recently as 1903 the Legislature amended the Consolidated School Law by providing that the number of trustees in any union free school district should not be increased or diminished unless due notice is given of the intention to present such question to the district for determination. A faction conspiring to control a board of education often accomplished that end by increasing or diminishing the number of members on such board at an annual meeting not largely attended and when it was not known that such action was contemplated. The action of the annual meeting in passing the resolution in question did not confer the lawful right to elect a trustee that night. It was not until after the ruling of this Department on that question was known to appellant's friends that they claimed Tuesday night as the legal time on which to hold the election. The resolution speaks for itself and shows conclusively that the annual meeting did not regard it legal to proceed to an election until after such resolution was adopted.

The board of education gave official notice as before stated that the election of trustee would be on Wednesday. This notice was published in the village paper for four weeks immediately preceding the date set for the election. It was also posted in several public places in the district. It was a matter of common interest and knowledge that the election of the district had occurred on that day for twenty-seven years immediately preceding. Should a faction in the district be permitted in view of these facts to take advantage of a technical provision of law and thus prevent a large number of the electors of this district from exercising the right to express their choice for a trustee? It appears that 143 of such electors desired to vote and at the election of Wednesday did vote while only 64 voted for trustee at the annual meeting.

It is contended by the attorney for the appellant that notice of the annual meeting was unnecessary and that failure to give notice does not invalidate an annual meeting. It is true that the law provides that a district meeting shall not be invalid for want of due notice to all qualified voters unless it shall appear that such omission was fraudulent or wilful. This Department has consistently refused to set aside the action of a meeting on such ground unless it has been shown that the failure to give notice was wilful or fraudulent, or the result of

such meeting might have been changed had those who failed to receive notice been present and been permitted to participate in the proceedings of the meeting. When the omission of notice has shown such results this Department has uniformly set aside the proceedings of meetings on that ground. (*See* decisions of this Department nos. 3587, 3593, 3741, 3809, 3820, 3912, 3921, 3926 and 4000)

In decision 4000 it was held: "Proceedings of an alleged annual meeting will be set aside where a long established custom in the district for calling the people together, had been purposely and intentionally omitted, thus enabling a very small minority of those intending to be present at the meeting to assemble and transact the business of the annual meeting."

The accepted doctrine of popular elections is that the great body of the voters shall have notice *in fact* of the election. It is not necessary that the formal notice of an election required by law shall be given or shall be brought to the attention of each voter but did knowledge of the fact that such election was set to be held at a fixed time become known to the great body of the voters?

Mechem says, at page 184: "When it is obvious that the great body of the electors were misled for want of the official proclamation, its absence becomes such an irregularity as prevents an actual choice by the electors; prevents an actual election in the primary sense of that word, and renders invalid any semblance of an election which may have been attempted by a few, and which must operate, if it operates at all, as a surprise and fraud upon the rights of many."

He also says in section 224: "It is well settled that where an election has been in fact had, and the great body of the electors have actually participated in it, irregularities not proceeding from a wrongful intent, in the manner of calling, holding or certifying the election, will, where they do not affect the result, be ignored."

McClary on Elections, section 176, says: "It does not follow that formal notice of the time and place of holding an election is always essential to its validity. Whether it is or not depends upon the question whether the want of formal notice has resulted in depriving any portion of the electors of their rights." In section 232 he says: "It is safe to say that a mistake should always be corrected if it can be corrected by the tribunal trying the contest. (*See also* Loring & Russell's Election Cases, Mass. p. 343 and 344 and cases therein cited.)

The paramount question in this whole proceeding is, Did the voters generally of this district have an opportunity to legally express their choice for a trustee? The right of any individual to the office of trustee is subordinate to this great right of the legal voters.

I know that the Court of Appeals of this State, in the case of The People v. Cowles, 113 N. Y. 350, held where a vacancy occurred in the office of a Supreme Court judge only a few days previous to the election and such vacancy was filled at the election although no official notice of such vacancy and the filling of the same was given, that such election was valid. It must be understood in this case, however, that the voters of the judicial district had *in fact* notice

of such vacancy and of the election. The vacancy was caused by the death of a judge in New York City. His death was immediately announced in all the great journals of that city. The political parties immediately nominated candidates to fill such vacancy. Four nominations were made. These nominations were printed in the daily papers and the relative merits and qualifications of such nominees were also discussed by the papers of that city. Then too the prevailing opinion of the court which was 4 to 3 was based upon a provision of the State Constitution.

The books will be searched in vain for a case wherein a court or an officer possessing judicial powers has sustained the claim of right or title to an office when the very right itself rests upon either fraud, corruption, negligence, imposition or wrong. The Court of Appeals of this State in 1900, matter of Mutual Fire Insurance Company of Albany (164 N. Y. 10) rendered a decision pertinent to the issue involved in this proceeding and shows the views of that tribunal upon an election resulting from sharp practice and in unfairness and injustice and not reflecting or representing the popular expression of those entitled to be heard. In this company there were two classes of voters known as cash policyholders and note policyholders. At the annual election in 1900 an unexpected contest occurred. The inspectors reported 1112 votes cast upon note policies for the Lyon board and 1347 votes upon similar policies for the Rathbone board. The inspectors refused to count 895 votes upon cash policies for the Lyon board. No votes upon cash policies were offered for the Rathbone board although they controlled 720 votes on such policies. The court (51 App. Div. 163) held that the cash policy votes cast for the Lyon board should be counted and also directed that the 720 votes on cash policies controlled by the Rathbone board should be counted although none of such votes were offered at the election. The Court of Appeals modified the order of the Appellate Division by holding that cash policyholders were entitled to vote but directing that a new election should be held.

For the views of courts generally upon similar questions see also 17 Atlantic Reporter 952, 12 Vroom 297, 102 Cal. 184, 10 Iowa 212, 44 Mich. 89.

There is a different relation between the Commissioner of Education and a proceeding before him from that which obtains between a court and a proceeding before it. A court is disinterested in all questions except the facts and the law. The Commissioner of Education is the administrative or supervisory officer of the whole educational system of the State. He is bound to have an interest in the equity, right and justice of all questions having a bearing upon the administration of the educational system. He must determine judicial questions with a view to the general effect upon the school system as well as to the technical requirements of the law. In the settlement of questions relating to the election of school officers it is his duty to see that all parties are accorded a fair opportunity to participate in elections if they will, not only because of the need of extending justice to individuals interested but also because the peace and quiet of the school district can only be maintained by doing so. The will of the majority

desiring to express itself and not guilty of any laches must be given its opportunity.

I decide, That neither the election at the annual meeting held on August 1, 1905, nor on the Wednesday next following were regular or legal elections in the sense contemplated by the statutes and that in the interests of justice to all parties concerned and for the best educational interests of this district a new election should be held. It also follows that the action of the board of education in electing Harry H. Dockstader its president was illegal. The election in the future must be held at the annual meeting until the time for such election is changed as provided by law.

So much of this proceeding as relates to the election of Harry H. Dockstader as a trustee and as the president of the board of education in said district no. 6, Mohawk, is sustained, and that relating to all other matters is dismissed.

It is ordered, That the board of education of union free school district no. 6, town of Mohawk, county of Montgomery, shall within 10 days from the date hereof, call a special meeting in such district and give notice thereof as provided in section 10 of title 8 of the Consolidated School Law, for the purpose of electing a trustee in said district whose term of office shall extend until July 31, 1908.

It is further ordered, That the board of education of said district no. 6, Mohawk, shall, within five days after the said election has been held, hold a meeting thereof for the purpose of electing a president of said board.

5293

In the matter of the appeal of E. H. Farrington and Mary A. Taylor from the proceedings of the annual meeting of union free school district no. 1, town of Franklinville, county of Cattaraugus.

Irregularities in calling or holding an election not proceeding from a wilful or wrongful intent and not affecting the results are not sufficient grounds for setting aside an election.

Decided October 29, 1906

L. Thayer Waring, attorney for appellants
George E. Spring, attorney for respondents

Draper, *Commissioner*

The board of education of union free school district no. 1, town of Franklinville, county of Cattaraugus, passed a resolution providing that the election of that district to be held at the annual meeting should open at 4 o'clock in the afternoon and continue until 7 o'clock in the evening and that the election should be held in the town room of Morgan Hall. The resolution also provided that immediately after closing the polls at 7 o'clock the annual meeting would be continued in the opera house room of the same hall for voting appropriations, receiving reports of officers and transacting any other business which might properly

come before the meeting. After the adoption of this resolution by the board of education that body gave notice that the annual election of members of the board and the annual meeting would be held on August 7, 1906, at the time and place provided by such resolution. This notice was published in the Franklinville *Journal,* a paper published within the district, in the issues of July 18th and 25th, and August 1st. The election and annual meeting were held accordingly.

This district is a union free school district whose boundaries do not correspond with the boundaries of an incorporated village. It appears there are more than 300 children of school age in this district but that no action has been taken as provided by section 14, title 8 of the Consolidated School Law to establish the Wednesday following the date fixed by law for holding the annual meetings as the time for holding the annual election of members of the board of education in this district. Such election in this district must therefore be held as provided by section 5 of title 8 at the annual meeting of the district. Section 13 of title 8 provides that the annual meeting of union free school districts whose boundaries are not the same as the boundaries of an incorporated village shall be held on the first Tuesday in August. The hour for opening such meeting and the place for holding it are not fixed by this section. Section 8 of title 7 however provides that the annual meeting of every district in the State shall be held at the schoolhouse and at 7.30 o'clock in the evening unless at a previous meeting some other hour and place shall have been designated. It is not claimed that any meeting of this district has designated some other hour or place for holding the annual meeting. This Department has held that a district in which a union free school has been established is still an ordinary district except so far as the inhabitants and officers thereof are invested with additional powers and privileges. Under section 16 of title 8 all provisions of the Consolidated School Law which relate to common school districts apply to union free school districts except where other or different provisions relating to union free school districts are prescribed by title 8. The statutes do not confer upon a board of education the power to fix an hour or place for an annual meeting. Therefore it must follow that in the absence of a fixed hour and place being prescribed by section 13 of title 8 and no action having been taken at a district meeting in prescribing an hour and place and the statutes not conferring power upon a board to fix such hour and place, the annual meeting of this district should have opened on August 7, 1906, at 7.30 o'clock p. m. in the schoolhouse. The action of the board in passing the resolution in question and in giving notice accordingly was irregular and without authority of law.

Section 13 of title 8 provides that notice of annual meetings shall be given by the board of education in the manner stated in section 10 of that title. Section 10 provides that notice of meetings shall be published once in each week for the four weeks next preceding the date of such meeting in two newspapers published in the district, if there are two, or in one paper if there is but one published in the district. The notice given by the board appears to have been published in three issues of one paper instead of four and in only one issue of the second paper published within the district.

Some time after this notice appeared in the newspapers the right of the board to designate 4 o'clock as the hour for opening such meeting appears to have been questioned. It also appears that there were two factions in the district and each faction nominated a ticket. One ticket known as the "administration ticket" was supported by those who indorsed the board of education and the other ticket known as the "opposition ticket" was supported by those who were opposed to the board of education. A short time previous to the date of the annual meeting, representatives of each faction communicated with this Department to ascertain the right of the board of education to designate 4 o'clock as the hour for opening such meeting. The Chief of the Law Division was on his vacation at the time such communications were received. The situation as presented in such letters appeared to be somewhat complicated and the clerk in charge of the Law Division was not willing to pass upon such questions but forwarded the letters to the chief of the division for his consideration. These letters did not contain all the information necessary to determine when the annual meeting should be held. The law contains separate provisions for districts having 300 children of school age or less and districts having more than 300 children. From the information given, the Chief of the Law Division assumed that the district had less than 300 children of school age and replied to the letters in question on that understanding. As this district had more than 300 children of school age the board of education construed the letter from the Chief of the Law Division as not applying to their district. Another letter was written by the clerk of the district explaining more fully the conditions in this district and asking for a definite reply as to whether or not the meeting might legally be opened at 4 o'clock. This letter was addressed to Mr Finegan where he had been spending his vacation. Before its receipt he had gone to another place and the letter was reforwarded several times, reaching him at this Department on Tuesday morning, August 7th, the date of the annual meeting. He immediately wired a reply to the effect that the meeting should open at 7.30 in the evening and suggested that a member of the board should be at the place designated for holding the meeting at 4 o'clock and give notice to any who might appear that the meeting would not open until 7.30 o'clock.

There was to be a sharp contest on the election of members of the board of education. A thorough canvass had been made by both factions. The hour and place of the meeting had been given the fullest publicity possible and it did not seem practicable to the board of education to defer opening the meeting until 7.30 o'clock. It appears that a conference was held between some of the leaders of the two factions and it was agreed to open the election at 4 o'clock and keep the polls open until all had voted. This course was pursued. The meeting was called to order by a member of the board of education. The Hon. Alfred Spring, a Supreme Court justice and a member of the Appellate Division of the fourth department, was chosen chairman. He stated at the outset the ruling of this Department on the legal right of the board to call the meeting at 4 o'clock. He also stated what had informally been agreed upon and specifically asked if

there was any objection to proceeding with the election. No objection was made. Representatives of both factions were present. Appellants appear to have been present, but if they were not they came in later and made no objection to the meeting being continued. Dr Kales, one of the prominent leaders of the opposition party, was present. The evidence shows that he distinctly assented to the meeting being called at 4 o'clock. This he denies. But whether he agreed to it or not, he was present and offered no objection and participated in the proceedings of the meeting. The appellants also participated in the proceedings of the meeting and at no time did they object to the meeting being held open previous to 7.30 o'clock. Had the opposition ticket been successful this appeal would undoubtedly never have been brought. It is claimed by appellants that the board of education refused to be bound by the ruling of this Department in failing to comply with the suggestion contained in the telegram from Mr Finegan. This contention is not sustained. Immediately after the close of the annual meeting the chairman of such meeting advised this Department fully of the action taken and gave the reasons therefor which were satisfactory.

The school law provides that no district meeting shall be invalid for want of due notice to all qualified voters unless it shall appear that such omission was fraudulent or wilful. In fact failure to give any notice of an annual meeting would not invalidate such meeting. The law fixes the date and the hour of annual meetings and the voters of a district may convene at that hour and transact the business of the district even if no notice is given. This annual meeting was in session at the time fixed by law and any legal voter of the district might have appeared at that time and exercised any of the rights or privileges which the law confers upon him. The legal rights of no voter of the district were violated by having the meeting opened at 4 o'clock. The polls were kept open until 8 o'clock and until all who desired had voted. The chairman distinctly asked two or three times if all who desired had voted. No protest was made by appellants, by Dr Kales or by any other person against closing the polls at 8 o'clock. It is not shown in the pleadings of appellant that any one was barred from voting by reason of the polls having been closed at 8 o'clock. The mere allegation of appellants that many were prevented from voting is insufficient. There should be some tangible evidence in support of such charge if it is to be given any weight. The same is true in relation to the charge that many illegal votes were cast. General charges of this character are not entitled to consideration unless there is evidence of some character to support them. Appellants do not give in their pleadings the name of one person who voted illegally or who was barred from voting by reason of the hours during which the polls were open.

The pleadings show that more than 400 votes were cast and that the meeting was unusually orderly. It appears that but one vote was challenged. The chairman questioned the challenged party and advised her not to vote. The advice was accepted. It appears that the building designated was one better adapted for holding the annual meeting than the schoolhouse. It was centrally located

and accessible. No wrongful intention or motive is shown on the part of the board. The only object which the board seemed to have in mind was to afford all voters of the district an opportunity to vote for their choice of candidates in an orderly manner and with ease and comfort. In this all parties acquiesced and are therefore barred now from raising that question of irregularity and technical procedure.

The main question in this appeal is, Did the voters of this district have a fair opportunity to legally and honestly express their choice for the candidates at such election?

The accepted doctrine of popular elections as laid down by our courts is: "It is well settled that where an election has been in fact had, and the great body of the electors have actually participated in it, irregularities not proceeding from a wrongful intent, in the manner of calling, holding or certifying the election, will, where they do not affect the result, be ignored."

It appears that the successful candidates received from 263 to 273 votes and the opposing candidates from 130 to 140 votes. The majority in favor of the successful candidates was so decisive that the general result of the election would not be changed by the few illegal votes which may have been cast in an election conducted as orderly and fairly as the election in question. No reason exists for ordering a new election.

The appeal herein is dismissed.

5426

In the matter of the appeal of John Gasser, jr, from the acts and proceedings of the annual meeting in district no. 3, Hempstead, Nassau county.

Destruction of excess ballots. The ballots cast for district officers at an annual meeting should be counted without unfolding them, except so far as to ascertain whether such ballots are single, and if it is found that the number of ballots cast was greater than the number of persons who voted, all the ballots should be replaced in the ballot box without being unfolded, and after the ballots are thoroughly mingled the excess ballots should be drawn out and destroyed. The fact that when the ballots are unfolded it is found that two of them may have been cast through error for a person for another office does not change the force and effect of this rule.

Minutes of meeting. The duly recorded and certified minutes of a district meeting, included as a part of the pleadings of one of the parties to an appeal, will be taken as true, unless impeached by clear and convincing evidence.

Decided November 18, 1909

John Lyon, attorney for appellant
Clock S. Seaman, attorney for respondent

Draper, *Commissioner*

This appeal is brought to set aside the action of the chairman of the annual meeting in school district no. 3, town of Hempstead, county of Nassau, held August 3, 1909, in declaring Henry Rowhel elected trustee of such district for

a term of three years. Numerous affidavits have been presented by both parties, and there is conflict between them as to some of the material facts. It is conceded (1) that the appellant, John Gasser, jr, and Henry Rowhel were the only persons formally nominated for the office of trustee; (2) that 83 persons voted by ballot for candidates for the office of trustee, and that upon canvass by the inspectors it appeared that 85 votes had been cast; (3) that the meeting instructed the inspectors to destroy two ballots, one cast for the appellant Gasser, and the other for the respondent, Rowhel; (4) that when the remaining ballots had been counted it appeared that Rowhel had 41 votes and Gasser had 39.

The appellant alleges that when the votes remaining after the destruction of the 2 votes were counted, there were still 85 votes canvassed, 2 more than the number on the list of voters kept by the clerk of the meeting. The respondent denies this, but does not attempt to impeach the minutes of the meeting which show that 85 votes were counted, of which Rowhel received 41, Gasser 39, Leary 3 and Wellstood 2.

The respondent Rowhel insists that he received a majority of the votes cast and was properly declared elected as trustee. He bases his contention upon the claim that there were only 85 votes in the ballot box when the count was begun; that 2 of these ballots, which were marked "for district clerk," were cast for William Wellstood; that these 2 ballots should have been destroyed instead of the 2 ballots which were destroyed at the direction of the meeting; that the direction given by the meeting as to these 2 ballots was illegal and should be disregarded, and that counting for him the ballot which was destroyed, he received 42 votes, a majority of those legally cast at the election.

It is not denied that when the ballots were counted after the polls were declared closed 2 more ballots were found than there were voters on the list. It was recognized by all present at the meeting that 2 ballots must be destroyed to make the number of ballots conform with the list of voters. The legal way would have been to count the ballots found in the ballot box without unfolding them, except so far as to ascertain that each ballot was single, and if it was found that the number of ballots deposited in the box was greater than the number of persons who voted, all the ballots should have been replaced in the box without being unfolded, and after having thoroughly mingled the ballots, one of the inspectors should have drawn out the excess ballots, standing so that he could not see the ballots and with his back to the box. Such excess ballots should have been then destroyed without being unfolded. This is the procedure prescribed by law for like cases at general elections (see election law, 1909, § 367). This Department has held that the rules as to the destruction of excess ballots at general elections should apply to school elections (see appeal of Dillon, no. 4261, July 1894). It follows that the method used in the case now being considered was not regular. But the respondent did not object to the method adopted, and seems to have acquiesced in it. It can not be held that the vote for him, which was destroyed, should be counted for him, upon the assumption that when the ballots were unfolded two of them were illegal, and that if they were thrown

out the number of ballots would conform to the list of voters. The election law, and parliamentary usage, demand that the excess ballots be drawn out before the ballots are unfolded. The rights of the candidates and the prevention of fraud demand that such a course be followed.

If the vote for Rowhel, which was destroyed, had been counted for him he would have had 42 votes, enough to elect him. If it is held that he was not entitled to such vote, he was not elected and the chairman was wrong in declaring him elected. It must be held either that the method of destroying the excess ballots was illegal, which nullifies the ballot, or that the method, while irregular, was not illegal, in which event the respondent Rowhel received only 41 votes, one less than a majority of the votes cast for the office. It follows therefore that Rowhel was not legally elected.

The appellant sets up as a part of his pleadings, a copy of the minutes of the meeting. The respondent has not attempted to impeach the accuracy of these minutes. It is an established rule frequently applied on appeals from the acts of district meetings, that the minutes of such meetings duly recorded will be taken as true unless impeached by clear and convincing evidence. The minutes of the meeting show that "the chairman announced 85 votes cast, 41 for Henry Rowhel, 39 for John Gasser, 3 for Arthur Leary and 2 for Wm. Wellstood." It thus appears from the minutes that Rowhel did not receive a majority of the votes cast, even admitting that he is right in his contention that the votes for William Wellstood should not be counted. It must be held that there was a failure to elect a trustee for the term of three years at the annual meeting and that a new election must be held for such purpose.

The appeal is sustained.

It is hereby ordered, That the action of the annual meeting of school district no. 3, town of Hempstead, county of Nassau, held August 3, 1909, in declaring Henry Rowhel elected as one of the trustees of such district for a term of three years be, and the same hereby is, set aside; and

It is hereby further ordered, That the clerk of such district give notice, as provided by law, of a special meeting of the qualified electors thereof to be held within thirty days after the filing of this decision, for the purpose of filling the vacancy caused by the failure to elect a trustee for a term of three years at the annual meeting.

3564

In the matter of the appeal of John A. Weatherwax from the proceedings of the annual school meeting in district no. 10, towns of Schaghticoke and Lansingburgh, Rensselaer county.

Where upon a ballot for trustee two ballots are found folded together, the presumption is that the vote is fraudulent, and when it is found that the ballots cast exceed the poll list by one, both ballots should be rejected.

When a district clerk upon whom a copy of an appeal is served colludes with the appellant to keep all knowledge of such service from the respondent, sufficient ground is afforded for his removal from office.

Decided February 9, 1887

G. H. Mallory, Esq., attorney for appellant
Hon. A. C. Comstock, attorney for respondent

Draper, *Superintendent*

This is an appeal from the action of the annual meeting in district no. 10, in the towns of Schaghticoke and Lansingburgh, Rensselaer county, held upon the 31st day of August 1886, relative to the election of a trustee. It appears that there were three candidates named for the position, namely, John K. Overrocker, Charles Moon and the appellant. John N. Bonesteel was made chairman of the meeting. Two tellers were appointed, namely, D. C. Halstead and Henry De Freest. Henry Smith was clerk and kept the poll list. When the meeting proceeded to elect a trustee, the names of the voters present were called, and each person, as his name was called stepped forward and deposited his ballot.

In his appeal, the appellant alleges that at the conclusion of the voting, the tellers counted the ballots and announced that 42 ballots had been cast and the poll clerk stated that 42 persons had voted; that Mr Halstead, one of the tellers declared, while counting the ballots, that two ballots were folded together and that the chairman took and retained these two ballots and they were not counted; that said two ballots were not folded together, but had slipped together; that the two ballots not counted were for the appellant; that the tellers reported the result of the ballot as follows, namely, Overrocker, 17; Weatherwax, the appellant, 16, and Moon, 7; that objection was made by the appellant and his friends to the rejection of the two ballots, and that it was insisted by them that said ballots should have been allowed to him, and that he was elected, as only a plurality was necessary to elect; that, as a result of the controversy, the meeting determined to take another ballot, which was done, and resulted in Overrocker receiving 21 votes and the appellant 19 votes, and Overrocker was declared elected.

The affidavit of service showed that the papers of the appellant were served September 25, 1886, on Henry Smith, the district clerk. The papers were filed in this Department September 27, 1886.

No answer having been received from the respondent, the case was disposed of on the statement of facts set forth by the appellant, and on the 15th day of November 1886, a decision was rendered, holding that the two rejected ballots should have been received and counted for Weatherwax and declaring him elected and entitled to the office of trustee.

On the 17th of December, 1886, Mr Overrocker, who was declared elected trustee at the annual meeting, and afterward acted as such, and was deposed by the decision of November 14th, presented an application for a reopening of the case upon papers which had been served on Weatherwax on the 15th of December. He alleged that he had received no notice whatever of the appeal; that the district clerk had colluded with Weatherwax and concealed the papers from Over-

rocker, the trustee most interested in the matter. He swore that he would have answered the appeal if he had had any knowledge of it, and that he had fully and fairly stated his case to counsel, and was advised by counsel that he had a good and substantial defense on the merits of the case. The statements of Mr Overrocker remained uncontroverted the requisite length of time, and, on the 27th day of December, an order was made by the reopening of the case, and allowing Mr Overrocker to come in and answer.

The answer and the affidavits which he has since presented materially controvert the facts set up by the appellant. Not only the respondent, but the chairman of the meeting, the two tellers who supervised the election, and numerous other persons of undoubted credibility, who stood about the table at the time the ballots were cast and counted, all swear that two ballots were folded together, both being in favor of said Weatherwax, and were so folded that the entire side of one was laid to and against the entire side of the other, and were evenly folded, with two folds, and had the appearance of one ballot, and could not have come together after they were cast; that if both of said ballots had been counted, there would have been an excess of one ballot over the number indicated by the poll list; that at the time of the occurrence, Mr Weatherwax and his friends only claimed that one of the rejected ballots should have been counted for him, which would have tied the result and made another ballot necessary; that the chairman ruled that one, and but one, of the ballots folded together should be counted; that one of said ballots was counted, which resulted in a tie vote between Weatherwax and Overrocker; that another ballot was taken, upon which Overrocker was elected. The preponderance of proof seems with Mr Overrocker. The sworn statements of the chairman of the meeting and the tellers who supervised the election are entitled to great weight. If their statements are correct, the two ballots folded together were clearly fraudulent, and the tellers would have been justified in rejecting both of them. The fact, which seems to be pretty well established by the affidavits presented by Mr Overrocker, that the appellant at the time when the first ballot was announced, did not claim to be elected, but only insisted that one of the disputed ballots should be counted for him, and that there was a tie vote, rendering another ballot necessary, and that he maintained this position until after he was defeated upon the second ballot, is an important fact. It is important because it is added proof of the fact that it was the general belief of the meeting that the two ballots were fraudulently folded together. Whether they were or not is the vital point in the case. If they were, neither of them should have been counted, and their rejection would have elected the respondent upon the first ballot, or, upon the view of the matter most favorable to the appellant, would have justified the meeting in proceeding to another ballot. Upon all the proofs submitted, it is impossible to come to any other conclusion than that they were fraudulent, and that the appeal must be dismissed.

It is proper to add that the manifest collusion between the appellant and the district clerk, by which the former served his appeal papers upon the latter as the official representative of the district, and the latter kept them from the knowledge

of the trustee in office, whom it was the purpose of the appeal to remove, not only disparages all of the proceedings of the appellant, and impairs confidence in affidavits presented by him, but, if not capable of explanation, it affords sufficient grounds for the removal of the district clerk from office.

The appeal is dismissed.

3831

In the matter of the appeal of Reuben A. Scofield v. Stephen B. Ayres et al.

Where, in a contest to determine who was elected trustee, it appears that five double ballots were found in the box, which were disregarded and not counted by the tellers, although the total number of ballots in the box was less than the number of persons voting, as shown by the poll list, and no evidence is produced to show that the double ballots were fraudulently folded together, but it is shown on the contrary that they might have slipped together after being cast;

Held, that the tellers were not justified in throwing out the double ballots. They should have produced evidence to show that they were fraudulent, or should have counted them. If the number of ballots exceeded the poll list, the excess should have been withdrawn at random from the whole number.

General allegations upon information and belief, that many persons voted who were not entitled to, will not suffice. Such persons should have been challenged at the election.

It is necessary not only to state specifically who voted without right, but that such persons voted at the procurement, or in the interest of the opposition.

Where affidavits are presented on one side by a number of persons who swear that they were paid for voting by the other side, and affidavits by the same affiants to the effect that their former affidavits were not true, and were made for pay, or when intoxicated, it is a case for the district attorney. Unless enough fraudulent votes are shown to have been cast to have changed the result, the Department will not set aside the election.

A. C. Harwick, attorney for appellant

Draper, *Superintendent*

This is an appeal from the declared result of an election for trustees in the union free school district embracing the village of Penn Yan, in the county of Yates, held at the annual meeting, on the 7th of October 1889. Three trustees were to be elected. Five persons were voted for. According to the determination of the inspectors, Mr Edson Potter received 536 votes, Mr P. P. Curtis 336, Mr Stephen B. Ayres 302, Mr R. A. Scofield 275, and Mr B. L. Holt 235, and the three first named were declared elected.

The appellant, with a view to overthrowing this result, alleges:

1 That 10 ballots bearing the names of Scofield, Potter and Curtis were wrongfully thrown out and not counted by the inspectors.

2 That enough illegal votes were cast and counted for the ticket opposed to him to have changed the result as between Ayres and himself.

3 That the result as declared was attained through corrupt and fraudulent acts on the part of his opponents, including the purchasing of votes.

The real and only issue is between the appellant and the respondent Ayres, and he alone interposes an answer. According to the inspectors, Mr Curtis had a majority of 101 over Mr Holt, and no substantial effort is made to overcome or set aside this result. But the declared result gave Mr Ayres but 27 majority over Mr Scofield, and the latter insists that this was attained by fraud, and should be set aside. Mr Ayres answers and denies the allegations of the appellant generally and specifically.

It becomes necessary to examine each of the appellant's grounds of appeal and the proofs thereupon submitted by the respective parties in interest.

1 It is claimed that 10 ballots cast for the appellant and his associates were thrown out and not counted by the inspectors. There is no conflict of evidence upon this point. Mr George R. Young, one of the members of the board of education, and a teller, kept the poll list of persons voting. At the conclusion of the voting this list showed the names of 563 persons who had voted. Upon counting the ballots before opening there were apparently but 559. Mr Young, however, swears that upon opening the ballots, 5 double ballots, or 10 in all, were found folded together in pairs, each of which contained the names of Potter, Curtis and Scofield, and that none of these were counted. He says that the paper upon which these ballots were printed was thinner than that used for the other ballots, and that they were so folded that they might easily have been slipped together after being deposited in the box. This is the only evidence upon this point. Neither of the other inspectors makes any statement upon this evidence, and in view of the number of names on the poll list, I am of the opinion that the inspectors exceeded their authority in disregarding the 10 ballots referred to. It is more likely that the names of some voters were not recorded or checked than that more were reported than voted. If the votes in the box exceeded the names upon the poll list, the excess should have been withdrawn at random and cast aside, unless a majority of the inspectors were satisfied that the excess was due to the fraudulent folding of ballots together before voting. In the latter case the inspectors should appear here to sustain their action, with the reason for it. One of them appears and disowns and discredits the idea of fraudulent double ballots, and the others are not heard from. It therefore seems to me that the appellant is entitled to be credited with the 10 votes in question.

2 The appellant presents a list of names of 31 persons who voted, and who, he says, "upon faithful inquiry and search, he is unable to ascertain, possess the necessary qualifications to make them voters in said district." He swears, upon information and belief, that more than enough of them voted against him to have changed the result. It seems to me that this is not sufficiently specific and certain to be of value to appellant's case. If the right of any of these persons to vote was in doubt, they should have been challenged and required to desist or take the statutory oath, and a foundation laid for subsequent criminal proceedings against them. Neglecting that, and raising the question at this late day, it is upon the appellant to show affirmatively that these persons do not own or hire real estate

in the district, and were not assessed for more than fifty dollars of personal property on the last assessment rolls of the town, and were not the parents of children attending school during the last year, and did not meet any one of the other conditions which, under the statute, would qualify him to vote at a school meeting. Moreover, as it seems to me, even though he had made a *prima facie* case against the right of these persons or any of them to vote, he can not charge his opponent with the responsibility of defending or maintaining that right on their part without first showing by evidence more specific and substantial than information and belief, that such opponent had procured them to vote without right, or at least had profited by their unlawful votes. In other words, to make this point avail him, it was necessary for the appellant to show, affirmatively, by proof, that certain persons voted who had no right, and also that they voted for the respondent.

It is of interest in this connection, although it would not seem to be vital, that the respondent Ayres says under oath, that he has made inquiry in regard to this list of names and finds that nearly all of them were legal voters, but that he does not know whether they voted for him or not, and that he "has no knowledge or information that any vote was obtained for deponent by any person by reason of any corrupt or fraudulent practice on the part of any one." This seems to me to be certainly all it was necessary for him to say in answer to the general and unsupported allegations of the appellant upon this point.

3 In the third place, the appellant asserts and undertakes to prove that the bribery of voters was resorted to by his opponent. He presents the affidavit of Holder Snyder, who swears that one, Frank Conklin, told him he could get a dollar for voting the Ayres ticket, and that he promised to vote it but got there too late and did not vote. He also presents the affidavit of Bernard T. Barry, who swears that Morris F. Shepperd gave him an Ayres ticket to vote and that he voted it, and subsequently, Shepperd, in his presence, gave Howland Snyder one dollar to be divided between them for so doing, and Howland Snyder corroborates him. Appellant also presents the affidavit of Johnson Hewins, who swears Orville F. Randolph promised and paid him a dollar for voting the Ayres ticket. He also presents the affidavit of Frank Conklin to the effect that he was employed for the sum of three dollars by Samuel P. Burrill to purchase "floaters" for the Ayres ticket at one dollar each, and names Charles Stanton, John Farrell and Charles Newland as men whose votes he purchased according to the terms of the agreement. The affidavit of John Kelly, who swears that he was promised one dollar by Frank Conklin for voting the Ayres ticket, but omits to say that he got the money, is also presented. The affidavit of Charles Stanton, saying that he was promised one dollar by Conklin, if he would vote the Ayres ticket, that he did vote it and afterwards received the money is also presented.

Here is evidence to the effect that eight men at least were procured to vote against the appellant for pay. Although the number is not sufficient to wipe out the majority still standing against the appellant, I should be strongly inclined to

deem it, if uncontradicted, sufficient to justify me in holding the election void in order to condemn such methods and rebuke persons who would be identified with or profit by them. I have, therefore, looked with considerable interest to see what answer the respondent makes upon this point.

Mr Ayres presents an affidavit by Holder Snyder, in which that worthy swears that there is no truth in his affidavit presented by the appellant, and that he signed it when intoxicated. The respondent also presents an affidavit by Bernard T. Barry, saying that there is no truth in the former affidavit made by him, and that he signed it when intoxicated and without knowing its contents. He also presents an affidavit by Howland Snyder, to the effect that he was asked by one William Sheldon to make an affidavit that he (Snyder) received money for his vote and that he refused to do so, as it would not be true; that Sheldon asked him to state what took place, and he did so, and Sheldon pretended to write it down; that Sheldon then read it to him, and that as he read it, it was that he did not sell his vote, and believing that to be the nature of the affidavit, he signed and swore to it. The affidavit of John Kelly is also presented, in which he swears that he did not vote at the election in question, and did not receive pay for so doing, and that he made the affidavit presented by appellant at the solicitation of Sheldon, and was paid seventy-five cents for so doing. Also the affidavit of Charles Stanton that he made his former affidavit at the solicitation of Sheldon, and without knowing what was in it, and that as it is now read to him, it is not true, and that he did not receive any money for his vote at such election.

This answer of the respondent to the third point of appellant's case, unfortunately does not reach and cover all the instances in which bribery is alleged, but it very seriously undermines his position. If some evidence of alleged bribery is shown to have been procured in the way this was, then we are left to speculate whether all is not of the same character. I am by no means satisfied that bribery was not resorted to. It is certain, however, that the appellant does not show enough of it to have changed the result of the election in any case, and outside of legal right, there would hardly be sufficient ground in view of the doubts thrown upon all the testimony concerning bribery, for the exercise of the discretionary powers of the Superintendent.

Whether bribery was resorted to or not, it is tolerably certain that other crimes were committed on one side or the other, if not by the principals, then by their zealous partisans, in connection with this school meeting. Such crimes should be ferreted out and punished, but this duty does not devolve upon this Department, and it has neither the facilities nor the time for doing it. The law provides the machinery and the officers for attending to this phase of the subject. The Department will cooperate with the proper officers in punishing crime, so far as it may be able, but farther than that it can not go.

The appeal must be dismissed.

5401

In the matter of the appeal of Robert Thompson, school district no. 10, Depeyster, St Lawrence county.

Ballot for trustee. Where two ballots for trustee were declared a tie, and a third ballot for the office was announced, votes cast on such ballot which stated that they were for a certain person for the office of collector, should not be counted, and if all the other votes were for a person named as trustee, he should be declared elected.

Resolution to change site of schoolhouse. A resolution adopted at a special meeting which provided for a change of the "location of the schoolhouse to the center of the district," and did not describe the proposed site by metes and bounds, is fatally defective.

Decided March 1, 1909

W. A. Stamp, attorney for appellant

Waterman & Waterman, attorneys for respondent

Draper, *Commissioner*

This appeal is brought by Robert Thompson on a petition complaining of the proceedings of the annual meeting of school district no. 10, town of Depeyster, county of St Lawrence, held August 4, 1908, whereby Fred E. Hurlburt was declared elected trustee of such district. It is further alleged by the appellant that the said Hurlburt unlawfully moved the school building from its former site to a site across the highway therefrom. It appears that at a special meeting called for the purpose it was voted to change the location of the school building to a point at the corner of the district. The petition is defective and inadequate to inform as to the relief desired. It contains no prayer for relief, and it is not easily understood therefrom as to what is required.

It is alleged that Fred E. Hurlburt was not legally elected as trustee; that he is unlawfully performing the duties of that office. The appellant and respondent were both candidates for the office. There were two ballots, both of which resulted in a tie. It is claimed that one of the voters for Hurlburt was not a qualified elector. It does not appear that she was challenged and obviously was permitted to vote without question or protest. It is now too late to raise any such objection. Hurlburt was chairman of the meeting and it is claimed by the appellant that he had no right to vote for himself. This position is untenable. A chairman of an annual school meeting may vote for himself as trustee. The two ballots were therefore legally declared a tie. Upon the third ballot for trustee it appeared that four votes were cast for Hurlburt for trustee and four votes for another person as collector. It is apparent that Hurlburt's opponents misunderstood the purpose of the ballot. The appellant and his wife insist in their affidavits that the ballot was announced as for collector. The respondent and his wife are equally insistent that the ballot was announced as a third ballot for trustee. There is nothing to show which man and his wife are telling the truth. If this ballot was announced as for trustee, the votes cast for persons named as candidates for collector were properly excluded, and therefore the election of Hurlburt was valid. It certainly was in order to proceed with the balloting for trustee before voting for a collector. The persons voting should have known this. I am of the opinion that under the circumstances the respondent should be permitted to continue in office until the expiration of his term.

The official acts of Hurlburt are valid so far as they are within the legal scope of his office. The appellant complains that the respondent disregarded the resolution adopted at the special meeting held August 15th which provided for the change of the "location of the schoolhouse to the center of the district." It does not appear that the resolution described the proposed site by metes and bounds as required by law. From what is contained in the record of this case I have no hesitation in concluding that the resolution adopted at this meeting is fatally defective and did not bind the trustee. He may have exceeded his authority in moving the school building to a site across the highway from the former site. But it appears that the former site was leased to the district by Mary C. Thompson for a term of years; that it expired in June 1908 and that she refused to renew the lease. This condition may have justified the action of the trustee. It is unnecessary, however, to decide this question at this time. The schoolhouse should be permanently located on a site selected as required by law. The action of the special meeting in attempting to change the site was illegal. Another special meeting of the district should be called by the trustee at which a resolution should be voted upon describing definitely the location and boundaries of the site selected. A suitable site should be agreed upon. It should be located at a place as conveniently accessible as may be to the children of the district, having in view the accommodation of a majority of them. Swampy or badly drained places should be avoided even at the expense of accessibility.

The appeal herein is dismissed; but

It is hereby ordered, That Fred E. Hurlburt, trustee of district no. 10, town of Depeyster, county of St Lawrence, within 60 days after the filing of this decision as hereinafter directed, issue and cause to be served, as provided by law, a notice of a special meeting of the qualified electors of such district for the purpose of voting upon a resolution designating a site for the schoolhouse in such district.

5396

In the matter of the election in union free school district no. 1, of the town of Walton, Delaware county, held August 5, 1908.

Ballots for long and short term. When three trustees are to be elected for a full term, and one for the balance of an unexpired term, the ballots must designate the terms for which the candidates are to be elected. Ballots which do not specify the terms are void, in the absence of evidence to show for whom the persons voting such ballots intended to vote.

Defective ballots; intent of voter. A person who can identify a ballot cast by him for a school officer will be permitted to explain, on appeal, ambiguities and uncertainties contained therein, to the end that his intent may be ascertained and his vote counted in favor of the candidate of his choice. The voter's intent must, however, clearly appear by definite, positive and unequivocal statements.

Decided November 24, 1908

Draper, *Commissioner*

It appears from the papers in this appeal that at the annual school meeting held in union free school district no. 1, town of Walton, county of Delaware,

nominations were made to fill the offices of three trustees, whose terms expired at that time, and to fill a vacancy caused by the resignation of one of the trustees during the preceding year. John G. More, William F. White and William D. Burns were named at this meeting as candidates to fill the vacancies caused by the expiration of the terms of the three outgoing trustees. Rev. R. C. Reed and William M. Peck, the appellant, were nominated to fill the unexpired term of the trustee who had resigned. R. W. Scott was named as a candidate for district clerk. No other nominations were made at this meeting for any of these offices. The election of these officers took place on the following day, August 5th. In accordance with the nominations made at the meeting held on the evening of August 4th, two sets of printed ballots were prepared, and deposited near the ballot box at the voting place. These ballots were in the following forms, designated nos. 1 and 2:

No. 1

FOR TRUSTEES
Full term
William F. White
John G. More
W. D. Burns

FOR TRUSTEE
Short term
R. C. Reed

FOR CLERK
R. W. Scott

No. 2

FOR TRUSTEES
Full term
William F. White
John G. More
W. D. Burns

FOR TRUSTEE
Short term
William M. Peck

FOR TRUSTEE
R. W. Scott

When the polls were closed and the votes counted it appeared that two other sets of ballots had been prepared and voted. These ballots were in the following forms, designated nos. 3 and 4:

No. 3

FOR TRUSTEES
Full term
E. W. Harris
John G. More
W. D. Burns

FOR TRUSTEE
Short term
William M. Peck

FOR CLERK
R. W. Scott

No. 4

FOR SCHOOL TRUSTEES

John G. More
W. D. Burns

William M. Peck
R. C. Reed

Twenty-six electors voted ballot no. 1; 13, ballot no. 2; 13, ballot no. 3; and 6, ballot no. 4. One ballot was cast the same in form as no. 3, except that the name

of R. C. Reed was written in the place of W. D. Burns. There were thus 59 ballots cast. The trustees acting as canvassers counted the votes for trustee and announced the result to be as follows: John G. More, 59; William F. White, 39; W. D. Burns, 57; E. W. Harris, 14; R. C. Reed, 33; William M. Peck, 33. They then declared that John G. More, William F. White and W. D. Burns had been elected as trustees for the full term, and that as R. C. Reed and William M. Peck had each received 33 votes there was no election of trustee for the short term.

The provision of the Consolidated School Law relative to ballots at elections of district officers in union free school districts having more than 300 children of school age, is as follows: "Such ballots shall contain the names of the persons voted for, and shall designate the office for which each one is voted. The ballots may be either written or printed, or partly written and partly printed." There were three trustees to be elected in this district for a regular term of three years. There was one trustee to be elected for an unexpired term of one year. To comply with the statute it was necessary that each elector should designate on his ballot the persons for whom he wished to vote for the full term, and the person for whom he wished to vote for the short term. He could only vote for three for the full term and for one for the short term. The three candidates receiving the greatest number of votes for trustees for the full term and the candidate receiving the greatest number of votes for trustee for the short term should have been declared elected. The first question pertains to the validity of the six ballots cast in the form above designated as no. 4. The names of both Reed and Peck, the two opposing candidates for the short term, appear upon these ballots, that of Peck being printed and that of Reed being written at the end of the ballot with the name of *White* marked off. The appellant contends that the striking out of the name of White, who was a candidate for trustee for the full term, and adding Reed's name at the end, and leaving on that of Peck, indicates the intent of the elector to vote for Reed for the long term in the place of White, and for Peck for the short term. I do not think this contention can be sustained. There is nothing on the face of these ballots indicating the preference of the voters in respect to the two opposing candidates for trustee for the short term. A person who can identify a ballot cast by him for a school officer will be permitted to explain, on appeal, ambiguities and uncertainties contained therein, to the end that his intent may be ascertained and his vote counted in favor of the candidate of his choice. The voter's intent must, however, clearly appear by definite, positive and unequivocal statements. In the absence of sufficient evidence to establish such intent these ballots must be declared fatally defective and therefore void. Four of the six persons voting these ballots have made affidavit to the effect that they intended to vote for More, Burns and Reed for trustees for the long term, and for Peck for trustee for the short term, and three of these four also made affidavit that they supposed the four candidates were all in the same class and that they did not know that some were candidates for the long term and others for the short term. I am of the opinion that these affidavits are not sufficient to explain the preferences of the voters casting these ballots and that they should not therefore have been counted.

The remaining question is in respect to the ballot in the same form as no. 3, on which the name of W. D. Burns was erased and that of R. C. Reed was written in place thereof. This ballot must be counted as a vote for Reed for trustee for the long term, and as a vote for Peck for the short term.

All the ballots actually cast at this election have been submitted by the respondents on this appeal and a recanvass is therefore possible. Applying the holdings heretofore made such ballots should have been counted as follows: Total votes cast 53. Trustees for long term, John G. More, 53; William F. White, 33; W. D. Burns, 52; E. W. Harris, 14; R. C. Reed, 1. Trustee for short term, William M. Peck, 27; R. C. Reed, 26. It thus appears that John G. More, W. D. Burns and William F. White were elected trustees for the full term of three years, and that W. M. Peck was elected trustee for the unexpired term, and I so decide.

The appeal herein is sustained.

It is hereby ordered, That so much of the proceedings of the annual election of union free school district no. 1, town of Walton, county of Delaware, held August 5, 1908, as declared the vote for the office of trustee in such district, to fill the vacancy caused by the resignation of J. A. Holley, to be a tie, is hereby set aside.

It is hereby further ordered, That William M. Peck who is hereby declared to have been elected at such election to fill such vacancy, on and after the filing of this decision as hereinafter directed, shall be a member of the board of education of such district for a term to expire at the time of the annual election in 1909, and that he shall perform the duties and have the powers imposed or conferred by law upon the members of such board.

5299

In the matter of the appeal of Alva J. Sibbett from the action of a meeting of school district no. 13, towns of Manchester and Palmyra.

An election will be set aside when it is shown that all who desired to vote were not accorded that privilege.

Decided January 2, 1907

S. R. & B. C. Williams, attorneys for appellant
Durfee & Lines, attorneys for respondents

Draper, *Commissioner*

The last annual meeting of this district convened August 7th, the date set by law, elected a trustee and other officers, transacted the usual business coming before an annual meeting and adjourned to a future date to consider the question of erecting a new school building. Five meetings were held between the date of the annual meeting and October 18, 1906. There can be no doubt but

that the meeting adjourned for a special purpose. No other business was considered at any of these meetings except that relating to the erection of a new building until the fifth meeting held on the 18th day of October. Mr Lines, one of the attorneys representing respondents, is clerk of the district and kept the record of the proceedings of these several meetings. His record of the proceedings of the meeting of August 21st states that the object of the meeting was as follows: "The purpose of the meeting being the consideration of the question of altering and repairing the schoolhouse or building a new one." Again in stating the object of the meeting held September 4th, Mr Lines said: "To consider the matter of building a new schoolhouse." It was generally understood that the meeting was to consider the question of erecting a new schoolhouse and nothing else. It is unnecessary, however, to determine whether an annual meeting adjourned for a special purpose may consider at the adjourned meeting any question which might come before the annual meeting in order to decide the real question involved in this appeal. At the fifth adjourned meeting it was voted to increase the number of trustees from one to three and the meeting elected two additional trustees. If this meeting had the right to elect such trustees it was necessary that the election should be held as the statutes require. Under the law the election of trustees must be by ballot and this means that each voter present must be allowed the privilege of voting for a trustee if he desires to do so. This Department has repeatedly held in appeal cases that a district meeting can not legally elect a trustee by directing the clerk or some other person to cast the vote of the meeting for a particular person. When an election has been held under such method of voting and an appeal therefrom has been brought to this Department such election has been set aside. It is claimed by appellant that in addition to the two nominees for whom the clerk cast a ballot two other persons, namely, Jordan Snook and William F. Garlock were nominated. Frank E. Blossom, a voter of the district, swears that he nominated Snook and Garlock. William Young, another voter of the district, swears that he seconded such nominations. Garlock swears that he heard his nomination and that of Snook made by Blossom and seconded by Young. Five other voters of the district swear that such nominations were made and seconded and that neither of such nominees declined. The pleadings of respondents contain several affidavits including that of the chairman of the meeting to the effect that they did not hear the nomination of Garlock. The chairman of the meeting also swears that at such time there was considerable talking in a low voice in the room. They admit Snook was nominated but claim he declined. Appellant claims that Snook declined when nominated for chairman of the meeting but he did not decline the nomination for trustee.

Respondents admit that after the clerk had cast a vote for the trustees the question of other nominations was raised and that it was claimed such nominations had not been seconded. It is not necessary that nominations shall be seconded. A voter may vote for any person he desires in an election of trustees

even if such person has not been nominated. It is not necessary that all persons present at a meeting shall vote. They must, however, be given the opportunity to vote. Where it is apparent that there is no contest at an election it is unnecessary for all to vote. However, in such case even, the polls should be opened and one or more votes cast. The chairman might then ask if there are others who desire to vote and must give them ample opportunity to do so. He should also announce that if there are no others desiring to vote the polls will be closed. This action should be taken deliberately to the end that any person desiring to vote may do so. The polls may then be closed. All the requirements of subdivision 4, section 14, title 7 should be strictly followed. Elections which are not held in accordance with the statutes can not be upheld.

It appears from respondents' pleadings that the question of directing the clerk to cast the vote of the district for trustee was not voted upon. A motion to that effect was made but was not put by the chairman. It appears that the chairman directed the clerk to cast the vote. He announced that if there was objection a vote was necessary, but only waited 20 seconds for objection. The whole election appears to have taken place in about one minute and thereafter appellant inquired about the votes for the other nominees. Under all the circumstances it must be held that the election in question was illegal.

The appeal herein is sustained.

It is ordered, That the action of a special school meeting of school district no. 13 of the towns of Manchester and Palmyra, held on the 18th day of October 1906, in electing Joseph Blossom and S. M. Short trustees of said district be and the same is hereby vacated.

3822

In the matter of the appeal of Charles P. Hills, Garit Van Vranken and others v. school district no. 7, of the town of Watervliet, county of Albany.

Proceedings of an annual school meeting set aside and new election ordered where it appeared that a large number of voters present thereat had no opportunity to vote upon the question of the election of a trustee.

Decided November 8, 1889

O'Brien & Addington, attorneys for appellants
John H. Gleason, attorney for respondents

Draper, *Superintendent*

The appellants allege that at the annual school meeting in the above named district, the chairman of the meeting arbitrarily declared one Jeremiah Sicker elected trustee for the ensuing year, without affording the voters present an opportunity to express their wishes in the matter. They say Sicker was first nominated and that Aaron Pease was also nominated, and that the chairman

disregarded the last nomination, put the affirmative of the question on the election of Sicker, and without putting the negative, or affording the opponents of Sicker an apportunity to vote against him, declared him elected. The chairman and others deny this and say that both sides of the question, on the election of Sicker, were put to the assemblage, and that no one voted against him. It is alleged on one side, and denied on the other, that the proceedings were very disorderly. It is difficult to determine all the facts in the matter, so opposed are the statements of the parties. But it is evident from these conflicting statements, that there were two distinct parties present at the school meeting, each with a candidate for the office of trustee, and it is scarcely conceivable that the members of one of these parties would have suffered their opponent to be elected without casting a vote against him, if the opportunity had been afforded them. On the side of the appellants, 21 men swear that they were present at the meeting, intending to vote against Sicker, and were prevented from doing so by the arbitrary course of the chairman. They swear also that not more than 14 persons were present in his favor. The respondents fail to controvert this material and, I think, controlling fact.

In view of this, it seems to me that there should be a new election ordered, that the respective parties may at least have an opportunity for demonstrating which has a majority of adherents.

The appeal is sustained. The alleged election of Jeremiah Sicker, as trustee, is declared void, and the district clerk is directed to give legal notice of a special meeting for the purpose of electing a trustee, to be held not less than ten nor more than twenty days from the date hereof.

3814

In the matter of the appeal of Fred G. Batty v. Michael Moran, trustee of school district no. 2, of the town of Easton, county of Washington.

The arbitrary course of the chairman of a district meeting in declaring himself elected trustee will not be sustained.

Decided September 29, 1889

B. E. Center, attorney for appellant

L. S. Pratt, attorney for respondent

Draper, *Superintendent*

At the annual meeting held in the above-named district on the 6th day of August 1889, Michael Moran was made chairman of the meeting. The appellant alleges that, immediately after organization, a motion was made that the said Moran be elected trustee for the ensuing year, when the appellant moved as an amendment that the meeting proceed to ballot for trustee; that the chair refused to entertain the amendment, and proceeded to take a vote on the original motion;

that three or four voted in the affirmative and some twenty in the negative, but that the chairman declared the motion adopted and himself elected as trustee.

The respondent answers and denies these allegations. He says that there was no motion made to elect a trustee by ballot until after the motion that he be elected trustee had been adopted.

The appellant alleges that there were but twenty-five persons present at the meeting. This is not denied by the respondent. Twenty-two persons swear that they were present and sustain the state of facts as alleged by the appellant. Six persons swear to the facts as set forth by the respondent.

The preponderance of proof, therefore, is with the appellant. The fact that the chairman of the meeting was himself a candidate for trustee should at least have caused him to have desired that the manner of voting should be in accord with the wishes of his opponents.

It seems that the meeting was characterized by much disorder, and it is alleged that forcible possession of the meeting was taken by the opponents of Moran, who selected another chairman and proceeded to hold another election for trustee, and to elect other officers. In view of all the circumstances, I do not feel justified in upholding this last-mentioned meeting.

The appeal is sustained, the alleged election of Moran declared to be null and void, and the clerk of the district is directed to give public notice of a time and place for a special meeting of the district to transact the business of the annual meeting.

3656

In the matter of the appeal of John B. Aikens v. school district no. 9, town of Butler, county of Wayne.

Unless it can be shown that persons alleged to be illegal voters were such, and that their votes might have changed the result, the action of a district meeting at which they voted will not be disturbed.

Want of mental capacity to do ordinary business held not to disqualify a voter at a school meeting.

Decided December 10, 1887

Draper, *Superintendent*

At the last annual meeting in school district no. 9, town of Butler, county of Wayne, it was agreed to elect a trustee by ballot. Upon the first ballot the result was a tie, and the meeting proceeded to another ballot which resulted in a majority of one for Elias H. Cady. Upon this ballot two persons, namely, William Gould and Charles Cornell, upon offering to vote were challenged, and they each took the oath and deposited their ballots. The appellant insists that these persons were not qualified electors of the district at the time of the meeting, and that they had not mental capacity to transact ordinary business.

The appeal can not be sustained. It is not shown that the two persons whose votes are objected to voted for the prevailing side. It is claimed that they were not qualified electors of the district, but I am inclined to think that

the proof submitted by the respondent establishes their right to vote, on the ground that they rent real estate liable to taxation, and reside in the district, and were of the statutory age. There is nothing in the claim that they had not sufficient mental capacity to transact ordinary business. Unfortunately that is no disqualification, if it were true, but whether it was or not it is not important to consider.

3652

In the matter of the appeal of Charles Schafer, a resident of school district no. 3, town of Clarence, Erie county, v. the proceedings of the annual school meeting, held in said district, August 30, 1887.

An election in a school district will not be overthrown because alleged legal voters did not vote or offer to vote.

Any voter may freely challenge the right of another offering to vote.

Decided December 8, 1887

Draper, *Superintendent*

This appeal is taken by Charles Schafer, a resident of school district no. 3, town of Clarence, Erie county, from the proceedings of the annual school meeting in the election of a trustee, and from the ruling of the chairman of said meeting in excluding from voting the appellant, Fremont Danser and Henry Reigle, all of whom the appellant alleges were legal voters. It is claimed that the appellant and Danser were tenants of real estate and the parents of children of school age, who had attended upon the school the year previous, and that Henry Reigle was a person liable to assessment for personal property.

Had these men been permitted to vote, the result of the election would have been a tie vote between the opposing candidates. The respondent answers that these men did not offer to vote; that the chairman simply stated that all who did not pay taxes would be required to swear in their votes, intending to imply that he would challenge all such persons.

There was an irregularity at the election, which was held by ballot. One person voted whose right to do so was questioned and he consented that his ballot might be withdrawn, as he would not swear it in. This would vitiate the election if a single ballot would change the result. In this case it would not. The appellant and Messrs Danser and Reigle have not placed themselves in a position to criticise the election. If they claim the right to vote, they should have offered to vote, and if entitled to do so and challenged, they should have taken the prescribed oath. Any elector may challenge the right of another to vote. Indeed, only in this way may any illegal votes be kept from the ballot box. The law expressly provides the course which must be pursued by electors whose right to vote is disputed, and that course must be followed. Elections can not be overturned on the ground that persons had the right to vote and did not exercise, nor seriously attempt to exercise it. The appeal must be dismissed.

3820

In the matter of the appeal of Sylvester Espenscheid and George Robinson v. school district no. 8, of the town of Sodus, in the county of Wayne.

Where the proceedings of a district meeting are characterized by such disorder and confusion as to make it apparent that no fair expression of the opinions or preferences of the legal voters resulted therefrom, they will not be sustained, but a special meeting will be ordered.

Decided October 23, 1889

Draper, *Superintendent*

This appeal is brought for the purpose of determining who was elected trustee, or the result otherwise of the annual school meeting held in the above-named district. The papers are voluminous. I have undertaken to read them with care. After such reading I am unable to determine which of the two contending parties is in the right. I am more inclined to believe that both sides are somewhat at fault for a most unfortunate controversy which exists in the district. It is claimed on one side that the annual meeting was organized before the legal time arrived, and by but seven persons who elected a trustee and transacted some other business, and that when some thirty or forty persons arrived at about the legal time and undertook to participate in the action of the meeting and made motions concerning district business, the chairman refused to recognize them, and that he finally declared the meeting adjourned without motion. On the other side this is all denied, and it is claimed that the meeting was not organized until the proper time and was conducted fairly. Numerous witnesses swear squarely against each other. But one thing seems clear to me, and that is that there was much confusion and disorder at the meeting — so much so as to make it impossible for the Department to sustain the proceedings which are claimed to have been taken either by one side or the other.

I have therefore concluded to hold that no district meeting was regularly held, and that a special meeting should be called for the purpose of transacting the business which devolved upon the annual meeting.

It is therefore ordered that the district clerk of said district no. 8, of the town of Sodus and county of Wayne, call a special meeting of the district for the purpose of transacting such business, not less than ten nor more than twenty days from the date hereof.

3752

In the matter of the appeal of Henry Fink v. Patrick Hopkins.

The official minutes of a district meeting show the election of a certain person as trustee, and also that the chairman so declared at the time of the election, although the action of the chairman is disputed. *Held,* that the official record will be accepted as true, unless impeached by clear evidence.

Illegal voting at school meetings is to be prevented by the exercise of the right of challenge and the exaction of the voter's oath as to his qualifications, and subsequent punishment for false swearing, if the person challenged is guilty of the same.

A person who merely occupies land for which he pays no rent, and which he does not own or hire, and upon which he is an occupant by mere sufferance; *held,* such occupant not to be qualified as a voter.

Decided January 17, 1889

Davies & Johnson, attorneys for appellant
James Gallagher, attorney for respondent

Draper, *Superintendent*

This appeal is brought for the purpose of determining who was elected trustee at the annual school meeting held in August 1888, in school district no. 10, of the towns of Camden, Oneida county, and Constantia, Oswego county. It seems that, soon after the organization of the district meeting, an informal vote was taken for the office of trustee. It was then ordered that a formal ballot should be taken, which was done. On this ballot 17 votes were cast, of which 8 were for Patrick Hopkins, 7 for Henry Fink, 1 for John Ford and 1 a blank. A second formal ballot was taken, of which 10 were for Henry Fink, the appellant, and 7 for Patrick Hopkins.

The official minutes of the meeting show the above facts, and that the chairman declared Fink elected. There is some controversy between the parties as to whether there was an official declaration of the result by the chair, and the chairman has made affidavits on both sides. I do not consider the question very material, but feel justified, under all the circumstances, in accepting the statement of the official record as the true one. Since the meeting, both Fink and Hopkins have claimed to have been elected. Mr Hopkins claims that Fink was not a qualified elector at the time the district meeting was held, and therefore not eligible to a district office; he also claims that one Henry G. Ford, who voted for Mr Fink, was not a qualified elector. On the other hand, Mr Fink, the appellant, claims that Charles Miller, Daniel Hopkins, George A. Cook and Vreeland Prest, who voted for the respondent, were not entitled to vote. No evidence is offered by the appellant to disprove the qualifications of either of the four persons named, except as to Vreeland Prest.

The case must, therefore, turn upon the right of the appellant and Henry Ford to vote on one side, and of Vreeland Prest on the other. The appellant swears that he hires real estate in said district liable to taxation, and did so during the year prior to the annual meeting referred to. The fact seems to be that he is living on a farm owned by his wife, but this is not inconsistent with his claim. Moreover, it seems that his right to vote was challenged at the annual meeting, and that he insisted upon it and voted. The law does not contemplate the determination of a disputed question of that character in a collateral proceeding. Its method of determining such a matter, where the right is insisted upon, is to confer the right of challenge, exact the oath of the voter, and punish him for false swearing.

I find no sufficient ground to sustain the claim that the appellant was not a legal voter and not eligible to the trusteeship. In the case of Henry G. Ford, whose right to vote is disputed, he swears that he was born and brought up in the town of Camden, and has resided in said school district no. 10 for the past six years, and has during that time held the office of trustee of said district for two years and the office of clerk for one year, and has voted at every school meeting held in said district during said time; that he has owned real estate, been assessed and paid taxes thereon, and has sent children to school in said district during all of said time, and that he is a legal and qualified voter. It is claimed by the respondent that Mr Ford lived in Canada for some time and that he became a naturalized citizen under the government of Great Britain. There is no proof of that fact offered, and in the absence of it, and in the face of his sworn statement showing his qualifications, and particularly in the face of the fact that for six years he has exercised the right of suffrage in the district school meetings, and during three years has held office in the district, the claim of the respondent against him can not be sustained.

On the other hand, it is claimed by the appellant that Vreeland Prest, who voted for the respondent, is not a legal voter. Prest claims the right to vote, and founds his right upon the fact that he rents real property. The facts regarding such rental do not very clearly appear. Mr Spencer J. Ford swears that he owns the land which Prest claims to rent. He admits that Prest lives upon said land, but swears that he pays no rent therefor, and that he is only there at sufferance. Prest, on the other hand, does not even say that he hires the same; he swears that he "occupies" it, and pays for the use by rendering services to the owner, in taking care of his stock, etc.

By the admission, therefore, of Prest himself, his occupancy at the most, is only at sufferance. He has no title in the land. The owner would not be obliged to serve notice of dispossession upon him. He could be unceremoniously ousted at any moment. It may well be doubted if this is such an owning or hiring as would confer upon him the right of suffrage at a school meeting under the language of the statute.

I therefore come to the conclusion that, of the votes cast upon the first formal ballot, there were seven legal votes cast for Mr Hopkins, seven legal votes for Mr Fink, and one for John Ford. It clearly required a majority to elect. Even if all the votes cast for the respondent had been legally cast by persons entitled to vote, he would not have been elected upon that ballot, for he had no majority of all the votes cast. This would be so considering the blank ballot as of no account. Upon the second formal ballot Mr Fink had ten legal votes and Mr Hopkins but six.

From these considerations it naturally follows that the appeal must be sustained and the appellant declared to be entitled to exercise the functions of the office of trustee in the district named.

3708

In the matter of the appeal of Hambly T. Orchard v. Ransom Dodge and C. P. Vail, trustees of district no. 1, town of Beekman, Dutchess county.

The election of a person as trustee by a district meeting to fill a vacancy, *held*, that the person so chosen would be entitled to hold the office only for the unexpired term, and that the district meeting could elect for no shorter period than the unexpired term.

Decided September 22, 1888

Draper, *Superintendent*

This appeal is brought to determine the title of the appellant to the office of trustee in the district named. The respondents are trustees and refuse to acknowledge the right of the appellant to act with them in that capacity. The appellant sets forth the facts to be as follows:

At the annual meeting held in the district in 1886, Charles A. Stephens was elected a trustee for the full term of three years. He moved from the district in the spring of 1887, and the supervisor of the town appointed P. A. Skidmore to fill the vacancy thus created. At the annual meeting in 1887 Skidmore was duly elected to fill the vacancy. The appellant claims that the district meeting of 1887 elected Mr Skidmore for the term of *one year*. The minutes of the meeting seem to sustain this claim, but there seems to have been some controversy in the district as to whether the election of Skidmore in 1887 was for one year or for the balance of the term to which Stephens was elected in 1886. The district meeting in 1888 is shown to have considered the subject, and the meeting decided that Skidmore had been elected in 1887 but for one year, and thereupon it proceeded to elect the appellant for another year. The respondents interpose no answer, but have written a letter in which they admit the correctness of the statements of the appellant and ask for an immediate decision.

I am of the opinion that the appellant has no lawful claim to the office. When the supervisor appointed Mr Skidmore trustee in place of Mr Stephens, who had moved away from the district, that appointment was good until the next annual school meeting, but the school meeting in 1887 had the power to elect a trustee to fill the vacancy for the unexpired term. There were two years of the term yet to run and they had no power to elect a trustee for that place for *one year*. There is apparently some conflict of opinion as to whether there was any intent to elect for one year or for the balance of the term. In my judgment, it is not material. If the meeting elected at all, it must have been for the balance of the term. It is undisputed that there was an election and Mr Skidmore was chosen. That being so, there was no vacancy to fill in the year 1888, and the election of the appellant at the school meeting of 1888 is, therefore, void and of no effect.

The appeal is, therefore, dismissed.

3568

In the matter of the appeal of Louis Wolf v. John Schaible, jr, and others, inspectors of election of school district no. 2, towns of Middletown and Southfield, county of Richmond.

When a ticket voted at an election for trustee contained a name printed and another name written, the presumption is that the voter intended to vote for the latter, and neglected to erase the name of the former.

Where the ballots cast for trustee run two short of the poll list, and two trustee ballots are found deposited in another box at the same election, they should be counted for the person whose name appears thereon.

Decided May 3, 1887

Max Huebner, Esq., attorney for appellant

Draper, *Superintendent*

This appeal is taken by Louis Wolf from the action of the inspectors of election of school district no. 2, towns of Middletown and Southfield, in the county of Richmond, in declaring the result of an election for trustee held in said district August 31, 1886.

The allegations of the appellant are, that at said election John Schaible, jr, Max C. Huebner and Squire Force acted as inspectors of election; that the appellant, one William Nulty and one Nelius were voted for for trustee; that the number of votes cast was 187; that the votes were canvassed as follows:

For Wolf, the appellant	92
For Nulty	84
For Nelius	8

That two ballots bearing the name of Louis Wolf for trustee were found in the box in which ballots for clerk were deposited, and two ballots for clerk found in the trustee's box; that one ballot for trustee contained the name of Louis Wolf printed thereon and the name of William Nulty written thereon; that if these three ballots had been counted, the vote would have exactly corresponded with the poll list kept at such election; that the ballot containing both the names of Nulty and Wolf was counted for Nulty, and the two ballots for Louis Wolf were rejected, and at no time included in the count. The chairman announced that no election had been held.

The respondent, Max C. Huebner, for answer to the appeal denies that the votes as counted exceeded the poll list, and while admitting that there were two trustee ballots found in the clerk's box, denies that they were opened or that anyone saw the contents of the said ballots. He admits that a ballot containing both the names of Wolf and Nulty was counted for Nulty. He alleges that all parties interested have not been made parties, and further alleges that at least six illegal votes were cast for Wolf, and asks that the matter be referred to the school commissioner of Richmond county to enable all parties in interest to give testimony therein.

On the 27th day of February 1887, an order was made, dated that day, that Commissioner Theodore Frean should give notice to both parties, appellant and respondent, of a time and place where the testimony of witnesses for the respective parties would be taken before him pursuant to law.

On March 8, 1887, at 7 p. m., the commissioner was attended by counsel for the appellant and by Max C. Huebner, one of the respondents, and the attorney who appeared herein for respondents, and by Squire Force, another respondent herein, and announced to them that he would attend at the Edgewater village hall on the 12th day of March 1887, at 7 o'clock p. m., to proceed to take evidence herein pursuant to said order. Both attorneys agreed to meet at the time and place so fixed. That at the date, place and time so named, the commissioner attended and the appellant appeared with his counsel and witnesses, but neither respondents nor counsel appeared. After waiting over three-quarters of an hour the matter was, on motion of appellant's counsel, adjourned until March 18, 1887, at 7 p. m. On the 18th day of March 1887, at 7 p. m., both appellant's and respondents' counsel appeared, and respondents' counsel applied for an adjournment, which was denied, and respondents' counsel retired. The commissioner states that "the motion was denied because appellant had six witnesses present, five of whom had been subpoenaed."

The evidence of the appellant was thereupon proceeded with.

At the close of appellant's evidence, the appellant's counsel asked that a notice be served upon the respondents, Max C. Huebner and Squire Force, to attend at the next session, to be held on Saturday, March 28, 1887, at 9 a. m., which was done.

After waiting some time on the adjourned day, one of the respondents, Squire Force, appeared, but stated that he had no counsel, did not want any and did not wish to be examined and had no witnesses he wished examined.

Mr Huebner, although in the building and personally notified, did not appear before the commissioner.

Thomas W. Fitzgerald, an attorney, appeared, and stated that he did so by direction of Mr Huebner, and asked for an adjournment. After waiting two hours, the commissioner declared the hearing closed, and has duly returned the evidence taken to me.

From the testimony taken, I find the facts to be as follows:

The poll list kept at the annual election showed that 187 votes were cast for trustee. In canvassing the votes deposited in the trustee's box, it was found that the appellant received 92 votes, Nulty 84 and Nelius 8. There was one defective ballot, which was probably intended to be cast for Nulty, and I so find. This would increase his vote to 85.

There were two ballots for trustee in the clerk's box, placed there by mistake, which were cast for Louis Wolf, and as the counting of these two ballots would make the vote cast correspond exactly with the poll list, they should have been counted for him. This would have increased his vote to 94, and the result would

then appear as follows: Wolf, 94; Nulty, 85; Nelius, 8; giving Louis Wolf a clear majority of 1.

I therefore sustain the appeal and hold that Louis Wolf was duly elected trustee of school district no. 2, towns of Middletown and Southfield, county of Richmond, at the annual meeting held in 1886.

3533

In the matter of the appeal of O. B. Kelsey and others from the proceedings of the annual school meeting held August 31, 1886, in school district no. 2, towns of Little Valley and Salamanca, Cattaraugus county.

An election of trustees set aside where it appeared that but twenty-two persons voted. Yet the ballot showed twelve for one candidate and eleven for another, one illegal ballot having been deposited, and it is not made to appear for whom.

Decided January 7, 1887

Coxe & Whipple, attorneys for appellants

Draper, *Superintendent*

This is an appeal by residents and voters of school district no. 2, towns of Little Valley and Salamanca, Cattaraugus county, N. Y., from the action of the annual school meeting held August 31, 1886, in said district, at which an election for trustee was held and James Whalen was declared elected.

For the appellants, it is alleged that but 22 persons voted, and yet the result showed 23 ballots cast, of which one Charles Easton was credited with 11 and James Whalen 12. The names of 11 persons, alleged to be qualified voters, are signed to the appeal. The respondents allege that 23 persons were present and that the vote as announced was correct, giving among others as having been present at the meeting one Alexander Stein; that said Whalen was declared elected trustee by the chairman; that upon information and belief two of the persons, Messrs Jones and Watkins, who signed the appeal and are alleged to have voted for Easton, were not qualified voters at the meeting, and that one Chamberlain, whose signature is attached to appellants' papers, voted for Whalen, repeatedly promised to do so, and has admitted he did.

The appellants reply and produce affidavits of Messrs Jones and Watkins, which prove that they are qualified voters, and also several affidavits of persons who swear that Chamberlain stated to each of them that he voted for Easton at the meeting. Also, several affidavits that Alexander Stein did not vote at the meeting, and that he admitted he did not vote.

From the proofs presented, it would appear that only 22 voted at the annual meeting, and the result which showed 23 ballots, proved that one illegal ballot may have been cast for either candidate. I can not determine for which candidate it was cast.

I have reached the conclusion that the appeal must be sustained and the election of James Whalen set aside and a new election held.

I therefore direct the district clerk to give notice within fifteen days from the date of this decision of a special meeting to elect a trustee.

3937

In the matter of the appeal of M. H. Murray v. William T. Wilson, as trustee of school district no. 4, town of Newfane, county of Niagara.

At an election for trustee five persons voted, and the right of each to vote was promptly challenged. The presiding officer was requested to administer the prescribed oath, but declined to do so. The alleged illegal votes were received.

These votes determined the election. *Held,* that the action of the presiding officer was illegal and reprehensible, and a special election ordered.

Decided December 3, 1890

Draper, *Superintendent*

Appeal by an elector of school district no. 4, Newfane, Niagara county, from the action of the above-named William T. Wilson, in assuming to be trustee of said district, and from the proceedings of a special meeting held in said district August 12, 1890, and the action of the chairman of said meeting.

The appellant alleges that a ballot for trustee at said meeting resulted as follows: For William T. Wilson, 14; for appellant, 9; blank, 1; that five persons voted for Wilson for trustee who were not qualified electors; that each was promptly challenged by appellant, and a request made that the prescribed oath be administered. This the chairman declined to do, and the illegal votes were received.

The chair made no declaration of the result of the ballot. Mr Wilson, however, has assumed the office. Deducting the five illegal votes cast for Mr Wilson from the total vote he lacked a majority, and consequently there was no choice or election. The action of the presiding officer in refusing to recognize legitimate challenges, was illegal and reprehensible.

The appeal is sustained. The district clerk is hereby directed to forthwith give notice of a special meeting to fill the vacancy in the office of trustee, as declared by this decision.

4395

In the matter of the appeal of Thomas H. Kavanaugh from proceedings of annual school meeting held on August 6, 1895, in district no. 10, town of Livonia, Livingston county, in the election of a trustee.

The method of school meetings in the election of district officers when but one candidate for an office is presented of authorizing the clerk or some other person to cast a ballot for such candidate is not approved and is not deemed to be an election of such officer

by ballot as required by the provisions of the school law. The polls should be open for the reception of ballots for each of the officers to be elected and the vote of every qualified voter who presents his or her vote should be received. It is optional with any voter whether he or she will vote, and when but one candidate is presented for an office and it is apparent that all the qualified voters present desire his or her election and the poll is open and balloting has commenced, after all have voted who wish, the ballot may be closed by unanimous vote of those present and the vote canvassed and the vote announced.

Decided October 17, 1895

Skinner, *Superintendent*

The appeal in the above-entitled matter appears to be intended as an appeal from the election of one P. G. Frutchey, as trustee of school district no. 10, town of Livonia, Livingston county, at the annual meeting of the district held on August 6, 1895.

The appellant, as stated in his appeal, appeals from the proceedings and decision of the chairman of said annual meeting, one George L. McDonald, alleging that said chairman's name does not appear on the assessment roll, and said chairman did not send children to school in said district; that at said meeting, under the head of "nominations in order for trustee" a Mr Frutchey was nominated for trustee, and a motion was then made and seconded that the secretary be empowered to cast one ballot for Mr Frutchey; that the appellant herein moved to amend said motion that we proceed to ballot for trustee, and the amendment was declared lost by the chairman; that the chairman did not put the original motion but ordered the secretary to cast one ballot for said Frutchey against the remonstrance of the appellant and other legal voters present at said meeting. The contention of the appellant, as stated by him in his appeal is, that the chairman not being a legal voter, disqualified him as chairman, and his ruling made a material difference in the conduct of said meeting under the statute; that under the school law, all district officers shall be elected by ballot, and the chairman shall declare to the meeting the result of each ballot as announced by the inspectors, etc.; that the defeat of the amendment of the appellant, asking that the meeting proceed to ballot for trustee, did not amount to the election of a trustee, as it simply asked that the meeting proceed to elect officers as required by the statute, and in the event of any officer being elected in any other manner, said election must necessarily be void.

No copy of the proceedings of said annual meeting accompanied the appeal nor is there any affidavit in support of said appeal annexed thereto or presented therewith.

One Wilbor C. Turner, claiming to be the clerk of said school district has filed an answer to said appeal, which answer consists of a verified copy of the proceedings of said annual meeting, and annexed is an affidavit, signed and sworn to by seven persons who allege they are legal voters of said district, and attended said annual meeting, and that said minutes of said meeting are correct to the best of their memory and belief.

By said copy of the minutes of the proceedings of said annual meeting it appears that said meeting was called to order by the clerk of the district for the

preceding school year, and that L. M. Coe was nominated as chairman, but he declining to act, one George L. McDonald was nominated and elected chairman; that W. C. Turner was elected district clerk and L. H. Chamberlin collector; that a motion was made and seconded that the clerk cast one ballot for P. G. Frutchey for trustee, which motion was amended so as to read "that the meeting proceed to ballot for trustee" and such amendment was lost; that the original motion, that the clerk cast one ballot for P. G. Frutchey for trustee, was unanimously carried, and the said clerk cast a ballot for said Frutchey for trustee who was declared elected by the chairman, and thereupon the meeting adjourned.

The burden is upon the appellant to establish his appeal by a preponderance of proof.

The appellant has failed to sustain his allegation in the appeal that the chairman of said meeting was not a qualified voter of the district. It was incumbent upon the appellant herein, in charging that said chairman was not a qualified voter in said district to show by evidence the lack of qualifications on the part of said chairman in such terms as necessarily to exclude every presumption that he could be qualified under either of the heads stated in section 11, article 1, title 7, of the Consolidated School Law of 1894. The appellant alleges in his appeal that the "chairman's name does not appear on the assessment roll and said chairman does not send children to school in this district." A person whose name does not appear on the assessment roll and does not send children to school in his district may notwithstanding be a qualified voter in the district under the provisions of said section 11, above cited. Under the provisions of the Consolidated School Act of 1864, chapter 555, of the Laws of 1864, prior to April 29, 1893, no method was prescribed as to the election of school district officers, except in districts having more than three hundred children. By chapter 500, of the Laws of 1893, which was approved by the Governor on April 29, 1893, and became operative on that date, subdivision 4, of section 16, of title 7, of said chapter 555, of the Laws of 1864 was amended requiring that such district officers shall be elected by ballot. Section 14, article 1, title 7, of the Consolidated School Law of 1894, chapter 556 of the Laws of 1894, which took effect on June 30, 1894, enacts that all such district officers shall be elected by ballot and prescribes the manner in which such elections shall be conducted.

It does not appear that at said annual school meeting in said district that a suitable ballot box was provided by the trustee, nor that two inspectors of election were appointed in the manner determined by the meeting, nor that a poll list was kept containing the name of every person whose vote was received was kept by the district clerk or the clerk for the time of the meeting, nor that written or printed or partly written and partly printed ballots containing the name of the persons voted for for the respective offices of trustee, district clerk and collector were cast by the qualified voters of the district present at such meeting and desiring to vote, nor that any such vote was canvassed by such inspectors of election and the result of the ballot announced to the chairman of the meeting, and by said chairman to the meeting. The copy of the proceedings of said meeting, as set out in the answer to the appeal, fails to state that two

inspectors of election were appointed or that a poll list was kept. It is stated that W. C. Turner was elected clerk and L. H. Chamberlin was elected collector, but it does not state how either of them was elected. The statement therein relative to the election of a trustee is as follows: "A motion was made and seconded 'that the clerk cast one ballot for P. G. Frutchey for trustee for one year,' which motion was amended so as to read, 'that the meeting proceed to ballot for trustee.' The amendment was lost. The original motion 'that the clerk cast one ballot for P. G. Frutchey for trustee for one year' was then unanimously carried, whereupon the clerk cast a ballot for P. G. Frutchey for trustee, who was declared elected by the chairman."

The appellant alleges that under the head "nominations in order for trustee" said Frutchey was nominated by one of the voters present for trustee, and then a motion was made and seconded that the secretary be empowered to cast one ballot for said Frutchey, whereupon the appellant made the following amendment to said motion, namely, "that we proceed to ballot for trustee;" that the chairman declared the motion lost; that neither at that time, nor at any other time during the meeting did the chairman put the original motion to vote, but ordered the secretary to cast one ballot for Mr Frutchey, notwithstanding an exception was then taken by the appellant and by other legal voters present. It will be seen that the only conflict between the appellant and respondent as to what actually occurred relative to the election of trustee, is as to whether or not the chairman, after announcing the defeat of the amendment offered by the appellant, put to vote the original motion. The respondent admits that the election of a trustee was not had and conducted as required by section 14, of article 1, title 7, of the Consolidated School Law of 1894, above cited; he admits that a motion was made and entertained by the chairman that the clerk cast one ballot for said Frutchey for trustee, and that the appellant offered an amendment, that the meeting proceed to ballot for trustee. Under the provisions of the school law every qualified voter present at any school district meeting at which an election of a district officer or officers is had, has the right to vote for the person or persons he desires to fill such office or offices, and neither the chairman of the meeting nor any voter or voters present has or have the legal power, directly or indirectly, to deprive him or her of such right.

The method of school meetings in the election of district officers, when but one candidate for an office is presented, of authorizing the clerk or some other person, to cast a ballot for such candidate, is not approved, and is not deemed to be an election of such officer by ballot as required by the provisions of the school law. In a few instances in which it has been indisputably established that all the voters present desired the election of a person nominated for a district office, and no voter asked that a ballot be taken I have sustained such election; but I am satisfied that even when there is no question but that the voters present at a meeting are unanimously in favor of a candidate for a district office, that to comply with the provisions of section 14, of article 1, title 7, of the Consolidated School Law of 1894, the polls should be open for the reception of ballots for said office, and the vote of every qualified voter who presented his or her vote

should be received. It is optional with the qualified voter whether he will vote. and when but one candidate is presented for an office and it is apparent that all the qualified voters desire his or her election, and the poll is open and balloting has commenced, and all have voted who wish, by unanimous consent of the voters present, the ballot may be closed, and the votes canvassed and the result announced.

From the papers presented in the appeal herein I am satisfied that it was not the unanimous wish of the qualified voters present at said annual meeting in said district that Frutchey be elected trustee of said district, and that the appellant herein by his said motion, or amendment to a motion, to the effect that the meeting proceed to ballot for trustee, was a request upon his part that a ballot be taken for trustee under the provisions of the school law, and such request should have been complied with.

I find and decide that said P. G. Frutchey was not legally elected as trustee of said district at said annual meeting, nor was said Wilbor C. Turner legally elected district clerk of said district, nor was L. H. Chamberlin legally elected collector of said district.

The appeal herein is sustained.

It is ordered, That all proceedings had and taken at said annual school meeting, held on August 6, 1895, in said district no. 10, town of Livonia, Livingston county, relating to the election of a trustee, district clerk and collector of said district, and of each of them, be, and the same are, and each of them is, vacated and set aside.

It is further ordered, That the trustee of said district in office at the time said annual school meeting in said district convened, be, and he hereby is, authorized and directed to call a special meeting of the inhabitants of said district qualified to vote at school meetings of said district for the purpose of electing a district clerk, a collector and a trustee of said district for the present school year.

4687

In the matter of the appeal of William Wendell and others from proceedings of annual school meeting held on August 2, 1898, in district 1, Greenfield, Saratoga county, and the decision of the chairman of the meeting that Dudley J. Wait was elected trustee.

At a school district meeting at which school district officers are elected it is the duty of the chairman of the meeting to declare to the meeting the result of each ballot as announced to him by the inspectors of election, and the person or persons having the majority of votes, respectively, for the several offices, shall be elected. Such chairman has no legal authority to decide who is elected as such officer or officers.

Decided October 17, 1898

S. M. Richards, attorney for respondents

Skinner, *Superintendent*

This is an appeal relative to the proceedings taken at the annual school meeting held August 2, 1898, in district 1, Greenfield, Saratoga county, and from the decision of the chairman of the meeting that Dudley J. Wait was elected trustee.

Dudley J. Wait and John B. Easton, the chairman of said meeting, have answered such appeal.

The appellants and respondents herein admit that at such annual school meeting, Calvin Hopkins and Dudley J. Wait were each nominated for the office of trustee of said district, and thereupon a ballot was taken for the election of a trustee; that such ballot resulted as follows: Whole number of votes cast, 31, of which Calvin Hopkins received 18 and Dudley J. Wait 13; that upon each of the 13 ballots cast for Wait were written "For trustee, D. J. Wait," and upon each of the 18 ballots cast for Hopkins was written "Calvin Hopkins" only, without the word "trustee" or the words "for trustee;" that after the result of the canvass of the ballots so cast was announced, the chairman of the meeting was asked to render a decision as to who was elected trustee, the said Wait and Hopkins each claiming to have been elected, and thereupon the said chairman decided and declared said Dudley J. Wait elected to the office of trustee of said district.

The respondent, Wait, contends that the ballots cast for Calvin Hopkins not having thereon the word "trustee" or the words "for trustee" were blanks and were not counted in favor of Hopkins, as they did not contain the name of the office for which they were cast, namely, trustee. This contention is not tenable.

A "ballot" is a written or printed paper that expresses a voter's choice. A "blank" is a paper containing no written or printed matter, intended for some special use, as an unwritten or unprinted paper to be cast as a ballot. In the ballot had for trustee there was not found in the ballot box any paper or papers containing no written or printed matter; but on the contrary, there were found 18 papers each containing the name of Calvin Hopkins. The respondent, Easton, alleges that as the school law, as contained in a circular of instruction issued by this Department, how to hold annual school meetings, a copy of which was handed to him at such meeting, requires that the ballots cast must contain the name of the office for which they were cast, he decided that Wait was elected trustee. It is clear that the respondent, Easton, did not correctly interpret such instructions.

It is true that on page 2 of said circular of instructions it is stated, under the heading "Election of school district officers" "the votes should be written or printed, or partly written and partly printed, and contain the names of the person voted for as well as the office, and be deposited in the ballot box"; but on page 8 of such circular, after stating the provisions of the school law relative to ballots for school officers, substantially the same as above quoted from page 2, it is further stated, namely, "The meeting may vote for persons for all the district offices on one ballot, or may vote for each officer separately. If the meeting decides to vote for each district officer separately, as for example, for trustee, a

ballot with the name of a person thereon, but without the designation 'for trustee' will be legal."

In decision 4271, made by State Superintendent Crooker, October 5, 1894, in the appeal of Charles Lamoreaux and others from proceedings of annual school meeting held in district 7, Schoharie, Schoharie county, on August 7, 1894, Superintendent Crooker said: "The ballot should be written or printed, or partly written and partly printed, containing the name of the person voted for and designating the office for which each is voted. This latter provision has especial reference to where all the district officers are elected upon one ballot. When each district officer is balloted for separately the ballot will be valid, having thereon only the name of the person voted for, as each voter has knowledge of the office for which the ballot is being taken and the ballot is for that office only." See page 237, etc. volume 1 of the report of the State Superintendent of Public Instruction for 1895.

At the annual school meeting held August 2, 1898, in district 1, Greenfield, Saratoga county, no ballot was taken for the election of all the officers of such district at one and the same time, and upon one ballot containing the name of a person for each office, and designating the office for which each was voted. A ballot was taken for the office of trustee only, and each voter present and voting at the meeting had knowledge that the ballot so taken was for the office of trustee only.

The chairman of a school meeting at which district officers are balloted for, has no legal authority to decide who is elected such officer or officers. Under the provisions of subdivision 4 of section 14, article 1, title 7 of the Consolidated School Law of 1894, it is enacted that after a canvass of the votes cast the inspectors of election shall announce the result of the ballot to the chairman; that the chairman shall declare to the meeting the result of each ballot as announced to him by the inspectors, and the persons having the majority of votes respectively, for the several offices, shall be elected. The chairman can only declare to the meeting the result of the ballot as announced to him by the inspectors of election; the school law determines and declares who are elected, namely, the person or persons having a majority of the votes.

I decide:

1 That in the ballot had at such annual school meeting for a trustee for the district, the 18 ballots found in the ballot box, containing on each the name of Calvin Hopkins, under the consolidated school law and the decisions of this Department, were valid ballots for said Hopkins as trustee of the district; that the inspectors of election in their canvass of the ballots cast for trustee should have counted said 18 ballots for Calvin Hopkins for trustee, and should have announced to the chairman of the meeting as the result of such canvass as follows: Whole number of votes cast for trustee, 31; of which Calvin Hopkins received 18 and Dudley J. Wait 13.

2 That at such annual school meeting, Calvin Hopkins having received, in a ballot had thereat for trustee, a majority of the votes cast, was duly and legally elected trustee of such district.

3 That the decision or declaration made by the chairman of such meeting that Dudley J. Wait was elected trustee of the district was without authority of law, and was void.

The appeal herein is sustained.

It is ordered, That the said decision or declaration made by John B. Easton, as chairman of the annual meeting held on August 2, 1898, in district 1, Greenfield, Saratoga county, after the ballot had thereat for trustee, and the announcement by the inspectors of election of the result of such ballot that Dudley J. Wait was elected trustee of said district be, and the same is hereby, vacated and set aside.

4302

In the matter of the appeal of John R. Welch and John F. Converse, trustees of school district no. 14, town of Ellisburgh, Jefferson county, from proceedings of annual school meeting held in district no. 14, town of Ellisburgh, Jefferson county.

Where at any school district meeting a district officer is elected by the color or form of an election although not strictly in accordance with the school law, such person becomes a *de facto* officer of the district and as such is authorized and required to perform the duties of his office until by an order of the Superintendent of Public Instruction such election is declared to be illegal and void. A person elected as trustee of a school district by color of an election and no appeal having been taken from his election, he will be deemed to have been duly elected for the term of time provided for in the school law. The action of a school district meeting, under the assumption that such election was invalid and thereupon electing a person to fill the vacancy assumed by the meeting to exist, without any order of the Superintendent declaring such election invalid, will be illegal and void.

Decided December 17, 1894

A. M. Leffingwell, attorney for appellants
H. B. Pierson, attorney for respondents

Crooker, *Superintendent*

This appeal is taken from the action of the annual school meeting, held on August 7, 1894, in school district no. 14, town of Ellisburgh, Jefferson county, in the election of a trustee of said district to fill a vacancy in place of one F. A. Wood; and from the election of one Mrs Mary E. Wood as such trustee to fill such vacancy.

The main ground upon which the appeal is taken, as alleged in the appeal, is that there was no vacancy in the office of trustee of said district to be filled by said district meeting, the said appellant, Welch, having been elected by color of an election, at the annual school meeting in said district held on August 22, 1894, as a trustee for the term of three years, and no appeal having been taken from such election, and the said Welch never having resigned or refused to serve or otherwise legally vacate said office.

From the proofs presented the following facts are established: At the commencement of the school year of 1893, to wit, the first Tuesday of August 1893, school district no. 14, town of Ellisburgh, Jefferson county, had the trustees, namely, the appellant, John R. Welch, whose term of office would expire on August 23, 1893, H. D. Laird, whose term of office would expire on the first Tuesday of August 1894, and J. F. Converse, whose term of office would expire on the first Tuesday of August 1895; that some time in August 1893, and prior to the time of the annual school meeting in said district, to wit, on the fourth Tuesday of August 1893, the appellant, John R. Welch, resigned to S. W. Maxson, then school commissioner of the commissioner district in which said school district was situate, said office of trustee then held by him, which resignation was duly accepted by said Maxson; that no special meeting of said school district was called or held for the purpose of supplying the vacancy created in the office of trustee by said resignation of said Welch; that on August 22, 1893, the annual school meeting in said district was held, and among other acts and proceedings had and taken thereat, a motion was made that the clerk be instructed to cast one ballot for John R. Welch, the appellant, for trustee for three years, and the chairman put the motion to a viva voce vote, and not being able to decide, he called for a rising vote, when 16 persons present voted for the motion and 14 against; whereupon the chairman declared the motion adopted, and thereupon the clerk of the meeting cast one ballot for said Welch as trustee of said district for three years, and said Welch was declared elected as such trustee; that no appeal has ever been taken from the said action and proceedings of said annual school meeting to the Superintendent of Public Instruction, nor any submission to him of the question as to the legality of said election of said Welch as trustee upon an agreed statement of facts relative to such election, signed by the contesting parties; that on December 4, 1893, said School Commissioner Maxson, assuming that there was a vacancy in the office of trustee of said school district caused by said resignation of the appellant, Welch, as aforesaid, and the failure of the annual school meeting in August 1893, to elect a trustee, and that such vacancy had existed for more than thirty days, appointed one F. A. Wood as trustee of said school district to fill the vacancy in said office so assumed by him, said Maxson, as existing; that said appellant, Welch, was present at said annual meeting, held on August 22, 1893, and did not then nor has he since declined said office of trustee, nor has he refused to serve as such trustee, and he has not resigned said office or otherwise legally vacated said office, but, on the contrary, has during the time since said annual school meeting acted, to some extent, as such trustee; that the said F. A. Wood, between December 4, 1893, and August 7, 1894, did or performed acts as such trustee; that at the annual school meeting held in said district on August 7, 1894, a motion was made that the meeting proceed to ballot for a trustee to fill vacancy in the place of F. A. Wood who had been so, as aforesaid, appointed by School Commissioner Maxson to fill an assumed vacancy, and the appellant, Welch, offered an opinion by A. M. Leffingwell and a letter of this Department in

regard to the annual school meeting held on August 22, 1893, both of which were read to the meeting, whereupon a vote was had upon said motion and the motion was declared adopted, and thereupon a ballot was taken for trustee, and one Mrs Mary E. Wood declared elected; that from such election of Mrs Wood this appeal is taken.

Under the provisions of subdivision 4 of section 15, title 7 of the Consolidated School Law of 1864 as amended, which were in force on August 22, 1893, school district officers were required to be elected by ballot. It is clear from the proofs that the appellant, John R. Welch, was not elected a trustee of said school district at such annual meeting in accordance with the provisions of the school law then in force. Every qualified voter at a school meeting has the right to vote by ballot for whom he or she desires for any school district office, and such voter can not be deprived of such right by the action of such meeting, either directly or indirectly. The method of electing a trustee pursued at said meeting, if allowed at all, should only be allowed when such motion is the *unanimous* wish of the qualified voters present at such meeting. Under the school law, the only person who has the power to decide whether or not school district officers have been legally elected is the Superintendent of Public Instruction, and the only method in which the question can be brought before him for a decision that will be binding upon all parties and the school district is by an appeal from the action and proceedings of the school meeting on the election of such officers, or by a submission to him of the question of the legality of such election by the contesting parties upon a statement of facts agreed upon and signed by such contestants. No appeal or submission, as above stated, has been taken or made relative to the action or proceedings of said annual school meeting held August 22, 1893, nor relative to the election of the appellant, Welch, as trustee, and, therefore, no decision has been made by me that the election of said Welch was illegal.

Where at any school district meeting a school district officer is elected by the color or form of an election, although not strictly in accordance with the provisions of the school law, such person by such color of election becomes a *de facto* officer of the district, and as such *de facto* officer is authorized and required to perform the duties of the office until by an order of the Superintendent of Public Instruction such election is declared to be illegal and void. Until a decision is made declaring void the proceedings of the meeting that elected him, he is to all intents and purposes a legal officer of the district so far as the public and third persons are concerned while acting in his official capacity for the district.

After said Welch, in August 1893, and prior to the annual meeting of said district, resigned the office of trustee and such resignation was accepted, there was a vacancy in said office which could have been supplied by a special meeting of the qualified voters of said district for the balance of the unexpired term. No such special meeting was had; but at the annual meeting of the district, held on August 22, 1893, the appellant, Welch was, by the color or form of an

election, elected a trustee of the district for the term of three years. When on December 4, 1893, Commissioner Maxson made his order appointing F. A. Wood as trustee of said district to fill a vacancy, there was no vacancy in the office of trustee of said district existing then; and said commissioner erred in assuming there was such vacancy, or that the annual meeting held in August, 1893, failed to elect a trustee for the full term of three years.

I find and decide, That upon the facts established herein and the reasons hereinbefore stated, the action of the annual school meeting held in said district on August 7, 1894, in the election of Mrs Mary E. Wood, as trustee of said district, was illegal and void.

The appeal herein is sustained.

It is ordered, That so much of the action and proceedings of the annual meeting held on August 7, 1894, in school district no. 14 of the town of Ellisburgh, Jefferson county, as relates to the election of Mrs Mary E. Wood, as a trustee of said district, to fill a vacancy in place of F. A. Wood, or any vacancy, be, and the same hereby is, vacated and set aside as illegal and void.

4375

In the matter of the appeal of John Hollenbeck from proceedings of annual school meeting held on August 6, 1895, in district no. 3, town of Erin, Chemung county.

An informal ballot for district officers is not recognized in the school law, but there is no provision of said law which forbids the qualified voters at a district meeting at which any district officer or officers are to be elected, from taking an informal ballot to ascertain the views or wishes of such voters as to the person or persons to hold said office or offices. When said meeting adopts a resolution to take such informal ballot, such ballot is not a ballot under the school law for the election of a person to fill the office, and the ruling of the chairman of the school meeting that the person receiving the majority of votes was elected trustee of the district was error.

Decided September 27, 1895

Skinner, *Superintendent*

The appeal and affidavits in support thereof, in the above entitled matter, were filed in this Department on August 26, 1895. No answer to said appeal having been filed in this Department, the allegations contained in the appeal and proofs are taken as admitted.

The allegations contained in the appeal herein, and affidavits relating to proceedings taken in the election of a trustee and voting taxes, are substantially as follows:

That an annual school meeting was held in district no. 3, town of Erin, Chemung county, on August 6, 1895; that a chairman and secretary of the meeting and two inspectors of election were chosen; that the trustee had neglected to furnish a suitable ballot box to receive the ballots cast in the election of

district officers; that a motion was duly made, seconded, entertained by the chairman and unanimously adopted that the meeting proceed to take an informal ballot for a trustee of said district; that such informal ballot was taken, two candidates being voted for, at which 43 votes were cast, of which one person received 20 votes and another person received 23 votes; that on said informal ballot at least four qualified voters of said district, then present, did not vote but intended to vote when a formal ballot for trustee should be taken; that after the result of said informal ballot was announced a motion was made and seconded that the meeting proceed to a formal ballot for trustee for the district; but the chairman of the meeting ruled said motion out of order and refused to put the said motion to a vote; that said chairman was asked to set aside the proceedings had in said informal ballot, and that the meeting proceed to the election of a trustee, which was denied, and said chairman declared the person who received a majority of the votes cast at said informal ballot duly elected as trustee of the said district. It further appears that two propositions for a levy of a tax, for two different purposes, were brought before said meeting for action, and that the vote thereon was not taken by ballot, or by taking and recording the ayes and noes of the qualified voters of the district present and voting upon each of said propositions, as required by the school law; but such vote was taken viva voce.

By section 14, of article 1, title 7, of the Consolidated School Law of 1894, chapter 556 of the Laws of 1894, all school district officers shall be elected by ballot, and the trustees of each school district are required to provide a suitable ballot box at elections of district officers.

An informal ballot for district officers is not recognized in the school law, but there is no provision of said law which forbids the qualified voters at a district meeting at which any district officer or officers are to be elected, from taking an informal ballot to ascertain the views or wishes of such voters as to the person or persons to hold said office or offices. When said meeting adopts a resolution to take such informal ballot such ballot is not a ballot under the school law for the election of a person to fill the office, and the ruling of the chairman of the annual school meeting, held in said district no. 3, town of Erin, that by and under said informal ballot the person receiving the majority of votes was elected trustee of the district was error, as it was apparent that no voter was misled, but all the voters present clearly understood that in and by such ballots they were simply giving expression of their choice for trustee, or putting candidates for the office in nomination, to be voted for when a regular ballot for the election of a trustee should be had. By such wrongful exercise of power on the part of the chairman of said meeting, in refusing to put the motion for a formal ballot for trustee, the qualified voters of said district present at said meeting were prevented from exercising the right accorded them under the school law in the election of a trustee for said district.

In subdivision 18, of section 14, article 1, title 7, of said Consolidated School Law of 1894 it is enacted: "In all propositions arising at said district meetings,

involving the expenditure of money, or authorizing the levy of a tax or taxes, the vote thereon shall be by ballot, or ascertained by taking and recording the ayes and noes of such qualified voters attending and voting at such district meetings."

It appears that in the action of said annual meeting in authorizing the levy of two taxes the vote thereon was not taken by either of the methods required by the provision of law above cited.

I find and decide that at the annual school meeting held on August 6, 1895, in school district no. 3, town of Erin, Chemung county, no one was legally elected a trustee of said district; that no legal authorization of a levy of a tax or taxes for any sum whatever was made at said annual meeting; that all proceedings had and taken at said meeting, relating to the election of a trustee of said district, should be vacated and set aside as illegal and void; that a special meeting of the district should be held for the purpose of electing a trustee of the district, and to act upon propositions for raising money for school purposes and authorizing the levy of a tax upon the taxable property of said district therefor.

The appeal herein is sustained.

It is ordered, That all proceedings had and taken at said annual meeting held on August 6, 1895, in said district no. 3, town of Erin, Chemung county, in the election of a trustee of said district, and in authorizing the levy of a tax or taxes in said district, be, and the same are, and each of them is, vacated and set aside.

It is further ordered, That a special meeting of the inhabitants of said school district no. 3, town of Erin, Chemung county, be called for the purpose of electing a trustee of said district, and to act upon propositions for raising money for school purposes and authorizing the levy of a tax upon the taxable property of said district therefor.

4200

In the matter of the appeal of W. A. Roedel, F. J. Tolles and Walter C. Reid, from proceedings of annual meeting in union free school district no. 1, town of East Chester, Westchester county.

At an annual meeting of a union free school district for the election of trustees, three persons were elected, when only two persons should have been elected for a full term of three years. *Held,* that the person elected to fill an alleged vacancy, no such vacancy existing, such election was illegal and void. The voters in a union free school district have no authority, under the school law, to elect a district clerk.

Decided November 15, 1893.

Herbert B. Lent, attorney for respondents

Crooker, *Superintendent*

The appellants, three members of the board of education of union free school district no. 1, town of East Chester, Westchester county, appeal from

action and proceedings of the annual meeting of said district in the election of three persons as trustees of said district, and of a person as district clerk. The appellants ask for my decision to questions relative to the action of said meeting in relation to other matters before said meeting. Nathan Johnson, a member of said board of education, has interposed an answer to said appeal, and the appellants have filed a reply to such answer. Both the appeal and answer herein have annexed to them, a copy of the proceedings of said annual meeting, signed by the chairman and secretary of said meeting.

It appears that said meeting was called to order at 7.30 p. m., on August 22, 1893, and Nathan Johnson was duly elected chairman, and W. E. Heyward, secretary; that a motion was made and adopted to elect two trustees for full term, and one trustee to fill vacancy caused by resignation of Mr Belmont; that two tellers were appointed and a ballot was taken with the result as follows: Theodore D. Rich received 109, and Fred H. Hart 108; Thomas Beattie received 56, and Lawrence B. Holler 55, for the full term of three years; Lawrence B. Holler received 108 votes to fill vacancy, one year; and E. L. Tourmine received 108 votes for district clerk; that upon the result of the ballot being announced the chairman declared Theodore D. Rich, Fred H. Hart and Lawrence B. Holler to be duly elected to fill the offices of trustees, and E. L. Tourmine, as district clerk.

The contention of the appellants is that there were but two trustees to be elected, to wit, for the full term of three years, and that the election of Mr Holler, as trustee, was illegal and void, as there was no vacancy in the board of trustees to be filled; also, that the meeting had no power to elect a district clerk.

It is admitted by the appellants and respondent that the board of trustees of said union free school district, as constituted at the establishment of said union free school, consisted of six members, and it does not appear that such number has been changed.

It appears that in 1889, Thomas R. Hodge and Edward Cordial were elected trustees for the full term of three years, and their terms of office would expire in 1892; that in 1890, Theodore D. Rich and L. B. Halsey were elected trustees for the full term of three years and their terms of office would expire in 1893; that Halsey resigned March 8, 1892, and Mr Reid was appointed in place of Halsey; that in 1891, Nathan Johnson and William Hitchcock were elected trustees for the full term of three years, and their terms of office would expire in 1894; that Hitchcock resigned April 15, 1892, and Mr Roedel was appointed in place of Hitchcock; that in 1892, it was necessary, at the annual meeting, to elect three trustees for three years in place of Messrs Hodge and Cordial, one trustee for two years in place of Hitchcock, and one trustee for one year in place of Halsey; that at the annual meeting in 1892, W. A. Roedel and Walter C. Reid were elected trustees for the full term of three years; F. J. Tolles for trustee for the term of two years, and F. W. Belmont for the term of one year; that after said annual meeting of 1892, said board consisted of the following: Roedel and Reid, each for three years; their respective terms expiring in 1895; Johnson

and Tolles, for two years; their respective terms expiring in 1894, and Rich and Belmont for one year; their respective terms expiring in 1893; that Belmont removed from the district in the spring of 1893, and School Commissioner Noxon appointed Mr Yale as trustee, to fill the vacancy caused by such removal of Mr Belmont. It appears from the foregoing that at said annual meeting, held in said district, in August 1893, the terms of office as trustees of Messrs Rich and Belmont respectively expired, and said meeting had the legal right, and it was its duty to elect two trustees for the full term of three years in place of said Rich and Yale, appointed in the place of Belmont; that said meeting did elect Theodore D. Rich and Fred H. Hart as trustees for the full term of three years; that said board of trustees of said district, since August 22, 1893, is constituted as follows: Nathan Johnson and F. J. Tolles, whose respective terms of office will expire in August 1894; W. A. Roedel and W. C. Reid, whose respective terms of office will expire in August 1895, and Theodore D. Rich and Fred H. Hart, whose respective terms of office will expire in August 1896.

I find and decide that the action of said annual meeting of said district, in voting for L. B. Holler, as trustee, for an unexpired term, was illegal and void, there not then existing any vacancy in the unexpired term of any trustee that the meeting had the legal power to fill, said meeting having the authority and power only to elect two trustees for a full term of three years in place of Messrs Rich and Yale; said Yale having been appointed in place of Belmont, who had removed from the district, before the expiration of his term of office.

Section 7 of title 9 of the Consolidated School Law of 1864, as amended by chapter 161 of the Laws of 1877, provides that boards of education of union free school districts may, with the advice and consent of a majority of the legal voters entitled to vote on questions of taxation, to be had at an annual meeting of the inhabitants, appoint a clerk to the board. Such appointed clerk must be a resident of the district, and a person other than a trustee or a teacher in the employ of the board. The clerk so appointed shall be the general librarian of the district, and also perform all the clerical and other duties pertaining to his office. For his services he shall be entitled to receive a salary, which shall not be greater than twenty-five cents a year for each scholar, to be computed from the actual average daily attendance for the previous year, as set forth in the annual report to the school commissioner, or less, as in the best judgment of said legal voters to be had at such annual meeting; such consent and approval not to be for a longer period of time than one year. In case no provision is made at an annual meeting of the inhabitants for the appointment and payment of a clerk, then, and in that case, the board will appoint one of their own number to act as clerk.

Prior to the amendment of section 7, 1877, said section provided that said board should elect one of their number clerk thereof, who should also be the general librarian of the district. It seems that said union free school district no. 1, of East Chester, has for a number of years elected a "district clerk" and did, at the last annual meeting, elect one E. L. Toumine "district clerk;" and the said board of education have elected annually one of their number as clerk.

Under section 7, above referred to, the board of education can appoint a clerk, not a member of said board, who will be entitled to a salary when so authorized by an annual meeting. The annual meeting does not "appoint," but may "advise and consent" to the appointment of a clerk at a certain salary, which salary is limited to twenty-five cents for each pupil of the number in actual average daily attendance, as stated in said section. Such authorization of the meeting to such appointment is valid for one year only. The clerk so appointed does not hold over after his term of office, which is one year from the date of the annual meeting. If no provision is made by the annual meeting for a clerk, the board shall appoint one of their own number as clerk; but no salary or compensation can be paid for his services.

The annual meeting in said district did not "advise and consent" to the appointment of a clerk at a certain salary; it elected a clerk, but that it had not the legal right to do, for by section 7, the appointment must be made by the board. Not having advised and consented to the appointment of clerk at a certain salary in the manner provided by said section 7, the election of the meeting of said Toumine as district clerk was illegal and void, and the board of education had the legal authority to elect one of said board as clerk, but who can not be paid any salary or compensation for his services.

By section 15 of title 9 of the Consolidated School Law of 1864, it is provided that it shall be the duty of boards of education, at the annual meeting of the district, besides any other report or statement required by law, to present a detailed statement in writing of the amount of money which will be required for the ensuing year for school purposes, exclusive of the public moneys, specifying the several purposes for which it will be required, and the amount of each. By section 16 of said title 9 it is provided that after the presentation of such statement, the question shall be taken upon voting the necessary taxes to meet the estimated expenditures, and when demanded by any voter present, the question shall be taken upon each item separately, and the inhabitants may increase the amount of any estimated expenditures, or reduce the same, except for teachers' wages, and the ordinary contingent expenses of the school or schools.

At said annual meeting in said district said board submitted to the meeting a detailed statement in writing of the amount of money which would be required for the year ensuing for school purposes, exclusive of public moneys, specifying the several purposes for which it will be required, and the amount for each, and the said several sums amounted in the aggregate to $4400. No voter present at the meeting demanded that the question should be taken upon each item separately. A motion was made that the amount to be raised be the sum of $3800, without specifying the several purposes which it was for or the amount of each, and upon a ballot taken upon this motion 93 votes were cast, of which 58 votes were for an appropriation of $3800 and 35 votes were against any appropriation. The meeting had the legal right to reduce the amount estimated by the board to be required for the year then ensuing for school purposes, except for teachers' wages and the ordinary contingent expenses of the schools, and the vote to raise

the sum of $3800 was legally adopted. The action of the meeting in voting the sum of $3800 can not be ignored by the board, nor can the board assess the amount of $4400 as presented by it to the meeting. The meeting failed to designate the specific purposes for which the sum of $3800 should be expended and the amount for each purpose, and I can not direct the board as to the expenditure thereof, nor indicate in what items submitted by the board the reduction is to be made.

Section 17 of title 9 of the Consolidated School Law provides that, if the inhabitants shall neglect or refuse to vote the sum or sums estimated necessary for teachers' wages, after applying thereto the public moneys, and other moneys received or to be received, for that purpose, or if they shall neglect or refuse to vote the sum or sums estimated necessary for ordinary contingent expenses, the board may levy a tax for the same, in like manner as if the same had been voted by the inhabitants. A motion was made at said meeting to raise $625 in addition to the sum already voted for the purpose of reimbursing the various funds overdrawn by reason of the establishment of the new school, and for other expenses not provided for in the appropriation of last year, and said motion was laid upon the table. It was optional with the voters present to lay the motion upon the table or to have taken a ballot upon it. The meeting decided to lay the motion upon the table, and their action was legal. There is no provision of the school law which required that a ballot should be taken upon it. The proposed appropriation of $625, in addition to the sum already appropriated, not having been voted for by the meeting, there is no legal authority in the board to include the same in the tax list and assessment of the district.

Section 20 of title 9 of the Consolidated School Law provides that it shall also be the duty of said boards of education, respectively, to have reference in all expenditures and contracts to the amount of moneys which shall be appropriated, or subject to their order or drafts, during the current year, and not to exceed that amount. The qualified voters in union free school districts, duly and legally assembled, only, under the school law, have authority to make appropriations of money and vote taxes for maintaining schools in their respective districts. Boards of trustees have no authority, under the school laws, to assess and levy taxes, other than for such purposes and such sums as they are so directed by the district meetings, except when such meetings neglect or refuse to vote sums necessary for teachers' wages and for ordinary contingent expenses. Said boards have no legal authority to exceed in their contracts and expenditures the sums appropriated and voted at the district meeting. When the district meeting votes a specific sum for a specific purpose, no part of sum so voted can be legally expended by said boards for any purpose other than that for which it was appropriated; nor can said boards legally transfer unexpended balances in any of such funds to make good a shortage that may exist in any other fund except by consent of the district meeting, as said boards have no legal authority to exceed the sums appropriated for special purposes, and, hence, there should not be any shortage.

So much of the appeal herein as is taken from the action and proceedings had and taken at the annual meeting held in union free school district no. 1, East Chester, Westchester county, relative to the election of Lawrence B. Holler as trustee of said district for an unexpired term, and the election of E. L. Toumine as district clerk, is sustained, and, as to the other matters, said appeal is dismissed.

It is ordered that so much of the action and proceedings of the annual meeting held on August 22, 1893, in union free school district no. 1, town of East Chester, Westchester county, as relates to the election of Lawrence B. Holler as a trustee of said district, and the election of E. L. Toumine as district clerk, be, and the same hereby is, vacated and set aside as illegal and void; and the election of said Holler as trustee and said Toumine as district clerk is, and each of them is, hereby declared to be illegal and void.

4183

In the matter of the appeal of John B. Russell and others, from the proceedings of the annual school meeting held August 22, 1893, in union free school district no. 2, Wawarsing, Ulster county, in the election of trustee.

Where, at an annual school meeting for the election of a trustee, 67 ballots were cast, of which Lewis D. B. Hoornbeek received 33 votes, Louis A. Hoornbeek received 32 votes, S. A. Hoornbeek received 1 vote and "C. D. B." received 1 vote, and the one vote for S. A. Hoornbeek was given to Louis A. Hoornbeek, and the ballot with "C. D. B." was given to Lewis D. B. Hoornbeek, and said Lewis D. B. Hoornbeek declared to be elected. *Held*, that there was no election of trustee and a special meeting of the district was ordered for the purpose of electing a trustee.

Decided September 22, 1893

Crooker, *Superintendent*

This appeal is from the proceedings of the annual meeting, held in union free school district no. 2, Wawarsing, Ulster county, held on August 22, 1893, in the election of a trustee.

It appears, from the papers presented upon this appeal, that 67 ballots were cast for the office of trustee, as follows: Lewis D. B. Hoornbeek received 33 votes; Louis A. Hoornbeek received 32 votes; S. A. Hoornbeek received 1 vote, and "C. D. B." received 1 vote. In the canvass of the ballots so received the one vote for S. A. Hoornbeek was given to Louis A. Hoornbeek, and the ballot with "C. D. B." upon it was given to Lewis D. Hoornbeek, and result of the ballot declared by the chairman of the meeting was that there were 67 votes cast, of which Lewis D. B. Hoornbeek received 34, and Louis A. Hoornbeek received 33.

Trustees of the school districts of the State must be elected by ballot and, except in school districts where the election of trustees is had under chapter 248, of the Laws of 1878, and the amendments thereof, the persons having a majority of votes respectively, shall be elected.

At the annual meeting held in district no. 2, Wawarsing, Ulster county, 67 persons voted for trustee, a majority of which would be 34 votes. It appears that no one received 34 votes. The counting of the ballot for S. A. Hoornbeek for Louis A. Hoornbeek and the ballot for "C. D. B." for Lewis D. B. Hoornbeek was error on the part of the officers of such meeting. The ballot for S. A. Hoornbeek should have been counted as a vote for the person whose name appeared upon said ballot, and not for Louis A. Hoornbeek. The ballot for "C. D. B." was a defective ballot and could not be counted for Lewis D. B. Hoornbeek, nor for any person, as there was not upon said ballot the name of any person. The ballot for trustee at said meeting should have been reported as follows: whole number of votes cast, 67; necessary to a choice, 34; Lewis D. B. Hoornbeek received 33; Louis A. Hoornbeek, 32; S. A. Hoornbeek received 1, and one ballot was defective.

No person having received a majority of the votes cast, there was no election of a trustee, and another ballot should have been taken.

It has been repeatedly held by the courts of this State, that a canvassing board has no power to determine that votes returned as cast for one man were, in fact, intended for another person, bearing another and different, although similar, name, and has no power to count and allow such votes for such other person.

It is clear the ballot, having upon it the letters "C. D. B." was defective, and that the officers of the meeting had no authority of law to count the ballot for Lewis D. B. Hoornbeek; neither had they authority to count the ballot cast for S. A. Hoornbeek to Louis A. Hoornbeek, nor for any other person than the one whose name was written thereon.

In my opinion the appeal herein should be sustained.

I do find and decide:

That Louis D. B. Hoornbeek was not elected as a trustee of union free school district no. 2, town of Wawarsing, Ulster county, at the annual meeting of said district, held on August 22, 1893, and that no person was elected a trustee of said district at said meeting. That the appeal herein is sustained.

It is ordered, That so much of the proceedings of the annual meeting of said union free school district no. 2, town of Wawarsing, Ulster county, held on August 22, 1893, as declared and decided that Lewis D. B. Hoornbeek was elected a trustee of said district, be, and the same hereby is, vacated and set aside.

It is further ordered, That a special meeting of the qualified voters of said union free school district no. 2, town of Wawarsing, Ulster county, be forthwith called, under the provisions of school laws, for the purpose of electing a trustee for said district to fill the vacancy in the office of trustee, created by the failure of said district to elect a trustee at the annual meeting held therein on August 22, 1893.

3844

In the matter of the appeal of Lewis S. Turner v. Charles A. Davis, trustee of school district no. 7, of the town of Mount Sinai, Suffolk county.

An election of a trustee at a school meeting at which there were rival candidates, and no sufficient opportunity was afforded to get the expression of the voters, set aside and a new election ordered.

Decided December 9, 1889

Draper, *Superintendent*

The appellant, a voter in school district no. 7, of the town of Mount Sinai, county of Suffolk, appeals from the proceedings had at the last annual meeting held in said district, so far as they relate to the election of trustee.

The facts, which are not disputed, are that both appellant and respondent were placed in nomination for trustee at the annual meeting. The chairman, a brother of respondent, put the question in the manner, "all those in favor of Charles A. Davis for trustee, say aye," and several responded, "all those opposed, say no," to which no one responded, and the chairman therefore declared Mr Davis elected.

This manner of voting for district officers, when two persons are placed in nomination, almost invariably produces dissatisfaction and discord in school districts.

As my predecessor, Judge Ruggles, observed in a case similar to this, such elections are irregular. A vote for rival candidates should be taken by ballot, calling the roll, by a division of the house, count, or some method by which the will of each individual voter shall be ascertained, a reasonable opportunity afforded for interposing challenges, and a fair expression of the voters secured.

In the case before me, I do not consider there was a fair expression given — at most, but few of those present voted, and it would seem that a majority did not vote upon the question.

I conclude that the election of respondent must be set aside, and a new election ordered. The appeal is sustained. The district clerk is hereby ordered and directed to give notice of a special meeting to elect a trustee within ten days from the date of this decision.

3647

In the matter of the appeal of John A. Strong v. joint district no. 1, of the towns of Harrietstown, Franklin county, and of North Elba and St Armand, in Essex county.

A person was chosen trustee, and because but few persons voted he asked that another election be had, in order, as he said, to determine the sense of all voters present. This was done and another was elected. Thereupon the person first chosen claimed the office under the election first held. *Held*, that he was estopped from setting up his claim.

Decided December 2, 1887

Draper, *Superintendent*

At the annual school meeting held in the district above named, a controversy arose in reference to the election of trustee, which it is sought to settle by means

of this appeal. It seems that, after action upon the report of the trustee, it was moved and carried that John A. Strong, the appellant, be elected trustee for the ensuing year. Upon this motion, but a small portion of the persons present voted, and Mr Strong stated in substance, that he preferred that there should be another vote taken and have an expression of the sentiments of the district, and, at his instance, the action was rescinded. It was then agreed to take a vote by ballot. The statements of the different parties disagree as to the understanding of the meeting touching the ballot which was taken. The appellant insists that it was a ballot to determine the election of a trustee. Others say that it was agreed that the voters present should signify by a secret vote, whether or not they would have Strong for trustee. The result of the vote seems to support the latter claim, for, of the 17 votes which were in the box, 5 were for Strong, 8 were marked "no," 2 were marked "against," and 2 were blank. Following this, it was moved and carried that the meeting proceed to ballot for trustee. A ballot was taken and 15 votes were cast, of which A. S. Wright received 11 and John Strong 4.

Mr Strong now claims that he was elected by acclamation when the meeting first voted by the uplifted hand, and again by rising, upon the motion to elect him trustee. This claim can not be sustained. Whether he was elected at that time or not is immaterial, for he waived any right which he might have gained to the office. It was at his instance that the meeting proceeded to determine the matter in another way. The appellant also claims that he was elected upon the first written ballot taken. This claim would undoubtedly be sustained if there was sufficient reason for believing that it was the purpose of the meeting to elect a trustee upon that ballot, but the proofs do not sustain such a position. The fact that the meeting had just been voting aye and no upon a motion that Strong be trustee, and the fact that, when the written ballot was taken, 5 votes were for Strong and 10 indicated the opposition of that number of persons to him, while they did not vote for another person, sustain the claim that it was understood that that ballot was taken for the purpose of determining whether or not Strong should be elected trustee, and not who should be chosen if he was not. The proceedings are somewhat irregular. The records are not complete, but I feel bound to sustain the manifest will of the majority of the voters present in the district meeting, as it is clearly indicated by the several votes which were taken, and particularly by the last one, in which Mr Wright received 11 votes and Mr Strong 4.

The appeal is, therefore, dismissed.

4261

In the matter of the appeal of James C. Dillon v. the election of trustees of union free school district no. 2, town of Newtown, Queens county, May 31, 1894.

Where at a school district meeting district officers are elected it is the duty of the inspectors of election, after the polls shall be closed, to count the ballots found in the ballot box without unfolding them except so far as to ascertain that each ballot is single, and by comparing the ballots found in the box with the number shown by the poll list to have been deposited therein. If the ballots found in the box shall be more than the number of ballots shown to have been deposited therein, such ballots shall all be replaced without being unfolded in the box from which they were taken and one of the inspectors shall, without seeing the same, publicly draw out as many ballots as shall be equal to said excess, and without unfolding them place them in some place apart from the other ballots. If two or more ballots shall be found in the ballot box so folded together as to present the appearance of a single ballot, they shall be destroyed if the whole number of ballots in such ballot box exceeds the whole number of ballots shown by the poll list to have been deposited therein, and not otherwise.

Decided July 25, 1894

Crooker, *Superintendent*

The appellant in the above entitled matter appeals from the action and decision of the officers of an adjourned school district meeting held on May 31, 1894, in school district no. 2, town of Newtown, Queens county, to consider the question of the establishment of a union free school therein, that one C. H. George was elected a trustee or member of the board of education of said district.

The following facts appear to be established: That on May 24, 1894, a duly called special meeting of the inhabitants qualified to vote, of school district no. 2, of the town of Newtown, Queens county, was held at the schoolhouse in Corona in said town, to act upon the proposition for the establishment of a union free school therein; that a resolution for the establishment of a union free school in said district was unanimously adopted; that it was voted that the board of education of such union free school district consist of five members, and thereupon the meeting adjourned to May 31, 1894; that on May 31, 1894, said meeting convened pursuant to adjournment and it was voted that one of said trustees or members of said board of education serve for one year, two for two years, and two for three years; that four tellers or inspectors of election were chosen and the meeting proceeded to the election by ballot of said five trustees or members of the board of education, all of said five trustees being voted for at once on one ballot, but designating the term of office of each class respectively; that after the polls were closed a canvass of the votes was made by the inspectors, and it was found that the poll list had 355 names recorded of persons who had voted, and the votes in the ballot box were counted without opening any ballot that was folded, *and without unfolding any of said ballots so far as to ascertain that each ballot was single,* and the number of said ballots was 355, thus agreeing with the number of names upon the poll list; that

said inspectors then proceeded to unfold the ballots and canvass the same, when they found two ballots so folded together as to present the appearance of a single ballot, and they decided that said ballot was fraudulent and ought not to be counted and did not count the same; that said two ballots so folded as one had thereon and on each the name of the appellant herein as a trustee for the term of three years; that the result of the said election, so far as related to the election of two trustees for the term of three years as ascertained and declared by said inspectors and the chairman of said meeting, was as follows: That C. F. Schwartz received 207 votes and was elected, and that the appellant herein, J. C. Dillon, received 172 votes, and C. H. George, 173 votes, with certain votes for sundry persons, and that said C. H. George was elected.

By chapter 680 of the Laws of 1892, being "An act in relation to the elections, constituting chapter 6 of the general laws," article 5, section 114, relating to the canvass of votes by inspectors, it is enacted: As soon as the polls of an election are closed . . . the inspectors of election thereat shall publicly canvass and estimate the votes and not adjourn or postpone the canvass until it shall be fully completed. They shall commence by comparing the two poll lists with each other, correcting any mistakes therein, and by counting the ballots found in the ballot boxes without unfolding them, *except so far as to ascertain that each ballot is single,* and by comparing the ballots found in each box with the number shown by the poll lists to have been deposited therein. If the ballots found in any box shall be more than the number of ballots so shown to have been deposited therein, such ballots shall all be replaced, *without being unfolded,* in the box from which they were taken, and one of the inspectors or canvassers shall, without seeing the same, publicly draw out as many ballots as shall be equal to such excess and, *without unfolding them,* deposit them in the box for unvoted ballots. *If two or more ballots shall be found in a ballot box, so folded together as to present the appearance of a single ballot,* they shall be destroyed, *if the whole number of ballots in such ballot box exceeds* the whole number of ballots shown by the poll lists to have been deposited therein, *and not otherwise.*"

I hold that the foregoing provisions of law relative to the canvass of votes by inspectors at elections in the State should govern the canvass of votes by inspectors or tellers at elections held in the school districts in the State.

It is clear that the inspectors at the school meeting in school district no. 2, town of Newtown, held on May 31, 1894, in the canvass of votes cast for members of the board of education, did not follow the provisions of the law above cited. There was one ballot box and poll list. In counting the ballots found in the box, to compare the number therein with the names contained on the poll list, the inspectors *should have unfolded such ballot so far as to ascertain that each ballot was single. This they did not do.* Had they done this, they would have ascertained the fact of the two ballots folded together as one, and on separating them, and then counting the ballots, they would have ascertained that there were 356 ballots, which would have been an excess of one over the number of voters shown upon the poll list, and it would then have been their duty to replace *all*

of the ballots in the box, and one of the inspectors, without seeing the same, should have publicly drawn out *one* ballot, which ballot should have been destroyed. The action of the inspectors in treating the two ballots found folded together as one, as fraudulent or defective, and rejecting them, was not lawful, and hence there was no legal or valid election of one member of said board of education for three years, and said C. H. George was not duly or legally elected a member of the board of education for said district for the term of three years from the first Tuesday of August, 1894, nor for any term of time. Neither Dillon nor George could be legally elected a trustee unless one of them received a majority of the whole number of votes cast. There were 355 votes cast, of which 178 is a majority, and neither of them received that number of votes.

The election of Mr Sandford for one year, Messrs Howard and Weed for two years and Mr Schwartz for three years is not in any manner affected by the action of inspectors in rejecting the two ballots.

There is no proof whatever that said inspectors, or either of them, in rejecting said two ballots containing the name of the appellant, did so knowingly or wilfully, nor that they did so in order to defeat the election of the appellant as trustee; nor is there any proof that said inspectors, or either of them, was or is inimical or hostile to the appellant.

I am satisfied that said inspectors, in the canvass of said ballots, acted in good faith.

I find and decide that C. H. George was not elected a trustee or member of the board of education for the term of three years at said meeting of the inhabitants qualified to vote in school district no. 2, town of Newtown, Queens county, on May 31, 1894, and that but one person, to wit, Mr Schwartz, was legally elected at said meeting as such trustee for the term of three years; and that but four of the five members which it was voted at the meeting, held on May 24, 1894, the board of education of said district should consist of, have been legally elected.

The appeal herein is sustained.

3662

In the matter of the appeal of Suel Chaddock and others, from the proceedings of the annual school meeting, held August 30, 1887, in school district no. 3, town of LeRoy, Genesee county.

In an election for trustee it was found that the ballots overran the number of qualified electors present by two. Thereupon two ballots were withdrawn. Afterward it was found that one blank ballot was cast and this was thrown out and one of the two withdrawn was put in its place. A candidate was then declared elected by a majority of one. *Held,* that the proceedings were irregular and a new election must be ordered.

Decided January 24, 1888

Draper, *Superintendent*

This is an appeal from the annual election of trustee in school district no. 3, town of LeRoy, Genesee county, and recites as the grounds thereof the following:

1 That when a ballot was taken it was discovered that the votes cast were in excess of the number of names upon the poll list; that thereupon two ballots were withdrawn from the pile of ballots cast and that subsequently one ballot remaining was found to be a blank, when one of the two ballots withdrawn was replaced and the blank thrown out and then the vote gave one Albert Anderson, a majority of one vote for trustee and he was declared elected.

2 That said Anderson was not a qualified voter at said annual meeting and therefore ineligible to the office of trustee.

3 That one person voted who was not a qualified voter.

No answer has been interposed and in deciding this appeal I do not consider it necessary to go into the second or third grounds of appeal.

The proceedings of the meeting in first withdrawing two ballots from those which had been voted, then replacing one for a blank ballot found, can not be upheld.

The election of Anderson is held to be void and it is hereby ordered that a special meeting be called within fifteen days from the date of this decision to fill the vacancy existing in the office of trustee.

4410

In the matter of the appeal of Michael Dippold and others, from proceedings of a school meeting held on August 7, 1895, in district no. 3, city of Kingston, Ulster county, in the election of school district officers.

Where at the annual election of school district officers in a common school district having more than 300 pupils therein, the trustees, as inspectors of election, appointed one Powers, a qualified voter of the district, to take the votes from the voters and deposit such votes in the ballot box, no other power or duty intrusted to said inspectors by law being delegated, or given to, or exercised by said Powers. *Held,* that such appointment was an irregularity on the part of such inspectors, which is not approved by this Department, but does not warrant the setting aside of said election. Irregularities, mistakes or omissions on the part of election officers will not vitiate the election or defeat the will of the electors as shown by their votes.

Decided December 18, 1895

Brinnier & Newcomb, attorneys for appellants
G. D. B. Hasbrouck, attorney for respondents

Skinner, *Superintendent*

The appellants in the above-entitled matter appeal from the election of officers of school district no. 3, city of Kingston, at a meeting held in said district on August 7, 1895, but from an examination of the appeal and the statements contained in the affidavits annexed thereto, it is in fact an appeal from the election of Henry Beck as a trustee of said district.

The grounds upon which the appeal is brought, in substance, are, that the trustees of the district, although present, did not act as inspectors of such elec-

tion, nor did they designate any one of their number to act as chairman or to receive the votes cast; that they did not act as inspectors and receive the votes as required by statute, nor lawfully appoint or designate any other person to act as inspector and receive the votes; that one Henry Powers, the principal of the school in said district, unlawfully acted as an inspector and unlawfully received and rejected votes; that said Powers refused to receive the votes of persons duly qualified to vote, and refused to permit persons offering to vote to make the declaration under the law, and threw ballots to the number at least of from forty to sixty, handed him by legal voters, upon the floor, refusing to deposit such votes in the ballot box; that at least seventy-five to one hundred illegal votes were received and counted for Henry Beck, who was unlawfully and fraudulently declared elected as trustee.

The affidavits of five persons other than the appellants in support of some of the allegations contained in the appeal, and the affidavits of forty persons, each of whom alleges that he or she was a qualified voter in said district and who offered to vote and was not permitted to vote or swear in the vote, are annexed to the appeal.

Trustees Beck and Weiss, two of the three trustees of said district, with sixty-eight qualified voters of the said district, have filed answer to said appeal, and to which answer are annexed the affidavits of Martin J. Sweeney, Henry Powers, George M. Zellmar and seventeen others, qualified voters of the district, in support of the statements contained in said answer.

The proofs filed herein establish the following facts:

That an election of a trustee, clerk, and collector of school district no. 3, city of Kingston, Ulster county, was held on August 7, 1895, between the hours of 12 o'clock noon and 4 o'clock p. m.; that Messrs Beck, Weiss and Mulholland, then trustees of said district, and George M. Zellmar, then district clerk, assembled at the place designated for holding said election just prior to 12 o'clock noon, and said Trustee Weiss was selected as chairman of the board of inspectors of election; that said trustees or a majority of them, acting as such inspectors of election, appointed Henry Powers, a qualified voter of said district, to assist them in said election by receiving the ballots from the voters and depositing the same in the ballot box provided by the said trustees; that at 12 o'clock noon, the said trustees, or a majority of them, being present and acting as inspectors of said election, and the district clerk being present, opened the poll of said election and received the votes, the said Powers receiving the votes of each voter and depositing the same in the ballot box, under the instruction of the said trustees as such inspectors of election, the district clerk recording the name of each person whose vote was received until 4 o'clock p. m., when the poll was closed and said inspectors of election proceeded to canvass the votes cast, first counting the ballots to find if they tallied with the number of names recorded by the clerk; that the whole number of votes cast was 737, and the poll list kept by the district clerk contained the names of 737 persons as having voted; that Henry Beck received 429 votes for trustee for three years and Michael Dippold

received 308 votes, and the result of the ballot was announced by the said inspectors of election, and the result of such ballot and election as announced by said inspectors of election was recorded by the district clerk.

It also appears that said trustees, or a majority of them, acting as inspectors of election, decided all questions arising at said election relative to the qualifications of voters, and as to whether any vote should be received or refused, and as to all other questions which arose, and that said Powers took no part whatever therein, but simply received such votes as said inspectors directed them to be received and deposited such votes in the ballot box.

The burden is upon the appellants to sustain the allegations in their appeal by a preponderance of proof. The answer and affidavits annexed to the appeal deny that said Powers refused to receive the vote of any person or refused to permit persons whose votes were challenged to make the declaration required by the school law, or threw any ballot of any person whose vote was received, upon the floor, except under the direction of said inspectors of election. The proofs on the part of the respondents deny that said Powers said in substance, "that he was running the meeting to suit himself."

The forty affidavits annexed to appeal of persons who allege that their votes were rejected were verified the latter part of August 1895, but not one of them alleges that he or she was a qualified voter in said district on August 7th. Neither does any one of them state the facts relative to his or her alleged qualifications as a voter so that it can be ascertained whether he or she possessed on August 7, 1895, any one or more of the qualifications required by the school law. Fourteen of these affiants state that they are taxpayers in the district, twelve that they are householders in the district, seven that they have children who attend school, but do not state that such children have attended school for eight weeks during the year prior to said election. The affidavits of Sweeney and Powers, annexed to the answer, which affidavits are not answered, show that the names of those claiming to be "taxpayers or freeholders" are not, nor is either of them, upon the tax lists of said districts for the years 1894 and 1895. The affidavit of Powers shows, from an examination of the school register for the year preceding the election, that none of the persons claiming to vote by reason of sending children to school in the district had any child or children of his or her own, or residing with him or her, who attended the school in said district for the period of eight weeks within one year previous to said election.

Admitting that each of these forty persons were qualified voters and each had voted for Dippold, still Beck would have been elected by eighty-one majority. The allegation in the appeal, that from seventy-five to one hundred illegal votes were received and counted for Henry Beck is indefinite and uncertain. The appeal does not give the name of any one of the seventy-five or one hundred that it is alleged voted illegally, nor do the appellants show by evidence the lack of qualifications of any one or all of said seventy-five to one hundred, in such terms as necessarily to exclude every presumption that such persons could not be qualified to vote under the provisions of the school law. This allegation is not supported by any evidence whatever.

The rule is well settled that an election will not be vitiated by illegal votes unless a different result would have been produced by excluding such votes. To warrant setting aside an election, it must appear affirmatively that the successful ticket received a number of illegal votes which, if rejected, would have brought it down to a minority.

The election in said school district on August 7, 1895, was held under the provisions of section 15, article 1, title 7, of the Consolidated School Law of 1894. Such section provides who shall be inspectors of election. It does not permit, neither does it prohibit, such inspectors from appointing a person simply to perform the mechanical act of receiving votes from persons whom the inspectors have decided are entitled to vote, and depositing such votes in the ballot box. The trustees or inspectors of election, it seems, expected from the interest taken in said election that a large vote would be polled, and in order to enable them to act upon questions that might arise relative to the election and the qualifications of voters, they appointed Powers, a qualified voter of the district, to take the votes from the voters and deposit such votes in the ballot box. No other power or duty intrusted to said inspectors by law was delegated or given to or exercised by said Powers. It was an irregularity on the part of said inspectors which I do not approve, but one which I do not think warrants me in setting aside the election. Irregularities, mistakes or omissions on the part of election officers will not vitiate an election, or defeat the will of the electors as shown by their votes.

The appellants have failed to sustain their appeal by a preponderance of proof and the appeal should be dismissed.

Appeal dismissed.

4053

In the matter of the appeal of John H. Innes, Frederick Mark and others v. school district no. 11 of the town of Newtown, in the county of Queens.

It is the business of school meetings and of presiding officers thereof, to undertake to ascertain the intent of the electors and give expression of their ballot as they intended. When one Joseph B. Johnson was nominated as one of two trustees to be elected at an annual meeting, and there was no pretense that any other person by the name of Johnson was a candidate or voted for at the meeting, votes cast for "Mr Johnson" and "Johnson" should be counted for Joseph B. Johnson.

Decided January 12, 1892

Draper, *Superintendent*

The school district above named is under the operation of a special act of the Legislature, being chapter 535 of the Laws of 1879. This act provides that the district shall hold its annual school meeting on the second Wednesday of October each year. Pursuant to this act the district held the annual meeting on the 14th day of October 1891, and proceeded to elect a trustee to succeed

Edward H. Weber, whose term of office had expired. Edward H. Weber and Joseph B. Johnson were duly nominated for the position and nominations were declared closed. The meeting then proceeded to ballot and the result was announced as follows:

	Votes
Edward H. Weber	51
Joseph B. Johnson	40
Mr Johnson	15
Johnson	3
Bernard Becker	2
Charles Klosset	1
G. T. Bauman	1
O. H. Green	1
T. McGowan, jr	1
Defective	3

Upon the announcement of the result it was moved and seconded that the votes cast for Mr Johnson be counted for Joseph B. Johnson. This motion was declared out of order by the chair. An attempt was then made to secure another ballot and this was refused by the chair. The chairman then declared that Edward H. Weber was elected. From this action this appeal is taken. The respondent offers several objections which are technical if not frivolous. He insists that if the proceeding was to have been commenced at all, it must have been commenced by Mr Johnson, and that the appellants here are not parties in interest. I think he is mistaken in this. Any elector in the district is sufficiently interested in such a matter to bring it before the State Department.

Again, the respondent insists that there are over 300 children of school age in this district and that the election therein must be governed by the provisions of chapter 248 of the Laws of 1878 as amended. I think he is in error in this position also. The school district is operating under a special act and is specially exempted from the provisions of the general act by section 10 thereof. As a matter of fact, the district did not proceed under the provisions of the general act. If the contention of the respondent was to be upheld, it would be fatal to his claim that he was elected. I am of the opinion that it required a majority of all the legal votes cast to elect. I think the chair was in error in refusing to permit the house to pass upon the question as to whether the votes cast for "Mr Johnson" and for "Johnson" were not intended for Joseph B. Johnson. Indeed, I think that the chair would have been justified in so holding without the direction of the meeting, and in declaring Joseph B. Johnson elected.

The 3 ballots which are returned as defective should not have been counted at all in determining the number which constituted a majority. Excluding these 3 votes, 58 votes constituted a majority. It is idle for the respondent to say that the 18 votes cast for "Mr Johnson" and "Johnson" were not intended for

Joseph B. Johnson, because there are one or two other persons in the district by the name of Johnson. There is no pretense that any other person by the name of Johnson was a candidate or was voted for at the meeting. Counting these ballots for Joseph B. Johnson, he received 58 votes and was elected. It is the business of school meetings and of presiding officers thereof to undertake to ascertain the intent of the electors and to give expression to their ballot as they intended.

Upon the papers presented, I entertain no doubt but that a majority of the electors at this meeting who saw fit to vote for trustee, intended and attempted to vote for the election of Joseph B. Johnson.

The appeal is therefore sustained and Mr Joseph B. Johnson is held to have been elected at the school meeting held in the above named district on the 14th day of October 1891.

4265

In the matter of the appeal of Joseph Holmes and William Hummiston from proceedings of the annual school meeting held in district no. 10, town of Stillwater, Saratoga county, on August 7, 1894, in the election of the officers of said district.

Where at an annual school meeting the election of district officers was not by ballot but by a viva voce vote of those present and voting; that no suitable ballot box was provided by the trustees of the district for such election, nor were any inspectors of election appointed, and no poll list kept by the clerk of the meeting containing the names of persons whose votes were received; *held,* that such election was illegal and void, and a special meeting ordered for the election of such district officers.

Decided September 24, 1894

Crooker, *Superintendent*

The appellants in the above-entitled appeal state that at the annual school meeting held on the first Tuesday of August 1894, in school district no. 10, town of Stillwater, Saratoga county, one Jacob Snyder was placed in nomination for the office of trustee of said district and was declared elected; that said election of said Snyder as trustee was not by ballot but by a *viva voce* vote of those present and voting; that no suitable ballot box at the election of the district officers of said district was provided by the trustee of said district, nor were any inspectors of election appointed; that none of the officers of said district were elected by ballot.

A copy of the appeal herein was personally served upon the said Jacob Snyder on August 25, 1894, and said appeal, with proof of service of a copy thereof upon said Snyder, was received at this Department on August 28, 1894. No answer to said appeal having been received by me, the allegations contained in said appeal are deemed by me to be admitted.

Under subdivision 4 of section 14, article 1, title 7 of the Consolidated School Law of 1894, all district officers in the common school districts of this State must be elected by ballot. At such elections the trustee or trustees of such district shall provide a suitable ballot box. Two inspectors of election shall be appointed as the meeting shall determine, who shall receive the votes cast and canvass the same and announce the result of the ballot to the chairman of the meeting. A poll list containing the name of every person whose vote shall be received shall be kept by the clerk of the meeting. The ballots shall be written or printed, or partly written and partly printed, containing the name of the person voted for and designating the office for which each is voted. The chairman shall declare to the meeting the result of each ballot, as announced to him by the inspectors, and the persons having the majority of votes, respectively, for the several offices, shall be elected.

Upon the facts stated in the appeal herein, it is clear that the officers of said school district were not, nor was either of them, elected pursuant to the provisions of the Consolidated School Law of 1894.

The appeal herein is sustained.

I do find and decide, that the said Jacob Snyder was not, nor was any one, legally elected as trustee of said school district no. 10, town of Stillwater, Saratoga county, at the annual meeting of said district, held on the first Tuesday of August 1894, nor was any person legally elected as district clerk or collector of said district at said meeting.

It is ordered, That so much of the action and proceedings of the annual meeting of said school district no. 10, town of Stillwater, Saratoga county, held on the first Tuesday of August 1894, had and taken in the election of the officers of said district, be, and the same are, and each of them is, hereby vacated and set aside as illegal and void.

It is further ordered, That Wilson Wylie, a qualified voter in and of said school district no. 10, and who is now acting as clerk of said district under the assumption that he was elected such clerk at said annual meeting, be, and he hereby is, directed to forthwith call a special meeting of the inhabitants of said school district no. 10, town of Stillwater, Saratoga county, entitled to vote at school meetings in said district, in the manner prescribed in sections 2 and 6 of article 1, title 7 of the Consolidated School Law of 1894, for the purpose of the election of a trustee, district clerk and collector of said district, said election to be conducted in the manner provided in subdivision 4 of section 14, article 1, title 7 of the Consolidated School Law of 1894.

It is further ordered, That said Jacob Snyder be, and he hereby is, enjoined and restrained from further acting as trustee of said district, and from doing any act as such trustee of said district.

4379

In the matter of the appeal of John Mulvihill from proceedings of annual school meeting held on August 6, 1895, in district no. 3, town of Campbell, Steuben county, in the election of a trustee.

Where a ballot has been taken for a district officer and such vote canvassed by the inspectors of election and the result of the canvass announced showing that some one has received a majority of the votes cast, the power of the meeting in the election of such officer has been exhausted. Such ballot can not be reconsidered nor a recount had or the ballot impeached by the affidavits or statements that the canvass of the votes was not a correct one, or by the affidavits of persons that in such ballot they voted for a particular person for said office.

Decided September 27, 1895

Francis E. Wood, attorney for appellant

Skinner, *Superintendent*

The appellant in the above-entitled matter appeals from so much of the proceedings had and taken in school district no. 3, town of Campbell, Steuben county, at the annual meeting held on August 6, 1895, as relates to the election of a trustee.

It appears from the papers presented herein that the said annual meeting was duly organized by the choice of one Chase as chairman and John Wilcox, district clerk, acting as clerk; that John S. Curtis and Patrick Mulvihill were appointed inspectors of election; that the appellant and George D. Turnbull, the respondent, were nominated for trustee; that a ballot was taken for trustee, the ballot cast being received by said inspectors and when such ballot was closed, the votes were canvassed by said inspectors who reported the result of such ballot to the chairman of the meeting as follows: Whole number of votes cast 25, of which George D. Turnbull received 13 and John Mulvihill 11, and 1 blank; that said result was announced by the chairman to the meeting, and no objection relative thereto was made at the time such result was announced by the chairman; that the said meeting proceeded to elect other district officers and transact other business; that one Michael Lyon jr, who was not a voter in said school district, went to the table used by the inspectors of election and upon which several persons had written ballots for the various district officers who had been voted for, upon which also ballots were lying, and after some time passed in examining the said ballots, etc., lying upon said table, stated that there was a mistake and that the ballot for trustee was twelve for each of the candidates, and one blank; that upon the statement being so made by said Lyon the chairman stated that a ballot having been had and the votes cast having been canvassed and the result announced and recorded the meeting could not act thereon; that no motion was made in regard to the matter of the election of trustee, either to reopen or reconsider the ballot or for a recount of the vote, or that anything be done in reference thereto, and the meeting adjourned.

The appellant in his appeal alleges, upon information and belief, that twelve votes were actually cast for him for trustee, and that only twelve votes were

cast for said Turnbull, and that the blank vote was cast and intended to be cast for him (the appellant) for trustee; that annexed to said appeal is an affidavit of twelve persons, including the appellant, who allege that each of them voted for the appellant for trustee, and an affidavit of Simon Mulvihill that he voted for the appellant.

The respondent avers in his answer, upon information and belief that the persons named by him therein voted for him for trustee and the names of thirteen persons, including his own, is given; that also annexed to said answer are the affidavits of L. L. Chase, the chairman, and John Wilcox the clerk, of said meeting, averring that said answer is true, and also the affidavit of John S. Curtis, one of the inspectors of election at said meeting, averring that the affiant and Patrick Mulvihill were such inspectors of election and together canvassed the votes cast for trustee and both agreed in the result of the ballot as so canvassed and announced by them as follows: Whole number of votes cast 25, of which Turnbull received 13, John Mulvihill 11 and blank 1; that he knows of his own knowledge that such result as announced was correct; that there was no recanvass of said votes after such result was announced by the inspectors to the chairman; that the facts stated in the answer by Turnbull of what occurred at the meeting are true. No affidavit by Patrick Mulvihill, the other inspector, in reply to the allegation contained in said affidavit of Curtis has been presented. There is also annexed to said answer the affidavit of nine qualified voters each of whom was present at said meeting, that the statement of facts as to what occurred at said meeting, contained in said answer, is true.

The statement of the man, Lyon, is the only statement presented in conflict with the announcement of the inspectors of election of the result of the ballot had for trustee. Lyon does not state at what time he examined the ballot, and it appears by the affidavit of thirteen voters of the district verifying the statement of facts and of what took place at the meeting, contained in the answer of Turnbull, that Lyon did not go to the table on which the votes for trustee were canvassed and until the other officers of the district were elected and other ballots other than those for trustee were lying upon the table with other papers.

Where a ballot has been taken for a district officer and such vote canvassed by the inspectors of election, and the result of the canvass announced, showing that some one has received a majority of the votes cast, the power of the meeting in the election of such officer has been exhausted. Such ballot can not be reconsidered nor a recount had, or the ballot impeached by the affidavits or statements of persons that the canvass of the votes was not a correct one, or by the affidavits of persons that in such ballot they voted for a particular person for said office.

It is difficult to reconcile the affidavit of thirteen persons who swear they voted for Mulvihill, with the affidavit of Lyon who swears Mulvihill received but twelve votes.

The burden is upon the appellant to sustain his appeal by a preponderance of proof and in this he has failed.

The appeal herein is dismissed.

4392

In the matter of the appeal of H. H. Wendell and others, from proceedings of annual school meeting held on August 6, 1895, in district no. 3, town of Herkimer, Herkimer county, in election of trustee.

When at any school district meeting for the election of officers said meeting has voted to proceed to ballot for a trustee or other officer, votes cast for said officer having the name of some person thereon, but not having written thereon the name of the office for which the person is voted, said ballot is a legal ballot. The mere circumstance that improper votes are received at an election will not vitiate it. The fact must be shown affirmatively that a sufficient number of improper votes were received for the successful ticket to reduce it to a minority if they had been rejected; or the election must stand.

A party knowing a person to be unqualified and permitting him or her to vote without challenge will not be allowed on appeal to object to the proceedings of the meeting because said unqualified person participated therein.

Decided October 12, 1895

W. C. Prescott, attorney for respondent

Skinner, *Superintendent*

The appellants in the above-entitled matter appeal from so much of the proceedings of the annual school meeting, held in district no. 3, town of Herkimer, Herkimer county, had and taken in the election of a trustee, and from the election of Miss Kate Coffin as trustee of said district, and allege that her election was illegal.

The grounds, as alleged in the appeal, upon which the election of Miss Coffin as trustee is claimed not to have been legal, are, in substance, that illegal votes were cast for her, and she did not receive a majority of the votes of the qualified voters cast at such election; that one Charles Ely was prevented from voting for the appellant, H. H. Wendell, who was one of the candidates for the office of trustee; that no notice was given of the closing of the polls, and that the ballots cast did not designate the office for which the persons written thereon respectively were voted for.

The appeal is signed and verified by sixteen persons, seven of whom were not present at said annual school meeting, and annexed to the appeal are two affidavits in support of the allegations contained in said appeal. Miss Kate Coffin has answered said appeal, denying the allegations in the appeal that she did not receive a majority of the legal votes cast at said meeting for the office of trustee, and was not legally elected trustee of said district; denying the allegation that one Charles Ely was prevented from voting for trustee at said meeting, and denying the allegation that no notice was given of the closing of the polls in the election of trustee. To her answer are annexed the affidavits of thirteen persons in support of the statements made in said answer.

To said answer the appellants have made a reply. The following facts are established:

That the annual school meeting in district no. 3, town of Herkimer, Herkimer county, was held on August 6, 1895, and was duly organized by the

election of George P. Gunn as chairman; C. W. Arnolds, district clerk, acting as clerk; that Eddy J. Clark and John W. Coffin were duly appointed inspectors of election; that the appellant, H. H. Wendell, and respondent, Miss Kate Coffin, were each nominated for the office of trustee and a ballot for trustee was taken, said inspectors of election receiving a ballot from each of the persons offering to vote and the name of each person whose vote was received was recorded by the district clerk upon the poll list kept by him; that two persons offering to vote for trustee were challenged, namely, M. J. Richards and Alice Ely, each of whom made the declaration required by the school law, and the vote of each was received; that after the ballots of those desiring to vote were received the chairman asked if all had voted who desired, and hearing no response, declared the polls closed; that the votes cast were then canvassed by said inspectors of election, and the result, as announced to the meeting by the clerk at the request of the chairman, was as follows: Whole number of votes cast, 25, of which Miss Kate Coffin received 15 and H. H. Wendell 10.

It also appears that the ballots for trustee were written, and upon about three were the words "For Trustee, H. H. Wendell," but the words "For Trustee" were not upon the other twenty-two votes; that upon said ballots were written respectively, "Mr Wendel," "Mr Wendal," "Mr Windel," "Windell," "H. Windell," "Miss Kate Coffin," "Miss Coffin," "K. Coffin," "Kate Coffin" and "Cate Coffin;" that there were residing in said district at the time of said annual school meeting therein two persons by the name of Wendell, namely, Herman H. Wendell and Earl D. Wendell, and two unmarried ladies by the name of Coffin, namely, Kate Coffin and Emma Coffin, who are sisters, and Kate Coffin being the elder is known as Miss Coffin.

It is admitted by the respondent that Mrs Joseph Dudleston, Mrs J. A. Shaw, Mrs G. P. Gunn, Mrs Walter Davidson and Mrs Jennie Worden, whose votes were received for the office of trustee at said annual meeting, were not, nor was either of them, qualified to vote at said meeting; and it is established that Jennie Worden voted for the appellant, Wendell, and the four other ladies voted for the respondent, Kate Coffin. The appellants have failed to establish that Alice Ely, whose vote was challenged, but who made the declaration and voted, was not qualified to vote at said meeting.

The appellants herein have failed to establish the allegation made by them that said Charles Ely was prevented from voting at said meeting.

By subdivision 4, of section 14, article 1, title 7, of the Consolidated School Law of 1894, it is enacted that the ballots for school district officers shall be written or printed or partly written and partly printed, containing the name of the person voted for and designating the office for which each is voted. The words "designating the office for which each is voted" applies when at a district meeting for the election of officers persons for more than one office are to be elected, i. e., for a trustee, district clerk, etc., and upon one ballot, and is not intended to apply in a case where a ballot is ordered for the election of a trustee. At the annual meeting in said district no. 3, Herkimer, a

ballot was ordered for the election of a trustee and the voters present were informed and knew that only a trustee of the district was to be voted for, and no one was misled. A vote cast in such ballot having upon it the name of a person and without the words "For Trustee" thereon, was a legal ballot under the school law. The votes cast were properly canvassed and counted for Miss Kate Coffin, and H. H. Wendell respectively for trustee. But two persons were put in nomination for trustee, to wit, said Miss Kate Coffin and H. H. Wendell, and such persons were well known to the voters present, and it was clearly the intention of each person who voted, to vote for the one or the other of the two persons nominated, and it was the duty of the inspectors of election in canvassing the votes cast to ascertain that intent and to count such ballots as such voters intended, whether the ballot had H. H. Wendell, Wendel or Mr Wendell, or Miss Kate Coffin, Kate Coffin, or Miss Coffin thereon. No one of the five persons who, it is admitted, voted at said meeting for trustee, and who, it is also admitted, were not qualified voters in the district, were challenged when offering to vote. This Department has held that "A party knowing a person to be unqualified and permitting him to vote without challenge will not be allowed to object to the proceedings of the meeting because said unqualified person participated in them."

The Supreme Court of this State held, in *ex parte* Murphy and others, 7 Cowen 153, that the mere circumstance that improper votes are received at an election will not vitiate it. The fact should be shown affirmatively that a sufficient number of improper votes were received for the successful ticket, to reduce it to a minority if they had been rejected; or the election shall stand. The Court of Appeals in the People v. Pease, 27 N. Y., page 57, said: "It is a paradox to say that a vote can be given by one not a voter, and as it is the greatest number of votes which elects a candidate and gives title to the office, it follows logically that those ballots given or handed in by persons not voters are not votes and can not, therefore, be rightfully estimated or have any influence upon the result." Judge Andrews of the Court of Appeals said in the People ex rel. Frost v. Wilson, 62 N. Y., page 179: "The 43 votes cast by persons not registered were plainly illegal. If, however, they are taken from the vote of the defendant the result would not be changed, and for this reason the fact that they were illegally received is immaterial." It is conceded that 25 votes were received at said annual meeting for trustee, of which the appellant, Wendell, received 10 and the respondent, Coffin, received 15. It is admitted that 5 votes were received from persons not qualified voters at such meeting, 1 of which was for the appellant, Wendell, and 4 for the respondent, Coffin. The 5 illegal votes must be deducted from the 25 votes received, leaving 20 legal votes cast for trustee. Of said 5 illegal votes, 1 was for the appellant, Wendell, and 4 were for the respondent, Coffin. It follows, therefore, of the 20 legal votes cast the respondent, Coffin, received 11 and the appellant, Wendell, 9, and that the respondent, Coffin, having received a majority of the legal votes cast was duly and legally elected trustee of said district.

Admitting for the purpose of argument only, that Miss Alice Ely, who voted for the respondent, Coffin, was not a qualified voter, the whole number of legal votes cast would be 19, of which the respondent, Coffin, received 10 and the appellant, Wendell, 9, giving a majority of 1 to the respondent, Coffin, who thereby was duly and legally elected trustee. The burden is upon the appellants herein to sustain their appeal by a preponderance of proof, and in this they have failed.

The appeal herein is dismissed.

4315

In the matter of the appeal of W. R. Harris and others from proceedings of annual school meeting in district no. 3, town of Southfield, Richmond county, in election of trustees.

In the election of school district officers the mere circumstance that improper votes were received will not vitiate the election. The fact must be shown affirmatively that a sufficient number of improper votes were received for the successful ticket to reduce it to a minority if they had been rejected; that a person believing or knowing a person offering to vote at a school meeting to be unqualified and permitting him or her to vote without challenge, such person will not be allowed to object to the proceedings of such meeting upon appeal, because such unqualified person voted therein. That in appeals from the proceedings and decision of a school meeting on the ground that the same was secured by illegal votes, it is incumbent upon the appellants not only to allege the illegal voting or the disqualifications of certain persons, but to show by evidence the lack of qualifications in such terms as necessarily to exclude every presumption that the voter or voters could be qualified under either of the provisions of the section of the school law prescribing the qualifications of voters at the school district meetings in this State.

Decided January 28, 1895

W. H. H. Ely, attorney for respondents

Crooker, *Superintendent*

This appeal is taken from the action of the annual school meeting, held on the first Tuesday of August 1894, in school district no. 3, town of Southfield, Richmond county, in the election of H. S. La Vaud, Elizabeth A. Britton and James Simpson as trustees of said district.

The sole ground alleged in the appeal is that such election was secured by illegal votes.

The pleadings and proofs are very voluminous, but much stated therein is not relevant to the question as to whether the election of the persons hereinbefore named as trustees of said school district was secured by illegal votes. Such pleadings and proofs have received careful examination.

The burden is upon the appellants to establish their contention by a preponderance of proof.

In *ex parte* Murphy and others, 7 Cowen 153, the Supreme Court of the State held that the mere circumstance that improper votes are received at an election, will not vitiate it. If this were otherwise, hardly an election in the State could be sustained. The fact should be shown affirmatively that a sufficient number of improper votes were received for the successful ticket to reduce it to a minority if they had been rejected; or the election shall stand.

This Department has uniformly held in accordance with the decision of the court above stated, in appeals taken from the election of school district officers in the contention that such election was secured by illegal votes. This Department has uniformly held that a person believing or knowing a person offering to vote at a school meeting to be unqualified and permitting him or her to vote without challenge, will not be allowed to object to the proceedings of such meeting because such unqualified person participated therein.

This Department has also uniformly held that in case of an appeal from the proceedings had and taken at a school meeting, on the ground that the same were secured by illegal votes, it is incumbent upon the appellant not only to allege the illegal voting or the disqualification of certain persons, but to show by evidence the lack of qualifications in such terms as necessarily to exclude every presumption that the votes or voters could be qualified under either of the provisions of the section of the school law prescribing the qualifications of voters at the school district meetings in this State.

The question for my determination, upon the papers presented is, have the appellants established by evidence the lack of qualifications of certain persons who voted at the annual meeting in said school district, in such terms as necessarily to exclude every presumption that such persons could be qualified voters under either of the provisions contained in section 11, article 1, title 7, of the Consolidated School Law of 1894, and that a sufficient number of votes cast by such unqualified persons in favor of the successful ticket were received to reduce said ticket to a minority if said improper votes had been, or should be, rejected.

The proofs presented herein show that at said annual meeting three trustees were to be elected for the term of one, two and three years respectively; that six persons were put in nomination for trustees, to wit: William R. Harris for three years, Thomas Smith for two years and John Smith for one year, and H. S. La Vaud for three years, Elizabeth A. Britton for two years and James Simpson for one year; that printed ballots were furnished to the voters, the ballot headed for La Vaud having also thereon a candidate for the office of clerk and collector respectively; that it was decided to ballot first for trustees, and then for clerk and collector, which decision rendered it necessary for the supporters of La Vaud and others for trustees, to eliminate from their ballots the names thereon of the candidates for clerk and collector; that inspectors of election were appointed, a ballot for trustees was taken and a poll list kept containing the names of each person whose vote was received, on which poll list were recorded the names of 119 persons; that upon a canvass of the ballots cast there

were found 118 single ballots, and 2 ballots folded together, each of which contained the names of Harris and Thomas and John Smith; that upon 2 ballots were found respectively the names of James Simpson for trustee for one year and that of William E. Cruise for clerk and August Wenske for collector; that 1 of said ballots contained the name of Harris for trustee for three years, La Vaud for trustee for two years and John Smith for one year; that another ballot contained only the names of Harris for trustee for three years and John Smith for trustee for one year; and another ballot contained only the name of Harris for trustee for three years; that the 2 ballots found folded together were laid aside until 118 single ballots were canvassed and said 2 ballots, notwithstanding objections made, were allowed to and counted for Messrs Harris and Smith; that the result of the ballot was then announced, as follows: H. S. La Vaud, 60 votes; Mrs Elizabeth A. Britton, 61 votes; James Simpson, 63 votes; William R. Harris, 58 votes; Thomas Smith, 55 votes and John Smith, 55 votes; that it does not clearly appear what persons offering to vote at said meeting were challenged aside from the four persons noted upon the copy of the poll list attached to the appeal.

The appellants allege in their appeal that " upon investigation we believe that more than 10 votes cast for H. S. La Vaud and E. A. Britton and James Simpson were voted by persons not having a legal right to vote at said meeting, hence should be stricken from the list and not counted," and then follow the names of eleven persons who voted, with allegations, stating the grounds upon which they claim that said persons were not qualified voters at said meeting. The appellants also allege, in papers filed by them subsequently to said appeal, that August Wenske, W. L. McCarthy and August P. M. Helmeyer, who voted at said meeting were not legal voters. The appellants do not show affirmatively that the votes cast by said persons were for the successful ticket for trustees at said meeting.

The respondents in their answer to the appeal allege that nine persons who voted at said meeting were not legal voters, and state the grounds upon which said allegations are made. One of said nine persons, it is admitted by the appellants, was not a legal voter. I have grave doubts, upon the proofs presented, as to whether several of the eight other persons named were at said annual school meeting qualified voters in said district. But I am of the opinion that upon said proofs I can not find that the respondents have shown by evidence the lack of qualifications of said persons in such terms as necessarily to exclude every presumption that said persons could be qualified under some one of the provisions of section 11 of title 7 of the school law.

I find that Mr and Mrs Reggonet, Richard King and Jacob Swain were not legal voters, nor was any one of them a legal voter, at said meeting; but the appellants have not shown affirmatively that their votes or the vote of any one of them was cast for the successful ticket for trustees at said meeting.

I find upon the admission of the appellants, that August Smultz, or Schmult, was not a qualified voter at said meeting, but that he voted at said meeting and

for Harris, Smith and Smith for trustees, as appears by his affidavit, sworn to on December 12, 1894, which affidavit has been filed by the appellants in the appeal herein.

I find that the two ballots folded together should have been destroyed by the inspectors, and it was error in counting said two ballots for Messrs Harris, Smith and Smith for trustees. It appears that 119 persons voted, and there were 120 votes in the box, and where two or more ballots shall be found in a ballot box folded together as to present the appearance of a single ballot, they shall be destroyed, if the whole number of ballots exceeds the whole number of ballots shown by the poll list to have been deposited therein.

The appellants state in their appeal, "Aside from our interest in the school, the appeal is brought to put an end to illegal voting in the district, etc., etc." Under the provisions of the school law, any qualified voter in a school district has the right, at any school district meeting, to challenge the vote of any person offering to vote, upon the ground that he or she is disqualified; that upon such challenge the chairman presiding at such meeting shall require such person to make the declaration required in section 12, article 1, title 7 of the Consolidated School Law; that if such person makes the declaration his or her vote must be received; but if such person refuses to make the declaration then his or her vote shall be rejected. Under section 13, same article and title, any person who shall wilfully make a false declaration of his or her right to vote after such vote shall have been challenged, shall be deemed guilty of a misdemeanor. If, at the school meeting, the above provisions of the school law should be brought to the attention of the persons attending said meeting, and any person challenged shall make and file a false declaration, and such person be proceeded against and punished for the misdemeanor committed, that illegal voting in the district would be stopped.

I find and decide that there must be deducted from the votes counted at said annual meeting for Harris, Smith and Smith, the two votes folded together, and also one vote cast by Smultz, or Schmult; that William R. Harris received 55 votes, Thomas Smith 52 votes and John Smith 52 votes; that H. S. La Vaud received 60 votes, Mrs Elizabeth A. Britton 61 votes, and James Simpson 63 votes, and that said La Vaud, Britton and Simpson were, and each of them was, duly elected trustees of said school district.

Assuming for the purpose of argument that Mr and Mrs Regonnet, Richard King and Jacob Swain each voted for La Vaud, Britton and Simpson, it would not change the result of said election, for the reason that deducting the four votes as cast for La Vaud, Britton and Simpson, La Vaud received 56 votes, Mrs Britton 57 votes, and James Simpson 59 votes, as against 55 votes for Harris, 52 votes for Thomas Smith, and 52 votes for John Smith.

The appellants have failed to establish their appeal herein and the appeal should be dismissed.

Appeal dismissed.

4397

In the matter of the election of school district officers in school district no. 8, town of Hounsfield, Jefferson county.

At an annual school meeting the several district officers were declared elected upon a vote for each taken by acclamation or *viva voce* and not by ballot. That the trustees elect, assuming that said election was not legal, called a special meeting of the district for the election of such district officers; that at such special election some person other than the one assumed to be elected at the annual meeting was elected trustee. *Held,* that at the annual meeting the district officers were elected by the form or color of an election and as such were entitled to perform the duties of their respective offices until by an order of the State Superintendent of Public Instruction such election was declared illegal and void. That the special meeting held in said district was illegal and void. That the election of said district officers was vacated and set aside, and a special meeting of the district called for the election of said officers, excepting for the office of librarian. That the trustee, under the school law, must appoint the librarian.

Decided October 18, 1895

Skinner, *Superintendent*

In the above-entitled matter Levi Bowles and George W. Stetson each claiming to have been legally elected trustee of school district no. 8, town of Hounsfield, Jefferson county, have presented to me an agreed statement of facts, signed by them, as to the proceedings taken relative to the election of school officers in said district, and have submitted the same to me for my consideration and decision.

The following is a statement of the facts as so agreed upon:

On August 6, 1895, the annual school meeting was held in said school district no. 8, town of Hounsfield, Jefferson county. Jefferson Baker was elected chairman and George H. Weaver acted as clerk; a vote was taken by acclamation and the following named persons were declared elected as officers of said school district, namely, George H. Weaver district clerk, Samuel Hicks collector, Levi Bowles trustee, and Lester Lamson librarian; that after the meeting had adjourned, Mr Bowles was informed by one or more electors of said district that the election of the said persons by acclamation, as such school district officers, was not a legal election, and that they should have been elected by ballot; that after considering the matter Mr Bowles announced that he thought the proper course to pursue was to call a special meeting of the district for the purpose of electing thereat by ballot the officers of the district for the school year and suggested to Mr Weaver, the clerk, that he call such special meeting; that such special meeting was called and held and at said meeting George W. Stetson was declared elected trustee by ballot; that three ballots for trustee were had at such meeting each of which resulted as follows: first ballot, whole number of votes cast was 11, of which Levi Bowles received 3, William Dunbar 4 and George W. Stetson 4; second ballot, whole number of votes cast was 11, of which Levi Bowles received 2, William Dunbar 4 and George W. Stetson 5; third ballot, whole number of votes received was 11, of which William Dunbar received 4 and George W. Stetson 7; that at said special meeting the other district officers were

not balloted for and no action was taken thereat to declare such other officers elected; that at the annual school meeting there was no dissenting vote against any of the candidates named.

Levi Bowles claims to be de facto trustee of said district, and George W. Stetson claims that he is the lawfully elected trustee of said district.

By section 14, of article 1, title 7, of the Consolidated School Law of 1894, chapter 556 of the Laws of 1894, the annual school meeting held in said school district had the power, and it was its duty, to appoint a chairman of the meeting and if the district clerk was absent, to appoint a clerk for the meeting; to elect a trustee, a district clerk and a collector; that all such district officers should be elected by ballot; that the trustee should have provided a suitable ballot box; that two inspectors of election should have been appointed in such manner as the meeting determined, who should have received the votes cast, and canvassed the same, and announced the result to the chairman; a poll list containing the name of every person whose vote was received should have been kept by the district clerk, or the clerk for the time of the meeting; that such voters should have used ballots written or printed, or partly written and partly printed, containing the name of the person voted for, and if said meeting decides to vote for all of such officers upon one ballot, designating on said ballot the office for each person named on said ballot was voted for; that the chairman should have declared to the meeting the result of each ballot as announced to him by the inspectors, and the persons having the majority of the votes respectively, for the several offices, should have been elected.

It appears, from said statement of facts, that said annual meeting complied with the provisions of law above cited in electing a chairman and having the district clerk act as clerk of the meeting; but in all other matters there was a total disregard of the said provisions. No ballot was had for any of the district officers and none of such district officers were legally elected. Said meeting had no legal authority to elect a librarian, as by the provisions of section 2, of title 13, of said Consolidated School Law of 1894, the trustee of the school district shall appoint a teacher of the school of the district as librarian of the school library.

The only person authorized under the school law to render a decision as to whether a school district officer is or school district officers are legally elected is the State Superintendent of Public Instruction, and the matter can be brought to him for decision either by an appeal from the proceedings of the district meeting taken in such election, or by submitting the question to him for decision upon an agreed statement of facts, signed by the contesting parties. Mr Bowles had not, nor had any other officer or voter of said district, the legal authority to assume or decide that the election of district officers at said annual meeting was illegal, and to call a special meeting for the purpose of electing such district officers or any of them. The special meeting called and held after said annual meeting, for the purpose of electing officers of said district, was illegal, and all proceedings had and taken thereat were illegal and void.

This Department has uniformly held that, when at a school district meeting, district officers are elected by the form or color of an election, but not in accordance with the provisions of the school law, the said officers so elected are de facto officers, and are authorized and empowered to perform all the duties imposed upon them respectively by law, until by an order of the State Superintendent of Public Instruction the election of said officers or any of them, is declared to be illegal and void. The persons elected to the respective district offices by the color or form of an election at said annual meeting, except the person elected librarian, became de facto officers, and all contracts made, or expenses incurred by them or any of them, authorized by law, are valid and a charge upon said district.

As the special meeting held after the annual meeting was illegal and void, Mr Stetson, who claims to have been elected trustee at said meeting did not become by the action of said meeting a trustee either de facto or de jure, and hence had no authority whatever to do or perform any act as trustee of said district.

It is ordered, That all action and proceedings had and taken at said special meeting held in said school district at which George W. Stetson claims to have been elected trustee of said district be, and the same are and each of them is, hereby vacated and set aside as illegal and void.

It is further ordered, That all proceedings had and taken at the annual school meeting, held in said district, relating to the election of trustee, district clerk, collector and librarian, or of any of them be, and the same are, and each of them is, hereby vacated and set aside, as illegal and void.

It is further ordered, That George H. Weaver, the district clerk of said school district for the school year of 1894–95 be, and he hereby is, authorized and directed to call a special meeting of the inhabitants of said district, qualified to vote at its school meetings for the purpose of electing a district clerk, a collector and a trustee of said district for the present school year; that he cause a notice of said special meeting to be served upon each of the qualified voters of said district; that the proceedings of said special meeting when convened shall be in accordance with section 14, article 1, title 7, of the Consolidated School Law of 1894.

4414

In the matter of the appeal of Cassius B. Lynde from proceedings of annual school meeting held August 6, 1895, and special school meeting held August 31, 1895, in district no. 7, town of Antwerp, Jefferson county; and acts of Arthur Gleason as trustee.

Where at an annual meeting in a common school district in the election of a trustee thereof no person received a majority of the votes cast in the ballot taken for said office, but the chairman of the meeting declared the person receiving the highest number of votes elected trustee, and a special meeting of the district having been called upon the assump-

tion that there was no valid election of a trustee and which meeting assumed to elect a trustee; *held,* that it was error on the part of the chairman of the meeting in declaring the person having a plurality of the votes only as elected trustee. That such meeting should have proceeded to ballot until some one received a majority of the votes cast. That such special meeting was null and void. That the tax list and assessment made and issued by the person claimed to have been elected trustee at such meeting be vacated and set aside, and that a special meeting of the district be called for the purpose of electing trustee and district clerk.

Decided December 18, 1895

A. W. Orvis, attorney for appellant

Skinner, *Superintendent*

At the annual school meeting held on August 6, 1895, in school district no. 7, town of Antwerp, Jefferson county, a ballot was taken for trustee of the district for the school year of 1895–96, and said ballot resulted as follows: whole number of voters cast 12, of which H. H. Kelsey received 6, Milo Paddock 3, and Frank Hicks 3, and said Kelsey was declared elected; that a ballot was then taken for district clerk, which resulted as follows: whole number of votes cast 12, of which Arthur Gleason received 6, Frank Hicks 4, and George Wood 2, and said Gleason was declared elected; that after such meeting James McRobbie, the trustee of the district for the school year 1894–95, delivered to said Kelsey the books and papers pertaining to said office of trustee; that a few days after said annual meeting, a special meeting of the inhabitants of the district was called for the evening of August 31, 1895, the notices for said meeting being given by Kelsey, the clerk of said district for the school year 1894–95, with the consent of said McRobbie; that at said meeting on August 31, 1895, a ballot was taken for trustee that resulted in Arthur Gleason receiving a majority of the votes cast; that a ballot was taken for district clerk that resulted in George Wood receiving a majority of the votes cast; that the said Gleason received from Kelsey the books and papers, and assumed to act as trustee of said district; that on November 7, 1895, said Gleason delivered to the collector of said district a tax list, with the warrant, for the collection of the taxes assessed therein.

The appellant herein has appealed from the tax list issued by said Gleason, assuming to act as trustee of said district. An answer by Gleason has been filed in which the material facts in the appeal are admitted.

Subdivision 4, of section 14, article 1, title 7, of the Consolidated School Law of 1894, enacts that in the election of school district officers the person having the majority of votes, respectively, for the several offices, shall be elected. It is the majority of the votes cast for a school officer that elects such officer, not the declaration of the chairman of the meeting.

It is clear that at the annual school meeting in said district there was no election of a trustee or district clerk for said district. It was the duty of the

meeting to have balloted until some one received a majority of the votes cast for trustee and clerk respectively, and the meeting having failed to do so, the trustee and district clerk in office at the time the said annual meeting convened respectively, continued to hold office until their successors should be elected or appointed. The special meeting held in said district on August 31, 1895, at which it is claimed said Gleason was elected trustee, and said Wood was elected district clerk, was illegal and void. There was no vacancy then existing either in the office of trustee or clerk of said district that a special meeting of the district could supply.

I find and decide that said Arthur Gleason is not legally a trustee of said district, not having been legally elected to said office; that for like reasons George Wood is not legally the district clerk of said district; that the tax list and warrant issued by said Gleason is illegal and void; that James McRobbie is the legal trustee of said district and that H. H. Kelsey is the legal clerk of said district.

It also appears that said McRobbie, as trustee of said district, prior to August 6, 1895, employed one James O'Brien to teach the school in said district.

I find and decide that said McRobbie, as such trustee of said district, had authority, under subdivision 9, of section 47, article 6, title 7, of the Consolidated School Law, to contract for the employment of said O'Brien as a teacher therein, if such employment was not for more than one year in advance; and that such contract is binding upon the successor or successors in office of said McRobbie and upon said district.

As it appears, the qualified voters of said district have been misled by the action of the chairman of said annual meeting, and the provisions of the school law, a special meeting of such district should be called for the purpose of electing a trustee and district clerk of said district.

The appeal herein is sustained.

It is ordered, That the tax list and warrant made and delivered to the collector of said school district no. 7, town of Antwerp, Jefferson county, on or about November 7, 1895, by Arthur Gleason, assuming to act as trustee of said district, be, and they are, hereby vacated and set aside as illegal and void.

It is further ordered, That the action and proceedings had and taken at special meeting of said district, held on August 31, 1895, be, and they are, hereby vacated and set aside as illegal and void.

It is further ordered, That James McRobbie, trustee of said district, be, and he is, hereby authorized and directed to call a special meeting of said district for the purpose of electing a trustee and a district clerk of said district for the present school year.

4101

In the matter of the appeal of F. A. Dutton and others from the proceedings of the annual meeting held on August 2, 1892, in union free school district no. 9 of the town of Gainesville, Wyoming county.

At a meeting in a union free school district in which the number of school children does not exceed 300, after the nomination of three persons for trustees for three years, a motion was made that the clerk be instructed to cast the ballot of the meeting for the three persons nominated for trustees. Such motion was put by the chairman, whereupon responses of "aye" were made, and thereupon the chairman called for the nays and responses of "nay" were made, and the motion was declared carried, and the ballot was cast by the clerk and the persons named in said ballot declared elected. *Held,* that there was no valid and legal election of trustees by said meeting; and that the trustees whose terms of office expired at such meeting held office until their successors were elected or appointed, and that there are no vacancies in the office of trustees, that a special meeting of the district can fill.

Decided September 22, 1892

Crooker, *Superintendent*

This is an appeal from certain proceedings had and taken at the annual meeting held on August 2, 1892, in union free school district no. 9 of the town of Gainesville, Wyoming county.

The appeal alleges improper and arbitrary decisions and action on the part of the chairman of the meeting, and his refusal to recognize and permit certain qualified voters to speak at such meetings; and that the election of three trustees for said district was not valid or legal. The appeal is verified by fourteen of the voters of the district, but no copy of the proceedings had and taken at said meeting is contained in or annexed to said appeal.

Milton R. Brown has filed an answer to said appeal, in which answer he denies the allegations contained in the appeal relative to decisions and actions of the chairman of the meeting and the refusal to recognize and permit qualified voters to speak at such meeting, and sets forth the proceedings had and taken at such meeting. Annexed to said answer are the affidavits of about thirty-two of the voters of the district as to the truth of the statements contained in the answer, and a certified copy of the proceedings had and taken at said meeting relative to the election of trustees.

The appellants have failed to establish their allegations relative to the decisions and actions of the chairman, and his refusal to recognize and permit qualified voters to speak at said meeting.

The facts clearly established by the papers presented upon the appeal relative to the election of trustees for said district are as follows:

That Mr M. R. Brown, the chairman of the meeting, stated that nominations for candidates to fill vacancies in the board of education were in order; that one G. S. Skiff placed in nomination M. R. Brown, J. W. Bristol and William Canning for members of the board of education for the ensuing three years; that, no other nominations being made, said Skiff moved that the clerk

be instructed to cast the ballot of the meeting for M. R. Brown, J. W. Bristol and William Canning to be members of the board of education for the ensuing three years; that said motion was seconded by one John Hickey; that the chairman of said meeting put the said motion, saying, in substance, "All who are in favor of said motion, say 'aye,'" whereupon responses of "aye" were made; the chairman then said, "Contrary, 'nay,'" whereupon responses of "nay" were made, and the chairman declared the motion carried; that thereupon the clerk cast one ballot for M. R. Brown, J. W. Bristol and William Canning for members of the board of education for the ensuing three years; that no other ballots were cast; that the chairman declared the persons so voted for elected; that thereupon a motion was made and seconded that the meeting adjourn, which motion was put and declared carried by the chairman, and said chairman declared said meeting adjourned.

The only question to be decided in this appeal, upon the papers presented, is whether there was or there was not a valid and legal election of trustees or members of the board of education at the annual meeting held on August 2, 1892, in union free school district no. 9 of the town of Gainesville, Wyoming county.

School district no. 9 of the town of Gainesville, Wyoming county, is a union free school district; its board of trustees or of education consists of seven members; the terms of three of said members expired at the annual meeting of the district on the first Tuesday of August 1892; the terms of two members will expire on the first Tuesday of August 1894. In said district the number of children of school age does not exceed 300, and the provisions of chapter 248 of the Laws of 1878 in relation to the election of officers in certain school districts do not apply; but under the school laws said district must hold its annual meeting on the first Tuesday of August in each year, and elect trustees in place of persons whose terms of office expire at the time of such annual meeting. Such election must be by ballot. The qualifications necessary to be possessed by persons to entitle them to vote at any school meeting in said district are defined in the school law, and a majority of the votes of those present and voting at the meeting who are qualified to vote, is requisite to elect such trustees.

Every person duly qualified to vote at any school meeting held in said district, present at said annual meeting on August 2, 1892, had, under the school laws of this State, the right to vote by ballot for whom he or she desired, for three persons as trustees in place of the persons whose term of office as trustees expired at such meeting, and such voter can not be deprived of such right by the action of the district meeting, either directly or indirectly.

Persons who were qualified voters at said meeting were deprived of their legal right to vote by the act of said meeting in the attempted election of three trustees of said district by the ballot of the clerk, cast, upon a motion adopted by an aye and no vote, on the decision of the chairman of the meeting that such motion was adopted.

If the method of electing district officers pursued at said meeting of said district should be allowed at all, it should only be allowed where the method is the *unanimous* wish of the qualified voters of the district present at said meeting. The fact that voters present at said meeting voted "no" upon the motion requesting the clerk to cast a ballot for the three persons whose names were presented to the meeting for trustees, shows that it was not the unanimous wish of the voters.

It is not shown in the appeal papers how many of the voters voted "aye" nor how many voted "no," nor is it shown whether or not all those present and voting "aye" or "no" were qualified voters. The motion was declared adopted by the chairman of the meeting, it seeming to him that a majority voted "aye" and that the "noes" were in the minority.

The legal method of electing members of the board of trustees or board of education in union free school districts is by ballot by the qualified voters of the district, presented to and received by the tellers, duly appointed by the meeting, and the name of each voter as she or he votes to be recorded by the clerks or secretaries of the meeting. A reasonable time should be given for taking the vote. After the polls are closed the votes should be canvassed and result recorded and announced and such result duly certified to by the board of education. No declaration by the chairman of who is elected is required. It is not the declaration of a chairman, but the fact that a person or persons received a majority of the legal votes cast, which constitutes an election.

The method and proceedings relative to the election of trustees or members of the board of education which were had and taken at said meeting are contrary to the letter and spirit of the school law governing such elections in union free school districts; resulted in depriving the qualified voters of the district present at the meeting of the right of expressing his or her choice for trustees by his or her ballot, and can not be sustained.

I do decide and determine:

That no valid and legal election of trustees or members of the board of education of union free school district no. 9 of the town of Gainesville, Wyoming county, was had at the annual meeting of said district held on August 2, 1892; that all proceedings had or taken at said meeting relative to the election of trustees are void.

There having been no valid and legal election of trustees or members of the board of education in said district at its annual meeting, and under section 25 of title 7 of the school law the trustees whose several terms expired at said annual meeting hold office until their successors are elected or appointed, there are no vacancies in the office of trustees that a special meeting of the district can fill.

So much of said appeal herein as is taken from the action and proceedings of said annual meeting relative to the election of trustees or members of the board of education is sustained; as to all other matters contained in said appeal, the said appeal is dismissed.

4281

In the matter of the appeal of Michael Mitchell from proceedings of annual school meeting in district no. 11, town of Annsville, Oneida county.

All school district officers must be elected by ballot in the manner prescribed by section 14, article 1, title 7 of the Consolidated School Law of 1894, and the persons having the majority of votes respectively for the several offices shall be elected.

Decided October 19, 1894

Silas L. Snyder, attorney for appellant
P. H. Fitzgerald, attorney for respondent

Crooker, *Superintendent*

The appellant in the above-entitled matter appeals from the proceedings of the annual school meeting, held on the first Tuesday of August 1894, in school district no. 11, town of Annsville, Oneida county, on the ground that such proceedings were irregular and in violation of the school law of this State. The appeal alleges that no inspectors of election were appointed to receive and canvass the votes and announce the result of the ballot to the chairman; that only a partial poll list of the names of the persons who voted was kept; that the chairman of the meeting nominated a candidate for the office of trustee, received the votes cast, canvassed the same and announced the result of the ballot; that persons voted who were not qualified voters in the district. An answer by Harry W. White to the appeal has been received, and sundry affidavits in support of the appeal and answer have been received. There is some conflict in the affidavits filed as to the number of ballots cast for the office of trustee, and the qualification of certain persons who voted for trustee at said annual meeting.

The following allegations contained in the appeal are not denied by the respondent, namely: that the annual meeting of school district no. 11, town of Annsville, Oneida county, was held on August 7, 1894, at the schoolhouse in said district at 7.30 p. m.; that Benjamin Ballard was elected chairman and William Stedman, clerk; that the chairman nominated Harry W. White for the office of trustee, and James Duffy and William Stedman were placed in nomination for said office; that no inspectors of election were appointed or elected, but the chairman of the meeting received the ballots cast for trustee, canvassed said ballots and announced the result to the meeting; that the clerk of the meeting kept a poll list; that the whole number of persons residing in the district claiming to be qualified voters in said district are 33 and that 16 persons claiming to be qualified voters were present at said meeting.

The appellant alleges in his appeal that 16 ballots were cast for trustee, and upon the canvass of the ballots by the chairman it was discovered that the number of ballots exceeded the number of names on the poll list by one, there being 16 ballots and but 15 names on the poll list (the appellant's name not appearing upon said poll list) whereupon the chairman cast out a ballot and declared Harry W. White duly elected, he having received 8 votes; that appellant voted at said meeting for William Stedman as trustee.

In support of these allegations the appellant filed his own affidavit, in which he states he voted at said meeting for said Stedman and was the third person who voted; that after the voting was over the chairman counted the votes and said there were 16 votes and asked the clerk how many names there were on the poll list and the clerk replied 15; and Ballard, the chairman, said he would have to throw one out, and did take up a vote from the table and threw it on the floor at his feet; that the deponent stood close to said chairman, almost touching him. He also files the affidavits of four other persons who were present at said meeting who each swear they saw the appellant vote at said meeting; three of whom swear that the chairman of the meeting received the vote of the appellant. He also files the affidavit of the clerk of the meeting, that after the voting was concluded he (the affiant) heard the chairman say there were 16 votes cast, and said chairman asked deponent how many names were on the poll list and deponent counted the names and informed said chairman there were 15, and the appellant's name was not among them. He also files the affidavit of three other persons present at the meeting, each of whom swears that he heard the chairman, who counted the ballots, declare that there were 16 votes cast, and also heard the clerk say there were only 15 names on the poll list.

The respondent, White, alleges in his answer to the appeal that the poll list at said meeting contained the names of 15 persons as having voted for trustee, the name of the appellant not appearing therein; that at the close of the polls the names on the poll list were counted and also the number of ballots cast and that both corresponded, each being 15; that the respondent received 8 of the 15 votes and was declared elected. Annexed to said answer and in support thereof is the affidavit of the respondent and six other persons in which it is alleged that the ballots were counted and found to be 15 and the names on the poll list counted and found to be 15; that no ballot was eliminated, thrown away or destroyed; that none of said deponents remember having seen the appellant vote at said meeting; that they verily believe that if the appellant had voted at said meeting they would have seen and remembered it. The respondent also files in support of his answer the affidavit of three lads of the age of 11, 14 and 16 years respectively, who each swears he was present at said meeting; that there were 15 votes cast at said meeting, and there were only 15 votes; that there were 15 names on the poll list, and that the names on the poll list and the number of votes cast at the meeting correspond; that in the presence of each deponent the votes were counted by Ballard and found to be 15.

Both the appellant and respondent allege that certain persons voted at said meeting who were not qualified voters. When such allegations are made it is incumbent upon the party making the allegations to show *by evidence* the lack of such qualifications in such terms as necessarily to exclude every presumption that person or persons could be qualified under either of the heads stated in section 11, article 1, title 7 of the Consolidated School Law. Both parties to this appeal have failed in this regard. A party knowing, or having good reason to believe, a person to be unqualified, and permitting him to vote without challenge, will not be allowed to object to the proceedings of the meeting because such unqualified person participated therein.

From the uncontroverted facts established in this appeal it is clear that the election of a trustee at the school meeting, held on August 7, 1894, in district no. 11, Annsville, was not in conformity with the provisions of subdivision 4 of section 14, article 1, title 7 of the Consolidated School Law. It does not appear affirmatively that any ballot box was furnished; no inspectors of election were chosen or appointed. The chairman of the meeting, in contravention at least of the proprieties, nominated a candidate for trustee; he assumed the duties of inspectors of election and received the ballots cast; canvassing the same and declaring the result.

The main questions presented by this appeal for decision are: first, How many ballots were cast at said meeting for the office of trustee?; and, second, Did any person receive a majority of the votes cast for the office of trustee?

It is conceded by the respondent that there were *fifteen* votes cast, and it is claimed by the appellant that there were *sixteen* votes cast. The appellant swears positively that he voted for Stedman for trustee, and was the third person who voted; one Cornelius Mitchell swears he saw the appellant vote for trustee. Hall, Downey and Corcoran each swear they saw appellant vote, and Ballard (the chairman) received such vote. In answer to this proof on the part of the appellant, the respondent, White, and six other persons, in a joint affidavit, one of the affiants being Ballard (the chairman), say "that none of them *remember* having seen Michael Mitchell vote at said meeting." Five persons swear positively to a fact, to wit, that the appellant voted for trustee at said meeting; and seven persons swear *that none of them remember having seen the appellant vote.* The appellant, the clerk, Stedman, and three other persons swear that the chairman, after counting the ballots, said there were 16, and asked the clerk how many names were on the poll list, to which the clerk replied 15; the appellant swears positively that he was standing close to the chairman and almost touching him; he saw the chairman, after receiving said reply from the clerk, take up a vote from the table and throw it on the floor at his (the chairman's) feet.

I am of the opinion that it is established herein by a preponderance of proof, that the appellant herein voted at said meeting for William Stedman for trustee; that the appellant handed his said ballot to the chairman of the meeting, who received said ballot; that said chairman failed to give the name of the appellant to the clerk for entry upon the poll list; that 16 ballots were cast for the office of trustee at said meeting and said 16 votes should have been canvassed and the result of said canvass announced to said meeting.

As to the second proposition, I am of the opinion also, that no one received a majority of the votes cast at said meeting for the office of trustee. There having been 16 votes cast a majority of said vote is 9. The respondent herein received 8, and the remaining 8 votes cast were given for either Stedman or Duffy. Therefore, no one was legally elected trustee of said district at said meeting.

The appeal herein is sustained.

I find and decide, That at the annual school meeting, held on August 7, 1894, in district no. 11, town of Annsville, Oneida county, Harry W. White, the respondent herein, was not, nor was any person, legally elected a trustee of said district.

It is ordered, That the trustee of said school district no. 11, town of Annsville, Oneida county, in office on August 1, 1894, be, and he is, hereby authorized and directed forthwith to call a special meeting of the inhabitants of said district qualified to vote at its school meetings, for the purpose of electing a trustee of said district, the last annual meeting of said district having failed to elect a trustee. That notice of said special meeting be served upon said inhabitants in the manner prescribed in section 2, article 1, title 7 of the Consolidated School Law of 1894; and that the proceedings of said special meeting when assembled, in organizing and in the election of said trustee, shall be in accordance with the provisions of section 14, article 1, title 7 of said Consolidated School Law of 1894.

4881

In the matter of the appeal of Charles H. Simmons and others from proceedings of annual meeting held August 7, 1900, in school district no. 6, Springfield, Otsego county, relating to the election of district officers.

Under the Consolidated School Law of 1894 all school district officers must be elected by ballot; at such election the trustee shall provide a suitable ballot box; two inspectors of election shall be appointed in such manner as the meeting shall determine, who shall receive the votes cast and canvass the same, and announce the result of the ballot to the chairman; a poll list, containing the name of every person whose vote shall be received shall be kept by the district clerk or the clerk for the time of the meeting; the ballots shall be written or printed, or partly written and partly printed, containing the name of the person voted for and designating the office for which each is voted; the chairman shall declare to the meeting the result of each ballot as announced to him by the secretary, and the persons having the majority of votes respectively, for the several offices, shall be elected.

Said law also exacts that in all propositions arising at school district meetings, involving the expenditure of money or authorizing the levy of a tax or taxes, the vote thereon shall be by ballot, or ascertained by taking and recording the ayes and noes of such qualified voters, present and voting at such district meeting. Taking and recording the ayes and noes means that the clerk of the meeting shall record the name of each person whose vote is received and set opposite to each name whether such person votes aye or no. No person can vote at any school district meeting unless he or she possesses the requisite qualifications as prescribed in section 11 of article 1, title 7 of said Consolidated School Law of 1894.

Decided September 22, 1900

Skinner, *Superintendent*

This is an appeal from the proceedings of the annual meeting held August 7, 1900, in school district 6, Springfield, Otsego county.

The appellants allege as the grounds for bringing their appeal, that no inspectors of election were appointed in such manner as the meeting should

determine, who should receive the votes cast and canvass the same, and announce the result of the ballot to the chairman; that no ballot was had for a district clerk or a collector; that the vote upon the appropriation of money for school purposes or the levy of a tax was not taken by ballot, or ascertained by taking and recording the ayes and noes of the qualified voters attending and voting at such annual meeting.

An answer has been made to the appeal.

The following facts are established by the proofs filed herein:

That the annual meeting was held in school district 6, Springfield, Otsego county, August 7, 1900, and George Eckerson was elected chairman and George W. McRorie, the district clerk, acted as clerk; that the proceedings of the last meeting were read and accepted; that the report of the trustee was read and accepted; that a motion was adopted that they proceed to ballot for trustee; that upon the suggestion of one S. M. Ingalls, no motion being made or any vote taken in that regard, the chairman and clerk acted as inspectors of election, the clerk keeping a poll list containing the names of the persons whose votes were received for trustee; that the trustee, not having provided a ballot box, a hat was used in which the ballots cast for trustee were deposited by the chairman, who received such ballots from the persons voting; that the poll list kept by the clerk contained the names of 25 persons whose votes had been received, but by the count made of the votes in the hat there were found to be 26 votes cast; that a motion was made and seconded that one ballot be withdrawn, to which said Ingalls objected, and upon his suggestion the names upon the poll list were called by the clerk, and thereupon Charles H. Simmons, one of the appellants, declared that he had voted, and Simmons' name was entered by the clerk upon the poll list; that the votes in the hat were then canvassed by the chairman and clerk, and the result of the count reported as follows: Whole number of votes cast, 26, of which S. M. Ingalls received 17, J. L. McKellip received 7, and Henry C. Sheldon received 2; that G. W. McRorie was elected district clerk by a viva voce vote; that A. T. McRorie was elected collector by a viva voco vote; that upon a motion made and seconded, and adopted by a viva voce vote, the sum of $40 was ordered to be raised by tax for wood and other expenses, and upon a like motion and vote the further sum of $17.98 was directed to be raised by tax to pay a note given for the purchase of a globe.

In subdivision 4 of section 14 of article 1, title 7 of the Consolidated School Law of 1894, chapter 556 of the Laws of 1894, it is, among other things, enacted that all district officers shall be elected *by ballot;* that at elections of district officers the trustee shall provide a suitable ballot box; that two inspectors of election *shall be appointed in such manner as the meeting shall determine,* who shall receive the votes cast, and canvass the same, and announce the result of the ballot *to the chairman;* that a poll list containing the name of every person whose vote shall be received shall be kept by the district clerk, or the clerk for the time of the meeting; the ballots shall be written or printed, or partly written and partly printed, containing the name of the person voted for and designat-

ing the office for which each is voted; that the chairman shall declare to the meeting the result of each ballot, *as announced to him by the inspectors,* and the persons having the majority of votes respectively, for the several offices, shall be elected.

In subdivision 18 of section 14, article 1, title 7, of said Consolidated School Law of 1894, it is enacted that in all propositions arising at said district meetings, *involving the expenditure of money* or authorizing the levy of a tax or taxes, the vote thereon *shall be by ballot or ascertained by taking and recording the ayes and noes of such qualified voters present and voting at such district meetings.*

Taking and recording the ayes and noes means that the clerk of the meeting shall record the name of each person whose vote is received and set opposite to each name whether such person votes aye or no.

The provisions above cited have been the law since *June 30, 1894,* and it is time that school district meetings should be conducted in accordance with said provisions.

The proceedings with reference to the election of district officers and authorizing the levy of taxes taken at the annual meeting in school district 6, Springfield, Otsego county, with the exception of keeping a poll list by the clerk in the ballot taken for trustee, were not as required by the school law.

The trustee failed to provide a suitable ballot box; the meeting failed to appoint two inspectors of election, and the chairman and clerk assumed, *without any authority of law or vote of the meeting,* but upon the suggestion of the respondent, Ingalls, to act as such inspectors. The ballots cast for trustee exceeded the number of names of persons recorded by the clerk upon the poll list kept by him, by one; that instead of placing all the votes in the hat and drawing out one ballot and destroying it and then proceeding to canvass the votes remaining, as was proposed by a motion made and seconded, but which was not put to vote, on the objection of said Ingalls, upon the suggestion of said Ingalls the clerk called the names upon the poll list and each person so called responded, when Simmons, one of the appellants herein, stated that he had voted, and thereupon his name was added to the poll list, and the canvass of the votes was announced by the chairman. Neither the district clerk nor the collector was elected by ballot, and the vote authorizing the levy of a tax was not taken by ballot or ascertained by the clerk recording the name of each person who voted and setting opposite to each whether such person voted aye or no.

This Department has held that where the trustee or trustees of a district have failed to provide a ballot box, the use of a hat for the reception of ballots will not of itself invalidate an election.

It is alleged by the appellants that Mrs Carrie Smith, the wife of Fred W. Smith, who at the time of said annual meeting was a citizen of the United States, upwards of 21 years of age and who with her husband had resided in such school district for more than 30 days prior to such meeting, and who had residing with them four children of school age, some one or more of whom

had attended the school in such district for at least eight weeks during the school year ending July 31, 1900, offered to vote, but her vote was rejected by the chairman upon the opinion expressed by the respondent Ingalls that she was not a qualified voter in the district. Said Ingalls in his answer admits that the statements made by Mrs Smith as to her qualifications as a voter are true, but denies that she offered to vote. He, however, admits that he stated to the meeting that in his (Ingalls') opinion she was not a qualified voter. Under section 11 of article 1, title 7 of the Consolidated School Law of 1894, and the uniform rulings of this Department, Mrs Smith was a qualified voter in said district at said meeting.

The appeal herein is sustained.

It is ordered:

That all proceedings taken at said annual meeting, held on August 7, 1900, in school district 6, town of Springfield, Otsego county, subsequent to the acceptance of the report of the trustee of the district for the school years 1899–1900, be, and the same are, hereby vacated and set aside.

It is further ordered:

That Henry C. Sheldon, without unnecessary delay, call a special meeting of the inhabitants of school district 6, Springfield, Otsego county, qualified to vote at school meetings therein, for the purpose of electing a trustee, a clerk and a collector of said district, and for considering and acting upon the question of the appropriation of money, and the levy of a tax for school purposes for the present school year; that the notice of such special meeting be given in the manner required by sections 2 and 6 of article 1, title 7, of the Consolidated School Law of 1894; that in the election of such district officers the proceedings taken shall conform to the provisions contained in, and the methods prescribed in, subdivision 4 of section 14, article 1, title 7, of the Consolidated School Law of 1894, relating to the election of school district officers, that the vote appropriating money or authorizing the levy of a tax for school purposes, must be made in the manner required by subdivision 18 of section 14, article 1, title 7, of the Consolidated School Law of 1894.

3448

The candidate for collector was not eligible. It not appearing that knowledge of his disqualification was brought home to the electors, the opposing candidate can not be declared elected, and a new election must be ordered.

Decided October 22, 1885

Ruggles, *Superintendent*

At the annual school meeting in district no. 3, Philipstown, Putnam county, upon a ballot for the election of district collector, James S. McIlravy received 86 votes and Thomas Smythe received 79. The appeal is brought to set aside the election of McIlravy upon the ground that at the time of the election he was not

a qualified voter at school meeting in the district. The allegation of the appellant, that the respondent did not at the time of said election possess any of the qualifications necessary to make him a qualified voter at such election, is not successfully controverted by the respondent, who alleges that he was a qualified voter solely upon the ground that he owned upwards of $50 worth of personal property *liable to taxation* for school purposes. This is not a legal qualification. The statute provides that a resident of the district, twenty-one years of age "who owns any personal property assessed on the last preceding assessment roll of the town, exceeding fifty dollars in value, exclusive of such as is exempt from execution," is a qualified voter. McIlravy not having been so assessed was, therefore, disqualified to hold the office of collector.

It is a well-settled rule of law that had the disqualification been known to a sufficient number of electors to constitute a majority for McIlravy, and had they, notwithstanding this knowledge, cast their ballots for him, their votes would have been a nullity, and it would follow that Smythe, if duly qualified, must be declared the legally elected collector of the district. But there is no proof that the disqualification of McIlravy for the office of collector was known to any of the electors prior to the election, nor that any elector, before voting, received notice that McIlravy was disqualified. Knowledge of the disqualification not having been brought home to the electors who voted for McIlravy, it only remains for me to decide that there was not a legal election of collector on the 26th day of August last in said district. A new election ordered.

Upon evidence tending to show that illegal ballots were cast at an election for officers of a district, it will not be assumed that the illegal votes were cast for the successful candidate.

Decided February 26, 1869

Weaver, *Superintendent*

At an annual meeting the result of the first ballot for trustee was declared to be 80 votes cast, 50 for Casey, and 30 for Bierce.

Upon the ballot taken immediately thereafter for a second trustee, there being two to elect, the result was 55 ballots cast, of which 50 were for Wilson, 3 for Casey and 2 for Smith.

The same number of persons was in the room at the taking of each of these ballots and the conclusion is reached that upon the first ballot, 25 votes in excess of the voters were cast or *counted*.

The Superintendent says: "No charge is made and no proof is given that any such votes were cast for the persons declared elected, and it is a notable circumstance that upon each balloting the successful candidate received just 50 votes. Under these circumstances I can not assume that illegal votes were cast for the person who received the highest number on the first ballot. 7 Cow. 153 clearly lays down the law applicable to the facts of this case. 'To warrant setting aside

the election it must appear affirmatively that the successful ticket received a number of improper votes which if rejected would have brought it down to a minority. The mere circumstance that improper votes were received will not vitiate an election.' "

4407

In the matter of the appeal of Charles W. Dutcher from proceedings of annual school meeting held on August 6, 1895, in union free school district no. 3, town of East Chester, Westchester county.

Where at an annual school meeting in a union free school district a vote is cast upon each of certain resolutions involving the expenditure of money or authorizing the levy of tax or taxes by the secretary or some other person, under a motion adopted by the meeting upon a viva voce vote, whether such motion is declared to be adopted unanimously or not, it is not a vote upon such propositions or resolutions as is required by the provisions of the school law, and upon such action and proceedings will be vacated and set aside.

The fact that the votes of persons not qualified were received at a school meeting in any ballot taken thereat will not vitiate such ballot; but to warrant setting aside said ballot it must appear affirmatively that the resolution balloted for received a sufficient number of improper votes for it to reduce such vote to a minority if they had been rejected, otherwise the vote adopting the resolution would stand.

It is incumbent upon the party appealing, not only to allege the illegal voting or the disqualification of persons who voted upon such resolution, but to show by evidence the lack of qualification in such terms as necessarily to exclude every presumption that such voters could not be qualified under either of the heads stated in the sections of the school law, describing the qualifications of voters at school meetings in the respective school districts of the State.

Decided December 2, 1895

William P. Fiero, attorney for appellant
Jared Sandford, attorney for respondents

Skinner, *Superintendent*

The appellant in the above-entitled matter appeals from the proceedings of the annual school meeting, held on August 6, 1895, in union free school district no. 3, town of East Chester, Westchester county, first, in the election of W. F. Jeffers as a trustee, on the ground that his election was not in accordance with the provisions of the school law. Second, in voting to appropriate the sum of $25,000 for the purchase of a new schoolhouse site and the erection of a new schoolhouse in Waverly-on-the-Hill, same to be raised in annual instalments, on the ground that persons not qualified voted upon said proposition. Third, in voting to appropriate $1500 for the building of an addition to school building no. 2, Upper Tuckahoe, and in appropriating $5000 for a site and new school building in the vicinity of the Harlem Railroad depot, on the ground that the votes thereon were not taken by ballot or ascertained by taking and recording the ayes and noes of the voters attending and voting; that the new sites voted

for were not described by metes and bounds; that the board of trustees failed to cause to be published an account of moneys received and expended, as required by section 18, article 4, title 8, of the Consolidated School Law.

Annexed to the appeal and in support of the allegations therein are the affidavits of two persons who allege that the statements in said appeal, are, from the recollection of the affiants of the occurrences and proceedings at said meeting, true.

The five persons constituting the board of education of said school district have answered said appeal, and annexed thereto are the affidavits of Matthew Horan, the chairman of said annual school meeting and four other persons in support of said answer; that also annexed to said answer and forming a part thereof, is annexed a copy of the proceedings of said annual school meeting as recorded in the records of said district certified by the clerk of the board of education of said district.

From such appeal and answer the following facts are established:

That at said annual meeting Matthew Horan was elected chairman and that two persons were appointed inspectors of election; that William Rickard and Walter F. Jeffers were placed in nomination for the office of trustee to succeed William Rickard, whose term of office expired at the time of said meeting; that Rickards declined the office and no other nominations being made a motion was adopted that the secretary cast one ballot for said Jeffers for trustee; that said secretary thereupon cast one ballot for said Jeffers for trustee for the term of three years, and the result of the ballot being announced the chairman declared said Jeffers elected as such trustee; that a resolution was submitted to the meeting that there be appropriated the sum of $25,000 to be levied and raised by tax on the taxable property within school district no. 3, town of East Chester, for the purchase of a new site in Waverly-on-the-Hill, and for erecting, completing and furnishing a new school building therein; and that said sum be raised by annual instalments, the last instalment to be paid in the year 1916, and a vote thereon was taken by ballot, the result thereof, as declared, being as follows: Whole number of votes cast 129, of which 89 were for the resolution and 40 against the resolution; that a resolution was adopted that the board of trustees of said district be authorized and empowered to purchase a new site on which to erect a new schoolhouse, and that we recommend the selection for said site the following described lot or premises, to wit, 200 feet front on the old White Plains road adjoining and north of Matthew Horan's property, and 500 feet deep, known as the Morgan property; that a resolution was adopted that $1500 be raised by tax, in annual instalments, the last instalment to be paid in the year 1916 for the purpose of building an addition to schoolhouse no. 2, Upper Tuckahoe, and that the vote thereon was taken by the secretary casting one ballot for the resolution, under a resolution to that effect adopted by the meeting; that a resolution was offered to raise by tax the sum of $5000 in annual instalments, the last instalment to be paid in the year 1916, for the purchase of a site in the vicinity of the Harlem Railroad depot, and for the erecting, completing and

furnishing thereon of a new school building, said site to be thereafter designated; that the appellant herein moved to increase the amount to $10,000, and one Mulvy moved to amend the amendment that only the amount advertised be voted on, which was adopted, and the vote upon said resolution was taken by the secretary casting one ballot for the resolution, under a resolution to that effect adopted by the meeting; that a resolution was adopted that the board of trustees of said district be authorized and empowered to purchase a new site on which to erect a new schoolhouse in the vicinity of the Harlem Railroad depot.

It appears that two persons were put in nomination for the office of trustee of the district for three years, and one of them declined to be a candidate, thus leaving but one person in nomination before the meeting. The appellant alleges that after the declination of Rickard one R. T. Young was attempting to place in nomination another person for trustee, but was prevented by the summary action of the meeting. After the declination of Rickard, there being but one person put in nomination, a motion was made and unanimously adopted, by a viva voce vote, that the secretary be directed to cast one ballot for Jeffers (the only nominee before the meeting) and the secretary cast such ballot and the result of the ballot was announced.

This Department has held, in some special cases, in which it was indisputably established that it was the unanimous wish of the meeting that a certain person nominated for a district office should be elected, that a vote cast by the clerk, or some other designated person for the meeting, should be sustained. I do not, however, approve of such method of electing district officers, and in my opinion such method is not a compliance with the provisions of the school law, in the election of school district officers. Under said law, a ballot for each officer should be had, and if after the ballot has commenced it appears all present are favorable to the election of the person or persons being voted for, and no other voter present desires to vote, the ballot may be closed and the votes cast be canvassed and the result announced. In this appeal I sustain the action of the meeting in the election of Jeffers, as it is not affirmatively shown that any qualified voter present was opposed to such election or desired a ballot. No other voter of the district has appealed from such election, and the appellant does not allege that he was opposed to Jeffers, or to the motion that the secretary cast the ballot for Jeffers. Upon the proofs presented I am of the opinion that the resolutions alleged to have been passed at said meeting raising by tax the sum of $1500 and $5000 respectively, were not, nor was either of them, passed in accordance with the provisions of the school law. All propositions arising at a school meeting, involving the expenditure of money or authorizing the levy of a tax or taxes in one sum or by instalments the vote thereon shall be by ballot, or ascertained by taking and recording the ayes and noes of such qualified voters attending and voting at such meetings. A vote cast for such resolutions, or either of them, by the secretary or any other person, under a motion adopted by the meeting upon a viva voce vote, whether such motion is declared to have been adopted unanimously or not, is not a vote upon such propositions or resolutions as is required by the provisions of the school law.

Under the school law the designation of a site or sites must be made by the district meeting. Such meeting can not delegate the selection or designation of such sites to the board of trustees. Such designation must be made at a district meeting and by a written resolution or resolutions, containing a description thereof by metes and bounds, and such resolution must receive a majority of the votes of the qualified voters present and voting at such meeting, to be ascertained by taking and recording the ayes and noes. The action of said annual meeting relative to new school sites at Waverly-on-the-Hill and the Harlem Railroad depot was not a legal designation of school sites, and such action can only be held to be an expression of opinion of the voters present at said meeting in relation thereto. It is clear that it will require the further action of a district meeting, in accordance with the provisions of the school law, to designate new sites in each of said localities. The appellant alleges that the report of the trustees of said district, required by section 18, article 4, title 8, of the Consolidated School Law of 1894, was not published. Whether such report was or was not published is not material as to the legality of the annual meeting, or the validity of the proceedings of said meeting.

The only other ground of appeal herein remaining for consideration is, that in the vote of said meeting appropriating the sum of $25,000, to be levied and raised by tax for the purchase of a new site in Waverly-on-the-Hill and for erecting, completing and furnishing a new school building thereon, the votes of persons not qualified were received. The appellant alleges, in substance, that the persons favoring the purchase of said new site and the erecting of such new schoolhouse, " packed and crowded said school meeting, as the appellant is reliably informed and believes, and from an examination of the alleged voters at said meeting he is satisfied, with nonresidents of said district and with 74 voters out of a total of 129 voting at said meeting who were not then and there legally entitled to vote thereat upon the question of bonding aforesaid or otherwise." The respondents deny this allegation, and allege that the persons who voted at said meeting were residents of said district and entitled to vote upon all matters presented thereat upon which a vote was required.

The burden is upon the appellant to sustain his appeal by a preponderance of proof. This the appellant has failed to do with regard to his allegation that the votes of persons not qualified to vote were received.

The fact that the votes of persons not qualified were received in the ballot had upon said resolution will not vitiate such ballot. To warrant setting aside said ballot, it must appear affirmatively that said resolution received a sufficient number of improper votes for it to reduce such vote to a minority if they had been rejected; or otherwise the vote adopting the resolution stands. It is incumbent upon the appellant in this appeal, not only to allege the illegal voting, or the disqualification of persons who voted upon such resolution, but to show by evidence the lack of qualifications in such terms as necessarily to exclude every presumption that such voters could not be qualified under either of the heads stated in the section of the school law prescribing the qualifications of voters at school meetings in said district.

No evidence is produced by the appellant showing that any one of the 129 persons who voted upon said resolution was not qualified to vote thereon, and hence has failed to establish affirmatively, that said resolution received a sufficient (or any) number of improper votes for it to reduce such vote to a minority for such resolution if such improper votes, if any, had been rejected.

I find and decide, That so much of the appeal herein as is taken from the action and proceedings of the said annual meeting, held in said district as relates to the appropriation of $1500 for the addition to a school building in Upper Tuckahoe, and the appropriation of $5000 for a site and new school building in the vicinity of the Harlem Railroad depot, and as relates to two sites, is sustained; and as to all other matters, the appeal herein is dismissed.

It is ordered, That the action and proceedings had and taken at the annual school meeting, held August 6, 1895, in union free school district no. 3, town of East Chester, Westchester county, appropriating $1500 for an addition to school building no. 2, Upper Tuckahoe, and the appropriating of $5000 for a site and the erection of a new school building in the vicinity of the Harlem Railroad depot, be, and the same are, and each of them is, vacated and set aside.

4930

In the matter of the appeal of Kenner G. Gifford and J. N. Mumpton from proceedings of special meeting held November 9, 1900, in union free school district no. 7, Cheektowaga, Erie county.

In an appeal from the election of school district officers the appellant must not only *allege* the disqualifications of persons whose votes were received, but must show *by evidence* the lack of qualifications of such persons in such terms as necessarily to exclude every presumption that they were qualified to vote.

Under the school law every person of full age who has resided in a school district for a period of thirty days preceding an annual or special meeting held therein, and a citizen of the United States, who owns or hires, or is in possession under a contract of purchase of real property in the district liable to taxation for school purposes, is entitled to vote for school district officers, and upon all matters brought before the school meeting. The tax law of the State defines the term "real property" to include the land itself, above and under water, all buildings and other articles and structures, substructures and superstructures erected upon or above, or affixed to, the same.

The school law does not define the *quantity* of real property necessary to be owned, hired, or in the possession under a contract of purchase, subject to taxation for school purposes in the district, of a person to entitle him or her to vote, provided he or she possesses the necessary qualifications of residence, age and citizenship. Such real property may consist of a small parcel of land, or a tract of many acres, or of a room, or a flat in a building, or a dwelling house, or a block of buildings, and the rent may be payable in work, money, taxes or improvements.

Decided February 28, 1901

Skinner, *Superintendent*

This is an appeal from the proceedings of a special meeting, held on November 9, 1900, in union free school district 7, Cheektowaga, Erie county, in the election of Eugene J. McGuire as a trustee of the district.

The appellants allege, in substance, as the grounds for bringing their appeal, that they feel and believe that there were at least 30 votes cast by men not entitled to vote; that they challenged voters until they saw that each person challenged would make the declaration required by the Consolidated School Law; that they name 24 persons whose votes were received, none of whom, from the best knowledge and belief of the appellants, was a qualified voter under the school law.

Annexed to the appeal is a copy of the proceedings of said special meeting, verified by the district clerk who acted as clerk of such special meeting.

An answer to the appeal herein has been made by a committee appointed at a special meeting held in such district February 1, 1901, to consider such appeal, which answer, upon the information and belief of the respondents therein, denies each and all of the allegations made by the appellants in the appeal.

It appears that a special meeting was held the evening of November 8, 1900, in said union free school district 7, Cheektowaga, Erie county, for the purpose of electing a trustee of such district for the term of three years from the first Tuesday of August 1900; that the meeting was duly organized by the election of a chairman, the clerk of the district acting as clerk of the meeting, and the appointment of two inspectors of election; that Eugene J. McGuire and Kenner G. Gifford were each nominated as candidates for the office of trustee; that a ballot was thereupon taken for a trustee, and the poll being closed and the inspectors of election having canvassed the vote cast, announced to the chairman the result of the election, as follows: whole number of votes cast 159, of which Eugene J. McGuire received 85, Kenner G. Gifford received 73 and Jacob B. Williams received 1; that the chairman of the meeting then announced that Eugene J. McGuire was elected trustee of the district for the term of three years from August 1900, and the meeting adjourned.

It also appears that during the ballot taken for trustee, only *five* persons offering to vote were challenged, and each of said persons made the declaration required by the Consolidated School Law, and their votes respectively were received; but it does not appear for whom such persons, or either of them, voted, nor is there any evidence presented that such persons were not, or that either of them was, not qualified, under the school law, to vote at such meeting.

Under the provisions of section 12, article 1, title 7 of the Consolidated School Law of 1894, any legal voter present at a school district meeting has the right to challenge any person offering to vote. Neither the chairman nor the inhabitants assembled at the meeting can act as judges of any person's qualifications. All that lies in their power is to make the challenge and accept the vote if the person makes the declaration, or reject it if he or she refuses.

Section 13, article 1, title 7 of such law provides that any person who shall wilfully make a false declaration of his or her right to vote at any school meeting, after his or her right to vote has been challenged, shall be guilty of a misdemeanor.

This Department has uniformly held that any legal voter present at a school district meeting, and knowing or having reason to believe, that any person or

persons offering to vote thereat, is or are, not a legal voter or voters, and permitting such person or persons to vote *without challenge,* will not be allowed to object to the proceedings taken at such meeting because such unqualified person or persons participated in such proceedings.

The rule is well settled that the proceedings taken at a school meeting will not be vitiated by illegal votes unless a different result would have been produced by excluding such votes. It lies upon the party objecting to show that fact, even if the nature of the proceedings (as in the case of a vote by ballot) is such as to deprive him of the power. For aught that appears in the proofs filed herein the ballots cast by the person claimed by the appellants not to have been qualified voters were for Gifford, the minority candidate. To warrant setting aside an election it must appear *affirmatively* that the successful ticket received a number of illegal votes which, if rejected, would have brought it down to a minority.

It is incumbent in case of appeal from the election of school district officers, for the appellant not only *to allege* the illegal voting, or the disqualification of certain persons whose votes were received, but to show *by evidence* the lack of qualification of such persons in such terms as necessarily to exclude every presumption that such persons could be qualified under the provisions of the school law prescribing the qualifications necessary to be possessed by persons to entitle them to vote at school district meetings.

Under the provisions of section 8, article 2, title 8 of the Consolidated School Law of 1894, it is enacted that every person of full age, residing in any union free school district, and who has resided therein for a period of thirty days next preceding any annual or special meeting held therein, and a citizen of the United States, who *owns* or *hires* or is in *possession* under a contract of purchase of *real property in such school district liable to taxation for school purposes,* is entitled to vote at any school meeting held in said district.

The tax law of this state defines the term "real property" to include the land itself above and under water, all buildings and other articles and structures, substructures and superstructures erected upon, under or above, or affixed to the same.

The school law does not define or declare *the quantity of real property* necessary to be owned, hired or to be in the possession of a person under a contract to purchase, subject to taxation for school purposes to entitle such person to vote at a school district meeting, provided he or she possesses the necessary qualifications of citizenship, age and residence. Such real property may consist of a small parcel of land or a tract of many acres, or of a room, or a flat in a building, or of a dwelling house, or a block of buildings, and the rent may be payable in work, money, taxes or improvements.

The appellants herein have failed to establish their appeal herein by competent evidence, and their appeal must be dismissed.

The appeal herein is dismissed.

4885

In the matter of the appeal of William Skutt, Edward M. Van Deusen and William Clark from proceedings of annual meeting held August 7, 1900, in school district no. 16, Elbridge, Onondaga county.

In the election of school district officers the chairman and clerk of the meeting can not legally act as inspectors of election; but two qualified voters of the district must be appointed as such inspectors, in such manner as the meeting shall determine. When the trustee has failed to provide a suitable ballot box, the use of a hat in which to deposit the votes cast will not of itself vitiate an election. When the meeting decides to vote for a district officer separately, as for example, for trustee, a ballot with the name of a person thereon, without the designation "for trustee" will be legal.

Decided September 29, 1900

J. C. McLaughlin, attorney for appellant
Barton C. Meays, attorney for respondent

Skinner, *Superintendent*

This is an appeal from the proceedings of the annual meeting held August 7, 1900, in school district 16, Elbridge, Onondaga county, upon the grounds that such proceedings were not in accordance with the provisions of the Consolidated School Law of 1894, and the acts amendatory thereof.

In subdivision 4 of section 14 article 1 title 7 of the Consolidated School Law of 1894, it is enacted that all school district officers shall be elected by ballot; that at such elections the trustees shall provide a suitable ballot box; that two inspectors of election shall be appointed in such manner as the meeting shall determine, who shall receive the votes cast, and canvass the same, and announce the result of the ballot to the chairman; that a poll list containing the name of every person whose vote shall be received, shall be kept by the district clerk, or the clerk for the time of the meeting; that the ballot shall be written or printed or partly written and partly printed, containing the name of the person voted for and designating the office which each is voted for; that the chairman shall declare to the meeting the result of each ballot, as announced to him by the inspectors, and the persons having a majority of the votes, respectively, for the several offices, shall be elected.

In subdivision 18 of section 14, article 1, title 7 of said Consolidated School Law of 1894, it is enacted, that in all propositions arising at district meetings, involving the expenditure of money or authorizing the levy of a tax or taxes, the vote thereon shall be by ballot, or ascertained by taking and recording the ayes and noes of such qualified voters attending and voting at such district meetings.

This Department has uniformly held that ascertaining a vote by taking and recording the ayes and noes means that the clerk of the meeting shall record the name of each person whose vote is received, and by setting opposite to each name whether such person voted aye or no.

This Department has uniformly held that under the provisions contained in subdivision 4 of section 14 of article 1 title 7 of said Consolidated School

Law, above referred to, when the trustee has failed to provide a suitable ballot box, the use of a hat for a ballot box will not of itself vitiate the election; that in the election of district officers the ballots may have names for all of said officers, or each officer may be voted for separately; that when the meeting decides to vote for a district office separately, as for example for trustee, a ballot with the name of the person thereon, without the designation "for trustee" will be legal, and that two inspectors of election to receive and canvass the vote cast, must be elected or appointed by the meeting; that the chairman and clerk can not act as such inspectors, or receive or canvass the votes cast in any ballot taken at any school meeting.

Frank Spaulding has filed an answer to the appeal herein, and to such answer the appellants have filed a reply.

The following facts are established by the pleadings and affidavits filed herein:

The annual meeting in school district 16, Elbridge, Onondaga county, was held August 7, 1900, and John W. Barnett was elected chairman, and John D. Cory acted as clerk; that two inspectors of election to receive the votes cast in any ballot or ballots had and taken at the meeting, canvass the same and announce the result of each ballot to the chairman, were not appointed by the meeting; that the chairman and clerk acted as inspectors of election and the clerk received the votes cast in all ballots taken at such meeting, and canvassed the same and announced the result to the chairman who announced such result to the meeting; that no poll list containing the name of each person whose vote was received in the ballot for trustee was kept by the clerk; that a ballot was taken for trustee, such ballots being received by the clerk and deposited in a hat, the trustee not having provided a suitable ballot box to receive such ballots; that 17 ballots were declared by the clerk to have been cast for trustee, of which 9 were said to have been for Frank Spaulding and 8 for William Skutt, and the chairman announced such result to the meeting, and declared Spaulding elected trustee. It does not affirmatively appear that any ballot was taken for district clerk; that the clerk on a vote of the meeting, cast one ballot for Ed. Van Deusen for collector, and the chairman declared Van Deusen elected for collector; that the vote, appropriating the sum of $80 for teachers' wages, $20 for contingent expenses, $15 for fuel and 50 cents to reimburse the collector for United States revenue stamp, was not ascertained by taking and recording the ayes and noes of the persons voting thereon, but such vote was taken viva voce.

The respondent alleges "that no inspectors of election were appointed at such meeting because the meeting and each voter waived such requirement, no one asking for the appointment of tellers, and no objection was made to the method or the result." This claim is not tenable, for the reason that the meeting in the aggregate or the individual voters thereof could not waive the requirement of the school law in regard to the appointment of such inspectors of election.

The appeal herein is sustained.

It is ordered:

That all the proceedings taken at the annual meeting held August 7, 1900, in school district 16, Elbridge, Onondaga county, except the election of John W. Barnett as chairman, and the acceptance of the report of the outgoing trustee, be, and the same are, hereby vacated and set aside.

It is further ordered:

That William Skutt, without unnecessary delay, call a special meeting of the inhabitants of school district 16, Elbridge, Onondaga county, qualified to vote at school meetings therein, for the purpose of electing a trustee, a clerk and collector of such district, and for considering and acting upon the question of the appropriation of money and the levy of a tax for school purposes for the present school year of 1900–01. That the notice of such special meeting be given in the manner required by sections 2 and 6 of article 1 title 7 of the Consolidated School Law of 1894; that in the election of such district officers the proceedings taken shall conform to the provisions contained in, and the methods prescribed in subdivision 4 of section 14, article 1, title 7, of the Consolidated School Law of 1894, relating to the election of school district officers; that the vote appropriating money or authorizing the levy of a tax for school purposes, must be made in the manner required by subdivision 18 of section 14 article 1 title 7 of the Consolidated School Law of 1894.

4366

In the matter of the appeal of Elvin A. Barrett from proceedings of annual school meeting held on August 6, 1895, in district no. 12, town of Alabama, Genesee county.

Where at an annual school meeting a motion is made and adopted that the meeting proceed to ballot for a trustee, and such ballot was taken, and on a canvass of the ballots it was found that on some of the ballots the words "For trustee" were not written, and the chairman of the meeting rejected said ballots as being illegal; *held,* that the ballots were legal and the rulings and decision of the chairman vacated and set aside.

Decided September 20, 1895

Tyrrell & Ballard, attorneys for appellant

Skinner, *Superintendent*

The appellant in the above-entitled matter appeals from the action and proceedings of the annual school meeting, held on August 6, 1895, in district no. 12, town of Alabama, Genesee county, in the election of a trustee.

George Daniels, who claims to have been elected trustee at said meeting, has filed an answer to the appeal.

The following facts are established: that the annual school meeting in and for said district no. 12, Alabama, was held on August 6, 1895; that said meeting was organized by the choice of a chairman and clerk, and two tellers

or inspectors of election were appointed; that after the reading of the reports of the trustee and collector, a motion was made and adopted that an informal ballot be taken for trustee of the district, and such informal ballot was taken which resulted, as announced, as follows: whole number of votes cast 37, of which E. R. Greene received 18, George Daniels 11, Hale Wright 5, Theron Ames 2 and Mrs E. A. Barrett 1; that a motion was then made and adopted that the meeting proceed to ballot for a trustee and such ballot was taken and the result thereof, as announced, was as follows: whole number of votes cast 39, of which E. R. Greene received 18, George Daniels 11, Hale Wright 9 and Theron Ames 1; that after the announcement of the result of said ballot it was claimed that as 24 of the ballots cast did not have thereon the name of the office for which the person or persons whose name or names were written thereon were voted for, to wit, "For trustee," that such ballots were illegal and therefore the chairman of said meeting declared said 24 ballots so received and cast were illegal, and stated that of the legal votes cast the whole number was fifteen of which George Daniels received 11 and Hale Wright 4, and that said George Daniels was elected trustee; that a motion was then made and seconded and put by the chairman to the meeting, that another ballot be taken for trustee and declared by the chairman to be carried, but no other or further ballot was taken for trustee and the meeting adjourned. It does not appear that any poll list was kept or that any ballot box was provided in accordance with the provisions of section 14, article 1, title 7, of the Consolidated School Law. It is not claimed that any person not a qualified voter of the district voted at such meeting.

It is clear that the chairman of said meeting had no legal right to reject the twenty-four votes cast, for the reason that said ballots did not have thereon the words "For trustee." The provisions of subdivision 4, section 14, article 1, title 7, of the Consolidated School Law of 1894, requiring that ballots for school district officers shall designate the office for which each is voted, applies to ballots for more than one office, namely, for trustee, district clerk, etc., and not to ballots cast for a single office, namely, that of trustee, as was the motion adopted at said district meeting. The ballot taken at said meeting in which the whole number of votes cast was 39 was for the office of trustee, and a ballot so cast, having the name of a person was a legal ballot for that person for the office of trustee of said district.

It follows, therefore, that the decision of the chairman that but 15 legal votes for trustee were cast and that George Daniels having received 11 votes was elected trustee of the district, was without authority of law.

From the facts established in the appeal herein I find and decide that the annual school meeting, held in said district no. 5, town of Alabama, Genesee county, on August 6, 1895, failed to elect a trustee for said district for the present school year; that the decision of the chairman of said school meeting, rejecting 24 of the ballots cast at said meeting as illegal ballots, was illegal and void; that the decisions of the chairman of said meeting that but 15 legal ballots

for trustee were received and that George Daniels, having received 11 of the said 15 votes, was elected trustee of said district were, and each of them was, illegal and void; that said George Daniels was not, by the form or color of an election, elected trustee of said district at said annual meeting; that there was no legal election of a trustee of said school district at said annual meeting and that the trustee of said district in office on August 6, 1895, hold over as trustee of said district until his successor in office shall be legally elected or appointed; that there is no vacancy in the office of trustee of said district which can be supplied at a special meeting of said district.

The appeal herein is sustained.

It is ordered, That the rulings or decisions made by the chairman of the annual school meeting, held on August 6, 1895, in district no. 12, town of Alabama, Genesee county, in rejecting 24 of the 39 ballots cast for trustee of said district at said meeting is illegal, that but 15 legal ballots for trustee were cast and that George Daniels was elected trustee of said district are, and each of them, is illegal and void, and they are, and each of them is, vacated and set aside.

4371

In the matter of the appeal of William M. Chapman from proceedings of annual school meeting held on August 6, 1895, in district no. 2, town of Catherine, Schuyler county.

When at an annual school meeting in a common school district a ballot has been had for a trustee of the district, and such ballot has been canvassed and the result announced by which it appears that one of the candidates voted for had received a majority of the votes cast; *held,* that the power of said meeting in the election of a trustee was exhausted, and said meeting had no legal power or authority to recanvass the ballots cast upon such formal ballot, nor to reconsider said ballot, nor to take another ballot for trustee.

Decided September 20, 1895

Skinner, *Superintendent*

The appeal in the above entitled matter is taken from the proceedings of the annual school meeting held on August 6, 1895, in school district no. 2, town of Catherine, Schuyler county.

John Pelham and others have answered said appeal. It appears from said appeal and answer that the annual school meeting in said district was held on August 6, 1895, and that Owen Gardner was chosen chairman and James Woodard, clerk; that one William Larue was appointed an inspector of election; that the report of the trustee was read and accepted; that the chairman announced that the election of a trustee was in order and upon a motion made and adopted the meeting proceeded to an informal ballot for trustee; that thereupon said inspector of election passed around the room and collected the ballots and after counting them announced that 22 votes were cast, of which William M. Chapman received 11 and John Pelham 11; that a motion was then adopted

that the meeting proceed to a formal ballot for trustee, and such ballot was had in like manner as the informal ballot; that the result of the ballot, announced by the chairman as received from the inspector, was that 23 votes were cast of which William M. Chapman (the appellant herein) received 12 and John Pelham 11, and the said Chapman thereupon accepted said office of trustee; that the meeting then ballotted in like manner for collector and John Pelham was announced as having received a majority of the votes cast; that in canvassing the votes for collector the chairman and clerck acted with said inspector, Larue, pursuant to a vote of the meeting; that a motion was then adopted that the votes cast upon the second (formal) ballot for trustee be recounted by the chairman, clerk and inspector of election, which recount was had and the result announced that the total vote was 19, of which William Chapman received 9 and John Pelham 10; that a motion was then adopted that the ballot for trustee be reconsidered and a new ballot for trustee be taken; that said new ballot was taken in like manner as the previous ballots and the votes so received were canvassed by the inspector of election, chairman and clerk and the result thereof announced as follows: Whole number 18, of which John Pelham received 13 and William M. Chapman 5, and said Pelham was declared elected trustee of the district; that after said announcement said Pelham declined to accept the office of collector to which he had been previously elected, and thereupon said meeting elected John Woodard as collector; that after the transaction of other business the meeting adjourned.

It appears that no poll list was kept containing the names of the voters whose votes were received; but it is not claimed that any but persons duly qualified voted in the election of such district officers.

School district officers and voters should, in the election of officers, comply strictly with the provisions of section 14, article 1, title 7, of the Consolidated School Law of 1894, and prevent contentions from arising in such districts, like those present in the appeal herein.

I find and decide that the method had and taken at the annual meeting in said district no. 2, town of Catherine, in the formal ballot for trustee was a sufficient compliance with the provisions of the school law and that the appellant herein, William M. Chapman, was legally elected trustee of said district, he having received a majority of the votes cast; that upon such election the power of said meeting in the election of a trustee was exhausted, and said meeting had no legal power or authority to recount the ballots cast upon said formal ballot, nor to reconsider said formal ballot, nor to take another ballot for trustee; that all proceedings taken at said meeting after said formal ballot was taken and the result thereof announced relative to said ballot or any ballot for the office of trustee was illegal and void and must be set aside.

The appeal herein is sustained.

It is ordered, That all proceedings had and taken at said annual meeting, held in said school district no. 2, town of Catherine, Schuyler county, relating in any manner to the election of a trustee of said district, after said formal ballot for trustee was taken and the result thereof announced be, and the same are, and each of them is, vacated and set aside as illegal and void.

3711

In the matter of the appeal of William H. Gardner v. school district no. 6, town of North Salem, Westchester county.

A person receiving a majority of the votes cast for the office of trustee will be held to have waived his right to the office by participating without a protest in a second ballot, upon which another was chosen as trustee.

Decided October 1, 1888

Draper, *Superintendent*

The appellant alleges that, at the election for trustee held at the annual meeting in school district no. 6 of the town of North Salem, Westchester county, a vote was taken with the following result: Martin Todd 10, Leander Mead 11. The respondent alleges that one vote was also cast upon this ballot for Isaac C. Wright, but I do not consider the variance in the allegations of the parties in reference to this one vote as very material. After the result of the ballot was announced, one William McCoy alleged that he had not voted and that he was entitled to do so, whereupon the clerk ordered another ballot to be taken. This second ballot resulted as follows: Leander Mead 12, Martin Todd 13, and Mr Todd was thereupon declared elected. The appellant now claims that Mead was elected on the first ballot, and that the meeting had no right to proceed to a second ballot.

The respective parties now allege that persons voted against them who were not lawfully entitled to vote. It is claimed that challenges were interposed at the time of taking the second ballot, which were disregarded by the chair, and that the persons challenged were allowed to vote without making the declaration required by law in such cases. The clerk's minutes of the meeting are not found in the papers, and no proof is offered beyond the bare allegations of the parties. This being so, I am obliged to disregard this phase of the matter. If Mr Mead received a majority of the votes cast on the first ballot he was undoubtedly entitled to the office of trustee in consequence, unless he waived his right under said ballot. If it appeared in the papers that he or his friends interposed objections to the taking of a second ballot, and had insisted upon their rights under the first one, I should feel bound to sustain him; but the papers clearly indicate that the second ballot was taken by mutual consent and agreement in the meeting with a view to allaying feeling and straightening out a confused state of affairs. This being done, the parties are bound to abide by the result. They could not proceed to the taking of a second ballot and avail themselves of the benefit of it if they succeeded, and, at the same time repudiate the consequences of it if they failed.

For these considerations, I have arrived at the conclusion that the appeal must be dismissed.

3713

In the matter of the appeal of Peter H. Keller v. school district no. 5, town of Roseboom, county of Otsego.

A person chosen trustee will be held to have waived his right to the office by consenting to the taking of a second ballot upon which ballot another was elected to the office.
Decided October 1, 1888

Draper, *Superintendent*

At the annual meeting held August 28th, 1886, in district no. 5 of the town of Roseboom, county of Otsego, the appellant and one Clark Sisum were candidates for the office of trustee. A ballot was taken, which was announced as follows: Keller 7 votes and Sisum 6 votes. The chairman then stated that he had not voted, and insisted upon doing so, and voted for Mr Sisum, which made the votes of the two men a tie. Another ballot was taken, which resulted in Mr Keller's getting 6 votes and Mr Sisum 8, and Mr Sisum was declared elected. Mr Keller appeals from this action, and contends that he was elected upon the first ballot. The chairman had the right to vote with the others when the ballot was taken. He had no right to vote after the ballot was closed and the result announced. I should hold that Mr Keller was elected upon the first ballot and entitled to the office of trustee but for the fact that he states in his appeal that he consented to the taking of the second ballot. If he did so, he is bound to abide the result of that ballot. His act must be held to waive any rights which he acquired under the first ballot

The appeal is therefore dismissed.

3736

In the matter of the appeal of F. S. Houseknecht v. Daniel T. Bennett, trustee of school district no. 4, towns of Alden, Erie county, Darien, Genesee county, and Bennington, Wyoming county.

A person who claims to have been elected trustee upon a ballot about which there is a dispute, who acquiesced and participated in subsequent ballots and until another person was chosen for the office will be deemed to have waived his right to the office.
Decided November 28, 1888

Draper, *Superintendent*

This is an appeal from the action of the annual meeting, held in district no. 4, of the towns of Alden, Erie county, Darien, Genesee county, and Bennington, Wyoming county, in electing a trustee. The appellant alleges that, at that meeting he was duly elected to the office of trustee upon a vote taken by ballot, the result of which was 10 for the appellant, one for A. C. Nichols, and 7 for Daniel Bennett. It further appears that no declaration of an election was made by the chairman, and that a second ballot, which resulted in no election, was

taken, and thereupon, a third ballot was taken, which resulted in the election of the respondent, and he was so declared by the chair.

The respondent avers that the first ballot was informal, and that after the vote on the third ballot, and the declaration of his election as trustee, the appellant, who had held the office of trustee the preceding year, gave the key of the schoolhouse to the respondent and notified him that the trustee's book was at one place, and that by calling at his residence he could have the code at any time. This appeal was not taken until long after thirty days after the meeting was held, and no excuse is shown for this delay.

Ordinarily, I should dismiss this appeal upon this ground, but in order to settle any misunderstanding, I shall determine the case upon its merits. It is not claimed by the appellant that, after the first ballot was taken and the second ballot was about to be proceeded with, any objection thereto was made by him or any of his supporters. On the other hand, it is averred by the respondent and his witnesses that no objection was made to the taking of a second and third ballot, or to the declaration of the chairman that the respondent was elected, and from the evidence before me it would appear that the appellant and his supporters participated in the second and third ballots, and, as it appears from the pleadings, acquiesced in the result.

In view of these facts, I have concluded to dismiss the appeal and to hold that the respondent was duly elected trustee of the above-mentioned district at the annual school meeting aforesaid.

EQUALIZATION OF VALUES

3490

Apportionment of railroad property; jurisdiction of Superintendent over assessors; proper basis of apportionment.
Decided March 31, 1886

Morrison, *Superintendent*

The appeal is taken in behalf of district no. 6, Hamburg, Erie county, from the action of the assessors of said town, in apportioning the property of the Lake Shore and Michigan Southern Railroad between the different school districts of said town.

It appears that there are nine and twenty-nine one-hundredths miles of track belonging to said company in the said town of Hamburg, of which 379 feet, about two acres in area, belongs to district no. 6. Included in the above 379 feet of track is an immense and costly culvert, one of the largest in the country, which cost, it is alleged, about $200,000. The total valuation of the railroad in Hamburg, as appraised by the assessors for the present year, is $340,000, and in said assessors' apportionment to the district in question, the sum of $2625, giving as their reason that said district is only entitled to its proportion of a mile.

The appellants claim, and with seeming justice, that the proportion of the assessment to which district no. 6 is entitled should range from $30,000 to $40,000.

It appears that in 1881 an appeal was taken from the action of the assessors of that year, in apportioning only $10,200 to said district no. 6, the assessors then claiming, as they do now, that the district is only entitled to its proportion of a mile of valuation; that the amount of railroad property in the town should be regarded as a unit, and that the district is only entitled to that proportion of the assessment which the length of the railroad in the district bears to the total length of the railroad in the town. The Superintendent, in 1881, did not agree with this view of the case, but sustained the appeal and directed a new apportionment to be made by the assessors.

The fact that the Superintendent passed upon this question as early as 1881, renders it unnecessary for me to discuss the point raised by the respondents, that the Superintendent is without jurisdiction in the case.

The acts of the assessors proceeding within the statute are judicial and not ministerial. But the conclusive character of their act is only while they confine themselves within the statute.

It is admitted in this case that the assessment was not based upon the *actual* value of the railroad property in the school district, but was based upon the theory that one mile of railroad was equal in value to any other value. By

adopting this plan of apportionment, the assessors failed to confine themselves within the statute, which provides that it shall be their duty to apportion the value of the property of each and every railroad company, as appears on the assessment list, among the several school districts in their town in which any portion of said property is situated, giving to each of said districts their proper proportion, according to the *proportion* that the *value* of said property in *each* of said districts bears to the *value* of the *whole* thereof in said town.

It may be that interference, at this late day, with an apportionment which has already gone into effect in eight districts of the town, would create confusion which would impair rather than protect the interests of the schools. I am, therefore, induced, though very reluctantly, to abstain from according the relief sought by the appellants in this instance; but the assessors of the town of Hamburg are directed, within ten days after notice to them of the filing of this decision, to meet and again apportion the valuation of the property of every railroad company "as appears on the assessment list among the several school districts of their town in which any portion of said property is situated, giving to each of said districts their proper proportion according to the proportion that the" *actual value* of said property in *each* of said districts bears to the *actual value* of the whole thereof in said town, in accordance with the provisions of section 1, chapter 694 of the Laws of 1867; and that hereafter in the assessment and collection of taxes in any of the school districts of the town, the apportionment then made shall be followed by local school authorities until the completion of the next annual assessment.

5446

In the matter of the appeal of James T. Morris, Clarence C. Donelson and Edwin Morton for relief from excessive taxation upon that part of the real property of union free school district no. 1, lying in the town of Greenburgh, as compared with that lying in the town of White Plains.

Equalization of taxes by supervisors A determination of the supervisors of towns, a portion of which is included in a school district, is not binding upon the board of education of such district unless made as required by law. It is not sufficient for the supervisors to state in their order that a specified reduction should be made upon the assessment of real property of one of the towns. The order of the supervisors is fatally defective unless it determines the relative proportion of taxes that ought to be assessed upon the real property of the parts of such district lying in different towns.

Decided May 13, 1910

Draper, *Commissioner*

This appeal was filed in this office January 5, 1910, having been served on the president of the board of education of union free school district no. 1, town of Greenburgh, county of Westchester, on January 4, 1910.

The appellants allege that some time in April 1909 they appeared before the board of education of such district and requested that some action be taken to

secure an adjustment of the assessment of school taxes between the portions of the districts lying respectively in the towns of White Plains and Greenburgh. The board of education passed a resolution directing notice to be given to the supervisors of such towns to meet at the office of the supervisor of White Plains April 30, 1909, " to proceed to inquire and determine whether the valuation of real property upon the assessment rolls of the towns of White Plains and Greenburgh are substantially just as compared with each other, so far as union free school district no. 1 of the town of White Plains is concerned, and if ascertained not to be so, that they shall determine the relative proportion of taxes that ought to be assessed upon the real property of the parts of such district lying in said towns of White Plains and Greenburgh." A certificate signed by the supervisors of these towns is attached to the petition which states that they met on the day specified in the notice, namely, April 30, 1909, and that " it was agreed that in order to equalize the taxes for school purposes upon the real property lying in the respective towns, a reduction should be made upon the assessment of the real property made by the town of Greenburgh of 22 per cent as shown by the table of equalization and assessments, 1908, board of supervisors." It does not appear that the board of education was ever informed of this determination or that copies were filed in the town clerks' office or the office of the district clerk.

The appellants complain of the board's action in failing to conform its assessments to the determination of the supervisors. If the determination of the supervisors was properly made and was duly brought to the board's attention, it was their duty to make their assessment in accordance therewith. The certificate attached to the papers shows that a legal determination was not made by the supervisors of the towns. It is not sufficient to state that a specified " reduction should be made upon the assessment of the real property " of one of the towns. The supervisors, in such a proceeding, must determine " the relative proportion of taxes that ought to be assessed upon the real property of the parts of such district lying in different towns." In this case the supervisors of White Plains and Greenburgh should have stated in their order the portion of the taxes to be collected in the entire district, which should be assessed upon the real property in each town. In making such determination the supervisors must ascertain the *actual value* of the real property in the school district situated in the town of White Plains, and the *actual value* of the real property in such district in the town of Greenburgh. After deducting the tax to be paid in the district on account of personal property assessments, the balance is to be assessed upon the real property in the part of the district in each town, in the proportion that the actual value of the real property in such part of the town bears to the actual value of the real property in the entire district. It is evident that the supervisors failed to observe any of these rules in making their determination. For this reason this appeal must be dismissed.

It is evident from the certificate of the two supervisors above referred to, that the valuation of real property upon the assessment rolls is not " substan-

tially just as compared with each other," within the meaning of section 414 of the Education Law of 1910 (former Education Law, § 384). The appellants, as taxpayers of the town of Greenburgh in such district, are entitled to the privileges conferred by such section. They may serve upon the supervisors of the two towns the notice required, and such supervisors may then be compelled by a legal proceeding in court, if need be, to determine as to the relative valuation of real property in the parts of the towns constituting the joint district.

The statute relative to the equalization of real property values in joint district has been in force since the Consolidated School Law of 1864. The practice thereunder is well established. There must be a substantial compliance therewith. For the method of computation and the procedure, reference may be made to the Code of Public Instruction of 1887, pages 380–82. When the relative proportion of taxes to be assessed upon the real property of the parts of this district lying in the towns of White Plains and Greenburgh has been legally ascertained the board of education of such district may be compelled by a proper proceeding to comply with the determination of the supervisors.

The appeal herein is dismissed.

3550

William N. Callender from the action of the trustees of joint school district no. 1, towns of Greenbush and East Greenbush, Rensselaer county, N. Y., in levying and apportioning a school tax upon an illegal valuation of real property in said district.

EQUALIZATION OF VALUES IN JOINT DISTRICTS

Supervisors have no power to change the values as fixed in the town assessment rolls. Their duty is to determine what proportion of a school district tax shall be paid by each town forming a joint district, so that relatively each shall pay the same.

Trustees, in preparing a tax list, *must* use the last town assessment roll after correction by assessors.

Decided December 24, 1886

Draper, *Superintendent*

This is an appeal by William N. Callender, a taxpayer of the town of East Greenbush, Rensselaer county, N. Y., a portion of which town forms a part of joint school district no. 1, towns of East Greenbush and the village of Greenbush, which is a portion of the town of Greenbush, in the county aforesaid, from the action of the supervisors of the said towns in assuming to change the assessed valuations of property from the valuations placed thereon by the respective town assessors, and from the action of the trustees of said district in using as a basis of valuations of real property the tax roll of the assessors of the town of East Greenbush for the year 1885, as altered by said supervisors, instead of the assessors' last roll, which was filed in 1886, and asking to have said assessment and the apportionment of school taxes for said district thereon and the warrant dated December 2, 1886, which accompanies it, set aside, and

the receiver of taxes of the village of Greenbush enjoined and stayed from enforcing the collection thereof. The errors alleged as above set forth are substantially admitted by the trustees, who appear as respondents herein. For the errors assigned, this appeal is sustained.

The supervisors and trustees in preparing the tax list, should have used the *last* assessment rolls of the towns, after correction by the assessors, as the basis of valuation for the tax list. This, it appears, they did not do.

The supervisors of the towns composing this district had no authority under the law (§ 69, title 7, ch. 555 of the Laws of 1864), to change the valuation of any piece of real property appearing in said tax list as they assumed to do. Their duty under the law was simply to determine the basis upon which the respective town assessors had proceeded in determining values for their assessment, and if found not to be ratably the same, to determine what proportion of a school tax to be collected should be apportioned to each town. Having failed so to do, their action was manifestly irregular and illegal, and can not be sustained.

I, therefore, sustain the appeal and set aside the action of the supervisors in changing the assessed valuations, and the apportionment of taxes by the trustees made thereon, and the tax list upon which such apportionment was made.

The receiver of taxes of the village of Greenbush is perpetually stayed and enjoined from the collection of the tax as at present apportioned; and said receiver of taxes is hereby ordered and directed to refund all sums which may have been collected by virtue of the aforesaid warrant upon said tax list to the persons from whom the same were collected.

3763

In the matter of the equalization of the assessments in school district no. 11, of the towns of Middleburgh and Broome, in the county of Schoharie.

In a school district composed of parts of more than one town the equalization of assessments for school purposes by supervisors will be set aside when it appears that the supervisors merely rode through the district and listened to interested parties, and then made their equalization by the vote of two of three supervisors, and it also appears from the town assessment rolls, and the affidavits of the assessors and others that the valuations fixed by the assessors were substantially just as compared with each other, and that the real property of each town was assessed at its full value. The evidence of sworn officers, chosen with special reference to the particular duty of determining values, will be given more weight than the unofficial declaration of residents of a neighborhood.

Decided February 16, 1889

Engle and Getter, attorneys for appellants
W. H. Albro, attorney for respondents

Draper, *Superintendent*

School district no. 11, of the towns of Middleburgh and Broome, is situated partly in each of said towns. That part of the district in the town of Broome

contains 1183 acres and that part of the town of Middleburgh 1416 acres. There is a little dispute about the entire accuracy of these figures, but they are sufficiently correct for present purposes, certainly. In December 1888, the supervisors of the towns met, upon application as provided by statute, for the purpose of inquiring whether the valuations of real property upon the assessment rolls of the two towns were substantially correct as compared with each other. Being unable to agree, they called in the supervisor of the adjoining town of Schoharie. After riding through the district and hearing what several interested parties had to say, the third supervisor joined with the supervisor of the town of Middleburgh, and on the 26th day of January 1889, made an order declaring that the assessments in the two towns were not just as compared with each other, and directing that one-half of the school taxes should be levied upon the 1183 acres in one town and the other one-half upon the 1416 acres in the other town.

From this determination this appeal is taken. The affidavits submitted are many and long, but I have read and considered them as carefully as I am able.

There is no question about which opinions will more widely differ, or none upon which sworn statements can more easily be procured, than upon the values of real property. I have found it the safer course to rely upon the valuations fixed by the assessors, who are officers chosen with special reference to the particular duty of determining values, and who are sworn to perform their work fairly and justly, than upon the unofficial declaration of residents of the neighborhood. There certainly must be a very clear and overwhelming case presented to impeach the facts set forth in the assessment rolls, or they must be given full faith and credence. In the present case, the assessment rolls of the two towns purport respectively to assess the real property of each at full value. Outside of the rolls, the assessors in each town swear that they did so. It is clear to me that the determination of the supervisors upon a casual observance of the lands, in the winter season, as against the assessment rolls and the affidavits of the assessors, is scarcely to be relied upon, and particularly so, when they only assume to find the differences in the values as compared with each other so very slight as in this case. There is no pretense that competent proof was presented to the supervisors, outside of their inspection, to establish the fact. It is a material fact, moreover, that the assessment rolls of Middleburgh, the town favored by the majority of the supervisors, for the year 1888, show a not inconsiderable reduction in values over the year 1887.

Taking all the circumstances together, I am unable to find any sufficient ground for the supervisors finding that the valuations fixed by the respective town assessors were not substantially just, as compared with each other. If there was not, then they had nothing farther to do. If their determination of that fact can not be upheld, then their subsequent proceedings must fall to the ground.

The appeal is sustained, and until the making of new assessment rolls, the trustees of the district will use the values fixed in the last assessment rolls of the towns after revision, in levying school taxes.

4358

In the matter of the appeal of C. R. Bowen of school district no. 6, Almond and Hornellsville, v. Nelson Ayers, Dwight Bardeen and Thomas Burrows, as assessors of town of Hornellsville, Steuben county.

When town assessors, under the provisions of chapter 694 of the Laws of 1867 and the amendments thereof, apportion the valuation of property of any railroad, telegraph, telephone and pipe line company as appears on the assessment roll of the town among the several school districts in the town, make such apportionment upon a different rule or basis than that specified in said chapter, an appeal to the State Superintendent of Public Instruction may be taken, and he has jurisdiction of such assessors, and may set aside their action and direct a new apportionment to be made by them in the manner directed in said chapter. When, however, said assessors proceed within the provisions of said chapter, their acts are judicial.

Decided July 9, 1895

Near & Rathbun, attorneys for respondents

Skinner, *Superintendent*

The above-named appellant, as a qualified voter in school district no. 6, Almond and Hornellsville, appeals from the assessment and decision of the above-named respondents as assessors of the town of Hornellsville, made in September 1894, in apportioning the valuation of the property of the New York, Lake Erie and Western Railroad as it appeared on the last assessment roll of the town of Hornellsville, in school district no. 6, Almond and Hornellsville, situated in said district in said town of Hornellsville, in the sum of $7000, under the provisions of section 1, of chapter 694, of the Laws of 1867, as amended by section 1, of chapter 414, Laws of 1884, upon the grounds, as alleged in the appeal, that said respondents as such assessors did not give, in such apportionment, to said school district no. 6, its proper portion according to the proportion that the value of said property of said railroad in each of school districts lying in the town of Hornellsville bears to the value of the whole thereof, in said town, as required by section 1, of said chapter 694, Laws of 1867, and the amendments thereof, but that said assessors made such apportionment upon the establishment by them of a unit of value of said railroad at a certain sum per rod, and apportioned the valuation of said railroad in said town as it appeared upon their town assessment roll, among the several school districts in said town, including said district no. 6, Almond and Hornellsville, in accordance with the number of rods in length of said railroad in said school districts respectively at the unit of value per rod as so established by them; that is, in effect, that the amount or assessed value of the property of said railroad within said town, should be regarded as a unit, and that said school district no. 6, Almond and Hornellsville, is only entitled to that proportion of such assessed value which the length of the railroad in that part of said district situate in the town of Hornellsville bears to the total length of the said railroad in said town; the theory of the assessors being that any rod or mile of said railroad in the town of Hornellsville was equal in value to any other rod or mile thereof.

The appeal herein was filed on October 9, 1894. An answer was received October 16, 1894, and not being properly verified was returned to respondents for proper verification. On October 27th, a reply of the appellant to said answer was received. On March 8, 1895, upon taking up the appeal herein for examination and decision, no answer was found and the respondents were written to inquiring what had become of said answer, and it was ascertained that it was lost, and respondents had permission to file an answer in place of the one lost, which they did on March 23, 1895. On April 12, 1895, the appellant filed a reply to said answer, and on June 25th additional affidavits in support of the answer were filed. The only papers which I can consider in deciding this appeal are the appeal, answer received March 23, 1895, the reply thereto received April 12, 1895, and the additional affidavits of respondents received June 25, 1895. The answer filed October 16, 1894, was never returned to me by respondents. The reply of the appellant to the lost answer can not be considered.

It appears from the papers presented to me that the respondents in making up the assessment roll of the town of Hornellsville in August 1894, assessed and valued the property of said New York, Lake Erie and Western Railroad within the town of Hornellsville at the aggregate sum of $175,000; that on September 15, 1894, said respondents filed in the office of the town clerk of Hornellsville a certificate of apportionment of the valuation of the property of the several railroad, telegraph, telephone and water companies, as appeared on the assessment list or roll of said town of Hornellsville for the year 1894, among the several school districts of said town in which any portion of said property is situated, and that from said certificate it appears that the apportionment made by said assessors of the property of the said New York, Lake Erie and Western Railroad, as aforesaid, upon said assessment roll of said town to said school district no. 6, Almond and Hornellsville, for that portion of said railroad situate in said district, was the sum of $7000.

Aside from the statements contained in the appeal the appellant has not furnished any affidavits or other proof sustaining the allegations made by him as to the methods adopted by said assessors in making the apportionment of valuation of said New York, Lake Erie and Western Railroad to said school district no. 6.

The respondents in their answer deny the most of the allegations contained in the appeal, and they deny that they regard the amount of railroad in the town as a unit and give each district only that proportion of the assessment which the length of the track in the district bears to the total length of the road in the town; they deny that they have admitted to the appellant or any other person that the apportionment appealed from is not based upon the actual value of the road, but upon the length of it. The respondents allege that in apportioning the valuation of said railroad as appeared on the assessment roll of said town of Hornellsville in 1894, among the several school districts of said town in which any portion of said railroad property was situate, they gave to each of said districts including said district no. 6, their proper portion according to the

proportion that the value of the property in each of said districts bears to the value of the whole of said railroad property in said town.

The appellant alleged that the respondents did not apportion the property of the New York, Lake Erie and Western Railroad as valued and assessed on the assessment roll of 1894, among the school districts in said town, in accordance with the provisions of section 1, chapter 694, of the Laws of 1867. The respondents explicitly deny said allegations of the appellant, and specifically aver that such apportionment was made strictly in accordance with the provisions of the law as above cited. The onus is upon the appellant to sustain his appeal by a preponderance of proof, and in this he has failed.

The Department has held that when town assessors, under the provisions of section 1, chapter 694, Laws of 1867, make the apportionment to school districts referred to therein upon a different rule or basis than that specified therein, that upon appeal to the State Superintendent of Public Instruction from such action and decision he has jurisdiction of said assessors, and may set aside their action and direct a new apportionment to be made by them in the manner directed in said section 1; that the acts of town assessors proceeding within the said chapter 694 are judicial; the conclusive character of their act, however, is only while they confine themselves within the statute. In the appeal herein the appellant has failed to show that the respondents, in making the apportionment, did not confine themselves within the statute, but went outside of it and acted upon a rule or method adopted by them, ignoring the provisions of said statute.

In my opinion the appeal herein must be dismissed.

Appeal dismissed.

LIBRARY

Decided September 17, 1839

Spencer, *Superintendent*

That part of the district library purchased with money raised by tax upon the district may be sold.

Trustees may exchange old library books for new ones.
Decided April 20, 1854

Randall, *Deputy Superintendent*

Trustees of districts may legally exchange old books belonging to the district library for new, paying the difference, if any, in price from the library money.

In regard to exchanging library books.
Decided September 8, 1854

Rice, *Superintendent*

No objection might be raised, if a district so determine by unanimous vote, to the exchanging of books in a library for others more appropriate to the wants of the people.

That part of district library which was purchased by a tax on property of district belongs to district, and may be disposed of by its voters as they shall direct. But that part bought with public money belongs to the State, and the district can not sell it.
Decided November 23, 1865

Rice, *Superintendent*

That part of the district library which had been purchased by a tax upon the property of the district belongs unqualifiedly to the district, and may be disposed of by the voters thereof as they may see fit to direct. But in that which has been purchased with the public money apportioned to the district it has only a qualified property. This portion of the library really belongs to the State, and the district is the bailee and not the owner of it. As such bailee it has no power to sell or otherwise dispose of the library.

MEETINGS

5151

In the matter of the appeal of Clinton Mudge and Glen Stone from proceedings of school meeting held in and for school district no. 9, town of Lima, Livingston county.

In conducting school district meetings a wide latitude must be accorded officers in the enforcement of parliamentary rules.

A refusal or neglect on the part of the trustee to call a special meeting of the voters of a district as required under subdivision 4 of section 13 of title 5 of the Consolidated School Law is a wilful violation of the school law.

When a schoolhouse has been regularly condemned by the school commissioner the district has not the legal right to vote a tax for repairs or equipments of any character to such building.

The expenses incurred by a trustee in his wilful determination to evade the provisions of the law are not a legitimate charge upon the district and a meeting of the district can not legally authorize the payment of the bills therefor.

A trustee is barred by the Penal Code from making a contract with his minor son who is not emancipated, to act as janitor.

Decided November 17, 1904

Albert H. Stearns, attorney for appellants
George W. Atwell, attorney for respondent

Draper, *Commissioner*

The appellants request the Department to declare illegal the proceedings of the annual school meeting of school district no. 9, town of Lima, held on the second day of August 1904, and especially to declare illegal the action of such meeting in voting certain appropriations which will hereafter be specifically enumerated and considered.

It is alleged by the appellants that the school meeting was disorderly and that the chairman of the meeting was arbitrary and unfair in his rulings and that such meeting was not conducted in the manner provided by the Consolidated School Law and in accordance with the usual parliamentary practices of such bodies.

Patrick Hendrick, the sole trustee, by direction of a special meeting of said district, has filed an answer to this appeal. He states in his answer that the meeting was held in the town hall in said district and that such hall has a seating capacity for not more than 150 persons, but that more than 250 persons were in attendance at the meeting. He also claims that the meeting was as orderly as could be expected under the conditions, and that such meeting was regularly and legally conducted. In proof of this a certified copy of the proceedings of such meeting is offered.

It is clearly true that the meeting was somewhat disorderly, that many irregularities occurred, and that parliamentary practices were not carefully observed. In conducting school district meetings a wide latitude must be accorded officers in the enforcement of parliamentary rules. The appellants have failed to satisfy me that the disorder or irregularities were sufficiently grave to warrant the setting aside of all the proceedings of the meeting on the ground that material rights of electors were denied or that the proceedings do not reflect the will of the majority of the voters attempting to participate.

The annual meeting in question voted appropriations for the following purposes: $500 for heating apparatus, $93.50 for professional services to George W. Atwell, $20 to School Commissioner McNinch, $165.80 for professional services to George W. Atwell, $53.04 to reimburse Trustee Hendrick, $54 to Martin Hendrick for janitor services.

On the 21st of March 1904, Scott L. McNinch, the school commissioner having jurisdiction over school district no. 9, town of Lima, regularly issued an order condemning the schoolhouse in said school district and providing that such order should take effect June 1, 1904. No appeal from such order of the school commissioner has been brought. In issuing such order the school commissioner showed that the total resident population of children between 5 and 18 years of age was 191 and that the number of resident children between the ages of 8 and 16, or those children coming within the provisions of the compulsory education law was 130. Such order of the school commissioner also showed that the schoolhouse in such district had seating capacity for only 60 pupils and that such building was unfit for use and not worth repairing. Although the order of the school commissioner was issued March 31, 1904, it did not take effect until June 1, 1904, thus allowing the school district ample time to make the necessary arrangements for the erection of a new building.

Under subdivision 4 of section 13, title 5 of the Consolidated School Law, it was the duty of Trustee Hendrick, immediately upon receiving the order of School Commissioner McNinch, condemning the schoolhouse of that district, to call a special meeting of the legal voters of the district to consider the question of building a new schoolhouse. If the district failed or refused to vote the necessary tax to build such schoolhouse within thirty days from the date of such meeting, it was then the duty of said Trustee Hendrick to contract for the building of such schoolhouse and to levy a tax for the same. A refusal or negelect on his part to call a meeting of the voters of the district for such purpose is a wilful violation of the school law. As the school building of the district was regularly condemned by the school commissioner, such district had not the power to vote a tax for repairs or equipments of any character to such building. The action of the annual meeting of such district in voting $500 for a system of heating was not within the power of such district and was, therefore, illegal.

The said annual meeting held in 1904 voted to pay the Atwell bill of $93.50. This bill was for professional services of said Atwell in defending appeal no. 5049 before the Department of Public Instruction and known as the Bates appeal.

The district at a special meeting held June 9, 1903, authorized the payment of this bill, but Warren I. Johnson brought appeal no. 5140 to the Department of Public Instruction to set aside the action of the district in voting to pay such bill. The State Superintendent of Public Instruction, in a decision rendered March 30, 1904, sustained such appeal. It is claimed by the respondents in the appeal under consideration that the State Superintendent of Public Instruction sustained the Johnson appeal on the technical ground that the vote authorizing the payment of the Atwell bill of $93.50 was at a special meeting of the district called for another purpose and that the notice of such special meeting did not state that one of the questions to come before the meeting was the consideration of the Atwell bill. This is true, but it is also true that in his opinion on such Johnson appeal the State Superintendent of Public Instruction expressly held, as pointed out in appellant's brief: "Mr Atwell, who is employed by Mr Hendrick to answer the Bates appeal, was the attorney for Trustee Sylvester in the appeal of Ferris and others and when employed by Hendrick knew that the acts of Hendrick appealed from were contrary to the decisions of the Department and that Hendrick had no valid or legal defense to such appeal." "In my opinion Mr Atwell has no legal claim against school district no. 9, town of Lima, for any services performed by him for Hendrick in the appeal of Alfred K. Bates. Such claim is for services performed for Hendrick personally, Hendrick knowing that the acts performed by him as trustee were in violation of the rulings and decisions of this Department."

The decision of the State Department on that question was "final and conclusive and not subject to question or review in any place or court whatever," under subdivision 7 of section 1, title 15 of the Consolidated School Law. The district, therefore, had no legal power to authorize the payment of such bill at its annual meeting in 1904.

The special meeting of June 9, 1903, also authorized the payment of the McNinch bill of $20. The Johnson appeal also requested the Department of Public Instruction to set aside the action of the meeting in authorizing the payment of such bill and the State Superintendent of Public Instruction, in his decision of March 30, 1904, did set aside such action of the district meeting and in so doing held that the McNinch bill was not a proper charge against the school district. The district, therefore, had no legal power to authorize the payment of the McNinch bill of $20 at its annual meeting in 1904.

A change in the administration of this Department has taken place since the decision in the Johnson appeal was rendered. In view of such fact, I have carefully examined the pleadings in that appeal and am satisfied that the decision therein is based on sound legal principles and on a wise administration of school district affairs.

The Atwell bill of $165.80 is for professional services in three cases, namely: $50 for defending the Johnson appeal, $88 for defending the Miner appeal, and $27.80 for services rendered in an action entitled "Supreme Court, Nora O'Connor v. Patrick Hendrick as Trustee etc."

This Department has held that the Atwell bill in the Bates appeal was not a proper charge against the district. Atwell's defense in the Johnson appeal was to establish the claim that his bill in the Bates appeal was a proper charge against the district. If Atwell's claim in the Bates appeal was not legally chargeable to the district, his bill for services in an unsuccessful endeavor to give validity to such claim is certainly not chargeable to the district.

The Miner appeal for which Atwell claims $88 became necessary because of the action of Trustee Hendrick in refusing to comply with certain decisions and orders of the State Superintendent of Public Instruction. The conditions, therefore, under which Atwell rendered services in the Miner appeal are similar to those of the Bates appeal and his bill for such services is not a proper and legal claim against the district. If the bills of Atwell for services in the Bates and Miner appeals are not a valid claim against the district, then the bill for his services in the "O'Connor v. Hendrick" case in the Supreme Court is not a claim chargeable to the district. The services rendered in this case were in defense of the wrongful and illegal acts of Trustee Hendrick.

It was the persistent and intentional refusal of Trustee Hendrick to comply with what he knew to be the school law of this State and withwhat he knew to be the orders and decisions of the Department which led to bring the Bates, the Johnson, and the Miner appeals and subsequently to the O'Connor v. Hendrick case in the Supreme Court. The expenses incurred by him in his wilful determination to evade the provisions of the law are not a legitimate charge upon the district and the action of the annual meeting in authorizing the payment of the Atwell bill of $165.80 was, therefore, illegal. It also follows that the district meeting had not the legal power to vote to reimburse Trustee Hendrick to the amount of $53.04 for costs rendered by the Appellate Division against Hendrick in the appeal of the motion to intervene by Miner and others.

The said annual meeting also voted to pay a bill of $54 to Martin Hendrick for services as janitor and for taking care of the furnace. Martin Hendrick is the minor son of Trustee Hendrick. Section 473 of the Penal Code prohibits a trustee of a school district from being directly or indirectly interested in any contract made by him as trustee. It is clear that he is interested in a contract with his minor son. Trustee Hendrick claims that such son has been emancipated. It is a well-settled principle of law that emancipation is a question of fact to be determined from circumstances and from the conduct of interested parties. It can not be presumed but must be established by positive proof. In my opinion the respondent has not produced sufficient evidence to establish an emancipation. He was, therefore, barred by the Penal Code from making such contract with his minor son and under such circumstances the bill of $54 to Martin Hendrick is not legally chargeable to said district and the annual meeting could not authorize its payment.

The appellants also request that the action of the said annual meeting in authorizing Hendrick to employ counsel to defend the appeal of Killips v. Hendrick be set aside. It is agreed by the appellants and the respondents that the

motion on the question was adopted by a viva voce vote. Subdivision 18 of section 14, title 7 of the Consolidated School Law provides that all propositions at school district meetings involving the expenditure of money or authorizing the levy of a tax, the vote thereon shall be by ballot or by taking and recording the ayes and noes of the qualified voters present and voting at such meetings. A motion to employ counsel to defend an appeal involves an expenditure of money and could not legally be adopted by a viva voce vote.

This district has the numerical and financial strength to maintain a good school provided its forces were wisely and harmoniously directed. It is to be regretted that such is not the case.

I decide, That the annual school meeting of district no. 9, town of Lima, county of Livingston, did not possess legal authority to authorize the expenditure of $500 for installing a system of heating in the condemned schoolhouse of such school district, and that such annual meeting did not possess legal power to vote appropriations for the payment of the Atwell bill of $93.50, the McNinch bill of $20, the Atwell bill of $165.80, the bill of $53.04 to reimburse Trustee Hendrick and the bill of Martin Hendrick of $54 for janitor services and that such bills are not properly or legally chargeable to the said school district.

I also decide that the action of said school district in voting by viva voce to authorize Trustee Hendrick to obtain counsel to defend the Killips appeal was illegal and no appropriation of the district's funds can be made thereon.

It is ordered, That Patrick Hendrick as trustee of school district no. 9, town of Lima, Livingston county, and his successor or successors in office, are hereby enjoined and restrained from making any expenditure for the installation of a heating system in the condemned schoolhouse of said district and from making any other repairs to said condemned school building and is also hereby enjoined and restrained from paying the bill of George W. Atwell for $93.50, the bill of School Commissioner McNinch for $20 and the bill of George W. Atwell for $165.80, the bill of $53.04 to reimburse Trustee Hendrick and the bill of Martin Hendrick of $54 for janitor services or any part or portion of each or any of such bills.

It is further ordered, That the said Patrick Hendrick, trustee of school district no. 9, town of Lima, Livingston county, shall refund and pay to such district any and all of such amounts paid by his direction or order from the funds of the said district no. 9, town of Lima, which are hereinbefore declared to be improper and illegal charges against said district.

So much of the appeal herein as relates to the action of the annual meeting of said district no. 9, town of Lima, in voting appropriations of $500 for heating apparatus, of $93.50 to pay the bill of George W. Atwell, of $20 to pay the bill of School Commissioner McNinch, of $165.80 to pay the bill of George W. Atwell, of $53.04 to reimburse Trustee Hendrick, of $54 to pay Martin Hendrick for janitor services, and the vote by which Trustee Hendrick was authorized to employ counsel to defend the Killips appeal, is sustained.

5153

In the matter of the appeal of J. E. Curtiss from the action of the board of education of school district no. 1, town of Elba, Genesee county, in adopting textbooks.

A board of education should have some definite system for calling special meetings and for the transaction of its business. The proper authority to serve the notice of a special meeting of a board of education is the clerk of that body unless the board has regularly designated some other person. It is not proper for a board of education to designate some one not a resident of the district to call its meetings.

Decided December 2, 1904

Wood & Dunham, attorneys for respondents

Draper, *Commissioner*

The papers in this appeal show that at a meeting of the board of education of district no. 1, Elba, Genesee county, on the 23d day of August 1904, such board authorized a change in certain textbooks to be used in the school of such district. Another meeting of this board was held on September 6, 1904, and a change was again authorized in textbooks on the same subjects. Another change was authorized in textbooks on the same subjects at a meeting of said board on the 24th day of September 1904. None of these meetings of this board of education appears to have been regularly held. In some cases all members of the board were not notified of the meetings. In other cases the notices of such meetings were served by a person not a resident of the district. In fact all of these meetings appear to have been held on the solicitation of representatives of certain publishers of textbooks and the notices of the meetings of the board in most cases were served by one of these representatives although not a resident of the district. These representatives of publishing houses may have shown much business enterprise, but the board of education has undoubtedly extended them a privilege beyond the courtesy to which they are entitled. A board of education should have some definite system for calling special meetings and for the transaction of its business. The proper authority to serve the notice of a special meeting of a board of education is the clerk of that body unless the board has regularly designated some other person. It is not proper for a board to designate some one not a resident of the district to call its meetings. If some definite system for calling meetings of a board is not adopted how shall its members know when a meeting is properly called?

It appears that this board of education adopted a resolution on September 9, 1902, providing that the clerk of the board be empowered to call special meetings when necessary, although the respondent claims the proof of such action is insufficient. The respondent also claims that if such resolution was adopted in 1902 it is not binding upon the present board. Any rule or by-law not in conflict with the law adopted by a board of education in 1902 to govern or regulate the business transactions of that body is binding upon successive

boards until revoked or modified. The adoption of textbooks by a board of education is an important matter and will not be looked upon lightly by this Department. All proceedings in relation thereto must conform to the provisions of the school law. A failure to notify all members of a board of education of a meeting to consider the adoption of textbooks or the transaction of other business will be regarded as sufficient reason for setting aside the action of a board when the matter is presented to this Department upon appeal. In the adoption of textbooks a board of education should be governed by a desire to put in the possession of the children and teachers of its school the best textbooks to be procured, to the end that the greatest educational results possible may be achieved. In adopting textbooks a board of education should not be influenced by a proposition from publishers or their representatives to donate books to a certain value for the district library on the condition that the books are adopted. Textbooks should be selected upon their merits and then not changed except for decisive reasons. Books for the library should be selected because of their special fitness for that purpose.

It is unnecessary to enter into a discussion of the evils resulting from the frequent changing of textbooks. They are generally recognized. The school law provides that when a textbook has been adopted in a union free school district it shall not be changed within a period of five years except by a three-fourths vote of the board of education of such district. See article 2, title 15 of the Consolidated School Law.

In view of the irregularities in calling the meetings of said board of education in question in this appeal it must be held that such meetings were not properly called and therefore not legal meetings.

The appeal herein is sustained.

It is ordered, That the action of the board of education of school district no. 1, town of Elba, Genesee county, in the adoption of textbooks at its meetings, held on the 23d day of August 1904, the 6th day of September 1904, the 24th day of September 1904, and the 19th day of October 1904, be, and the same hereby is, declared illegal and void.

5430

In the matter of the appeal of William Davidson from the proceedings of a special school meeting in district no. 6, Marathon, Cortland county.

Regularity of annual meeting must be determined by the Commissioner of Education on appeal. Where it is alleged that an annual meeting was irregularly conducted, the trustees are not authorized to set aside such meeting and call a special meeting to transact the business which should have been transacted at the annual meeting. The Commissioner of Education is vested with exclusive authority to determine whether or not the officers declared elected at an annual meeting were legally elected and whether the proceedings thereof were legally conducted. The officers declared elected

at such meeting are to be deemed the officers of the district until their election is set aside on appeal duly brought as provided in the law and rules of practice relating to appeals.

Decided December 29, 1909

L. R. Chase, attorney for appellants

Draper, *Commissioner*

This appeal concerns the legality of a special meeting held in district no. 6, town of Marathon, county of Cortland, on the 28th day of August 1909. Such meeting was called by a notice signed by two of the three trustees of the district for the purpose of transacting the business of the annual meeting. At such special meeting Fred Alexander was elected trustee, W. F. Brown was elected collector, David Wallace was elected clerk, and Earnest Maricle was elected treasurer. Certain appropriations were made at such meeting and a contract was let to furnish wood to the district. The appellant, William Davidson, appeals from the actions of such special meeting, and alleges in his petition that the annual meeting was regularly held in such district on August 3, 1909 and that the proceedings thereof were legally conducted. The appellant was elected as trustee at such meeting, and W. F. Brown was elected collector, David Wallace, clerk, and Frank Gardner, treasurer. An appropriation of $500 was made at such annual meeting for the payment of teachers' wages, $60 for the purchase of wood during the ensuing school year for school purposes, and $100 for the payment of janitor's services and incidentals.

The two members of the board of trustees who took upon themselves to issue the call for the special meeting to transact the business of the annual meeting, have not answered the allegations of the petition. There is nothing in the record which indicates in what respect the actions and proceedings of the annual meeting were irregular or illegal. A certified copy of the minutes of the annual meeting is attached to the petition. Such minutes do not specify whether the officers were elected by ballot or by acclamation, nor do they state how the votes upon the appropriations were taken. It is probable that the respondent trustees assumed that the proceedings of the annual meeting were illegally conducted and concluded that they had the right to call another meeting to elect district officers and transact the business of the annual meeting. It has been frequently decided upon appeals that the Commissioner of Education is vested with the exclusive authority to determine whether the officers declared elected at an annual meeting were legally elected and whether the proceedings thereof were legally conducted. The officers so declared elected are to be deemed the officers of the district until their election is set aside on an appeal duly brought as provided in the law and rules of practice relating to appeals. Until such time the official acts of such officers are valid and binding upon the district. The appropriations alleged to have been made at an annual meeting are deemed legally made unless it is decided on an appeal that they were unlawfully voted.

It must therefore be held in this case that the officers elected at the annual meeting are the officers of this district, and that the appropriations made at

such meeting are legal and binding upon the district. The special meeting held in such district August 28, 1909, was illegal and the acts and proceedings thereof were of no effect.

The appeal is sustained.

It is hereby ordered, That the special meeting held in district no. 6, town of Marathon, county of Cortland, on August 28, 1909 be, and the same is hereby declared to be, illegal, and all the proceedings thereof are hereby set aside and declared of no effect; and

It is hereby further ordered, That William Davidson be one of the three trustees of such district, and that other officers of such district elected at the annual meeting be the officers of such district, to the exclusion of those persons declared elected as such officers at the special meeting held August 28, 1909.

5434

In the matter of the appeal of Alwin E. Powell and William C. Elmendorf from the proceedings of special meeting in school district no. 3, Hurley, Ulster county

Appropriations for legal expenses. Appropriations to pay the expenses of an action which may be brought against a district and to provide for the expenses of the trustee in taking a trip to Albany to look after the welfare of the district, are not authorized where it is apparent that no action on appeal has been brought by or against the district. Subdivision 15, section 96 of the Education Law of 1909 does not authorize a resolution voting a tax to pay expenses which may be incurred in defending a suit or appeal which has not yet been commenced.

Decided February 14, 1910

Milton O. Auchmoody, attorney for appellants
Charles F. Prescott, attorney for respondent

Draper, *Commissioner*

The appellants appeal from the proceedings of a special meeting held in district no. 3, town of Hurley, county of Ulster, on the 17th day of September 1909, and from the tax list and warrant issued by the trustee of said district, based upon certain resolutions adopted at such meeting. It is insisted by the appellants that the meeting was illegally held, since the notices calling such meeting were not served as required by law. The respondent trustee admits that the notices of the meeting were not served on the appellants, but states that they were posted in three conspicuous places in the district ten days before the meeting was held. This is not sufficient to constitute legal notice of the meeting, unless a resolution had been adopted at some annual meeting prescribing that such method of giving notice of a special meeting should be followed. It does not appear from the papers in the case whether or not such a resolution had been adopted. It is not necessary to determine the question of the sufficiency of the notice in rendering a decision on this appeal.

The minutes of the meeting show that three resolutions were adopted, all of which are attacked by the appellants. The first resolution appropriated $100

to be "raised by taxes to defend any action which may come against said district." The second resolution directed a Mr Bundy to employ a lawyer to defend the district at a cost not to exceed $15. The third resolution directed the trustee, Charles Prescott "to go to Albany to look after the welfare of said district no. 3 and that he may take with him whom he may deem necessary and that said district shall pay his and their expenses." It is apparent that the appropriation of $100 was to cover all the expenses incurred under these resolutions including the expenses of the proposed trip to Albany. It was apparently contemplated that an action or appeal might be brought by or against the district which would make it advisable for the trustee to go to Albany in behalf of the district. At the time the appropriation was made no action or appeal was pending either against the district or any of its officers. There is nothing in the petition or answer which shows the purpose of the proposed trip to Albany, or how the interests of the district were to be thereby promoted.

Subdivision 15 of section 96 of the Education Law authorizes a district meeting to vote a tax "to pay the reasonable expenses incurred by district officers in defending suits or appeals brought against them for their official acts, or in prosecuting suits or appeals by direction of the district against other parties." This provision does not authorize a resolution voting a tax to pay expenses which may be incurred in prosecuting or defending a suit or appeal which has not yet been commenced. There is no other provision of the Education Law which authorizes a tax to pay expenses to be incurred in a threatened suit or appeal by or against the district or its officers. It must therefore be held that the resolution voting a tax of $100 "to defend any action which may come against said district" was illegal. The tax list and warrant issued by the trustee for the collection of such tax was invalid, and the taxes collected thereunder were illegally paid.

The appeal herein is sustained.

3765

In the matter of the appeal of James Riley v. Evan O. Prichard, trustee of joint school district no. 5, towns of Deerfield, Oneida county, and Schuyler, Herkimer county.

A trustee in a school district in which the schoolhouse had been destroyed by fire, and who had received insurance money thereon and who neglected for a considerable time to respect a petition of the inhabitants requesting the calling of a special meeting to act upon the question of building a new schoolhouse, held remiss in his duty. The district clerk directed to call a special meeting for the consideration of the question above referred to.

Decided February 21, 1889

Jones & Townsend, attorneys for appellant

Draper, *Superintendent*

This appeal is taken by a resident taxpayer of joint district no. 5, towns of Deerfield, Oneida county, and Schuyler, Herkimer county, from the refusal

of the respondent, a trustee of said district, to call a special meeting of the inhabitants upon the request of a reasonable number of electors, for the purpose of providing for the rebuilding of a schoolhouse in said district, which was destroyed by fire on the 18th day of October 1888. The property so destroyed was insured for the sum of $200, which amount was, on the 11th day of December 1888, paid over by the insurance company to the said trustee, who still retains said amount. A majority of the taxpayers in said district, on the 21st day of December 1888, joined in a petition requesting said trustee to call a special meeting as above stated.

The appeal was duly served upon the respondent on the 25th day of January 1889, and although more than ten days have elapsed, no answer thereto has been received. It appears from the pleadings of the appellant that the weather has been favorable for holding a district meeting and for proceeding to build a schoolhouse, and the only obstacle in the way has been the refusal of the trustee to respect the petition of the voters.

I conclude, therefore, to sustain the appeal, and hereby order and direct the district clerk, Mr Milton Dainard, upon receipt of a copy of this order, to give notice for a special meeting of the district to consider the questions proposed in the petition above referred to.

5147

In the matter of the appeal of Philip Best, Crawford Rockefeller, Arthur Rockefeller and Edward Rockefeller jr, qualified voters in school district no. 5, town of Germantown, Columbia county, N. Y., from the proceedings of a special school meeting alleged to have been held in said district.

The failure to hold a district meeting or to properly adjourn it terminated the meeting and had the same force and effect upon the meeting as an adjournment without date would have.

Decided October 25, 1904

Draper, *Commissioner*

The object of this appeal is to set aside the action of a special meeting of the district held September 7, 1904, in school district no. 5, town of Germantown, Columbia county, on the ground that notice of such meeting was not given in accordance with the provisions of the Consolidated School Law. The parties to this appeal are agreed upon the essential facts relating to this point. It is, therefore, unnecessary to enter into a discussion of the other questions involved.

The trustee of this district called a special meeting to be held on August 27, 1904, for the purpose of raising the sum of $500 for repairs to the schoolhouse. It is claimed by the appellants that several legal voters of the district did not receive notice of the meeting and that the notices which were given were not given in the form and by the method prescribed in sections 2 and 6 of title 7 of the Consolidated School Law. The technicalities raised on this question are not sufficient in themselves to cause this Department to hold that the meeting was not legally called. The meeting was held on August 27th, but regularly

adjourned until Saturday evening, September 3, 1904. The appellants show, and it is admitted by the respondents, that Saturday evening, September 3, 1904, was a stormy evening and no meeting was held. None of the officers of the meeting or district, or any of the qualified voters of the district appeared at such meeting. The schoolhouse was not even opened. The failure to hold such meeting or to properly adjourn it terminated the meeting and had the same force and effect upon the meeting as an adjournment without date would have had. It was not proper or lawful to convene such meeting again under the original call for the meeting of August 27th. The only way by which a meeting could have been held after September 3, 1904, was by the trustee issuing another call for such meeting and causing due notice of the same to be served on all the legal voters of the district in accordance with the provisions of sections 2 and 6 of title 7 of the Consolidated School Law. The action of the trustee in telling the voters of the district whom he met that a special meeting would be held on September 7, 1904, and directing others to spread such information throughout the district was not a proper or legal method of convening the voters of the district in a special meeting.

The desire of the district to maintain suitable school buildings and to make proper repairs is commendable. Meetings for commendable purposes must, however, be called and held as the law directs. It will be necessary to issue a new call.

Decision. The meeting of September 7, 1904, in district no. 5, town of Germantown, Columbia county, was not a legal meeting of the district, and all business transacted at such meeting was irregular and without legal effect.

The appeal herein is sustained.

5300

In the matter of the petition of voters of school district no. 4, town of Windsor, for the removal of Bert E. Brown as trustee of said district.

Notice of an adjourned annual meeting is not required when such meeting is adjourned for less than thirty days.

An adjourned annual meeting may transact any business which might legally be transacted at an annual meeting.

The practice of a trustee in drawing district funds from the collector and holding the same for the purchase of incidentals as needed is not founded upon any legal right or upon proper business methods. The procedure contemplated is that such purchases shall be paid by order of the trustee upon the collector of the district.

A trustee will not be removed for pursuing the established custom in vogue in the district for several years, even if such custom is contrary to the statutes, when the act does not proceed from a wilful intent and no wrong or injustice is perpetrated.

Decided January 3, 1907

H. S. Williams, attorney for petitioners

U. C. Lyons, attorney for respondent

Draper, *Commissioner*

The petitioners herein allege that the respondent was not legally elected to the office of trustee. They also allege that he drew orders upon the collector

payable to himself to the amount of $25 and that he did not use such money for the purposes for which it was collected. It is further alleged that he did not require the collector to give a bond before putting the tax list in his hands.

It was stormy on the evening on which the annual meeting occurred and the trustee and one other resident of the district were the only persons present. The annual meeting was adjourned for one week. The respondents claim that the notices of such adjourned meeting were posted in conspicuous places in the district. One of these was at the creamery where many of the residents of the district drove daily with milk. Personal notice was given many residents of the district and many were notified by telephone. The adjournment of such meeting was talked over by the residents of the district as they met during the week and appears to have been generally known. The meeting was adjourned for only one week and the law does not require notice to be given of a meeting adjourned for a period less than thirty days. It is claimed by petitioners that such meeting was a special meeting and that legal notice thereof was not given. The clerk entered upon the records that it was an adjourned annual meeting and it appears that the meeting was generally regarded as an adjourned annual meeting. The trustee made his report; officers were elected for the ensuing year and the other business of an annual meeting transacted. No objection was raised by anybody. The proceedings appear to have been regular. No objection has been raised since the election until now — four months after the meeting occurred and after the trustee had acted for that period of time. If there had been irregularities in such election a proceeding to set it aside should have been instituted within thirty days from the date on which it occurred. Some of the petitioners were also present at the meeting and participated in the election. Under all conditions such persons are barred from raising objection now. The meeting must therefore be regarded as having been legally held and respondent as having been legally chosen trustee.

On September 17th, respondent issued a tax list for $191.85. This tax was raised for the following purposes: teachers' wages $160, fuel $16.50, to pay balance due teacher of last year $9, other expenses $6.33. The respondent should have required the collector to give bond in double the amount to be collected with acceptable sureties before placing the tax list and warrant in his hands for collection. He failed to do this. He alleges that he did not require such bond because it had not been the custom of former trustees to require it and states that he previously served as collector in the district and did not give bonds. The right of a collector to proceed with the collection of taxes without giving bond was questioned by certain residents of the district. The respondent thereupon directed the collector to give bonds as the law provides. The collector refused to give such bonds. Thereupon the trustee very properly declared the office of collector vacant and filled such vacancy by appointment. Under the law he had full authority and under the circumstances it was his duty to take such action. The new collector gave a bond and the retiring collector turned over to him the funds of the district which were in his possession. The conduct of respondent in this whole proceeding appears to have been that of an

honest man and an official who wanted to do right and to conform to the law according to his best understanding of it.

Respondent acknowledges that he drew an order of $5 on the collector, payable to himself. He states that it has been the practice of trustees in previous years, as a matter of convenience, to draw such a sum as was necessary to purchase small supplies from time to time and to make a detailed report of such expenditures to the annual meeting. This is not denied by petitioners. The sum of $6.33 was raised by the trustee for the purchase of such supplies. The practice of the trustee drawing district funds from the collector and holding them for purchase of incidentals as needed is not founded upon any legal right or upon proper business methods. Where the amount is small such method will undoubtedly serve as a convenience, but the plan may lead to abuses and misunderstandings. A trustee should therefore adhere to the procedure contemplated by the law and when such purchases are made, pay for them by order upon the collector of the district. In this particular case respondent should pay to the collector of the district any unexpended portion of the $5 in question and should make an accounting to the annual meeting of the portion which he has expended, submitting vouchers therefor.

Respondent also admits that he drew an order upon the collector for $20 payable to himself. He claims that this money was drawn for the purchase of blackboards, repairs to windows, etc., but that the school commissioner had made an order relative to the size of the blackboard which had caused a delay in placing it in the school and that he has paid the $20 to the present collector of the district. The trustee should purchase the blackboard and pay for the same by order upon the collector. It involves more labor but it is the usual and proper method in dealing with public funds.

The procedure of respondent may have been somewhat irregular but not altogether unusual. It is not shown that there was any intentional act committed with a wrongful purpose. The petitioners simply claim that the method pursued by the trustee, although it appears to be the usual one for this district, is unauthorized. They do not allege a wilful intent on the part of the petitioner to wrong the district or improperly expend its funds. Pursuing the established custom in vogue in the district for several years, even if such custom is unauthorized is not in itself sufficient ground for removal. There must be some wrong or injustice done or some wilful act to warrant such action. None is shown in this case and on the moving papers this proceeding should be dismissed.

It is charged that respondent has contracted to supply wood to the district. He had a right to make such contract. He did not as trustee purchase from himself wood for the district. The district at the annual meeting usually lets a contract for wood to the lowest bidder. It pursued the same course this year. Respondent was the lowest bidder and the annual meeting awarded him the contract.

It appears that this proceeding is instigated as the result of a district quarrel over repairing the schoolhouse. The school commissioner has endeavored

to get this district to make proper repairs to its buildings. The annual meeting took no action. A special meeting was held thereafter and certain repairs authorized, which in the judgment of the school commissioner were insufficient. The matter was reported officially to this Department. School Commissioner Hurlburt came to the Department and agreed with the Third Assistant Commissioner upon the repairs which should be made. The school commissioner made an order accordingly on the 3d day of November and directed certain repairs at an expense not to exceed $200. It then became the duty of the trustee to make such repairs irrespective of any action taken at the special meeting of the district. The trustee did undertake to make such repairs. Certain residents of the district were opposed to the repairs which the commissioner ordered. It appears that some of the petitioners in this proceeding called at the schoolhouse and insisted that respondent should stop work on such repairs and make those only which the district had authorized. They claimed so many irregularities in the procedure that the trustee ceased work to ascertain definitely what his duty in the matter was. It also appears that thereafter certain residents of the district entered the schoolhouse and made, so far as possible, the repairs voted at the special meeting. The school commissioner had requested this Department to send an inspector to examine the building and it appears to have been the desire of those opposed to the repairs ordered by the commissioner to make the repairs voted by the special meeting before an inspector from the Department arrived.

Without further delay the trustee should proceed to make such repairs as the order of the school commissioner, made on the 3d day of November last, directed. He may utilize so far as possible any material supplied by residents of the district and any repairs which have already been made. He may not only expend the $200 directed in the order of the school commissioner but he may on his own motion expend an additional sum of $50 if necessary. The school commissioner is hereby directed to report to this Department within the next thirty days the progress being made in such repairs.

If the school commissioner has made an improper order and petitioners are aggrieved the law affords them adequate remedy for relief.

The petition herein is dismissed.

5287

Roland W. Pattee and others from an assessment levied by school district no. 10, town of Greece, county of Monroe.

In certain instances the judgment of the voters of a district as to the necessity of erecting an iron fence around the school ground is conclusive.

Decided October 22, 1906

Draper, *Commissioner*

The annual meeting of school district no. 10, town of Greece, county of Monroe, held August 7, 1906, voted an appropriation of $1000 for the erection of an iron fence around the school grounds. An appeal from such action was

filed at this Department September 29, 1906, and a petition for a restraining order filed with such appeal. The order was granted October 10th. The answer made by the trustee of the district shows that William Patterson, one of the appellants, was at the annual meeting and voted in favor of the appropriation. This being the case, Mr Patterson is estopped from raising an objection. Respondent also claims that the appeal is brought too late as the action complained of took place at the annual meeting held August 7, 1906, and that the appeal was not brought until September 29th, or more than thirty days after the appropriation was voted. The answer also shows that the annual meeting appointed a committee of three taxpayers to let the contract to the lowest bidder and that such contract was let on August 22d for the sum of $685.49 or more than $300 less than voted. It also appears that the fence is nearly completed and that the district through its action has created a district liability.

The district is a wealthy one having an assessed valuation of more than $378,000. It also appears that large corporate interests are heavily assessed in this district and that the expenditure for this purpose will not result in a burdensome tax upon the individual taxpayers of the district. It also appears that the schoolhouse is located on Charlotte boulevard, the most prominent thoroughfare out of Rochester and leading direct to Lake Ontario. For this reason it is claimed that the children are exposed to the dangers of automobiles, electric cars and all kinds of moving vehicles. Under all the conditions I think the question was one on which the judgment of the voters of the annual meeting should be conclusive. It also appears that the vote in favor of erecting such fence was almost unanimous. I must therefore hold that sufficient irregularities do not exist to warrant my interference and that it was clearly within the discretion of the meeting to make the appropriation authorized.

The appeal herein is sustained.

It is ordered, That the restraining orders made by me on the 10th day of October in this proceeding be, and the same hereby are, vacated.

5190

In the matter of the appeal of David H. Allen from the proceedings of a special school meeting held in school district no. 12, town of Yates, Orleans county, on April 6, 1905.

That a majority of the voters of a district are willing to assume an improper and illegal claim against the district does not confer the power or right to do so. A small minority might be unwilling to assume such illegal and improper claims and in the administration of school affairs and the interpretation of school laws a minority must be given full protection.

Decided July 10, 1905

Ryan & Skinner, attorneys for appellants
Edward Posson, attorney for respondent

Draper, *Commissioner*

This appeal grows out of a controversy in this district which originated at the annual meeting in 1903, and a special meeting held August 11, 1903. Charles

Houseman was elected trustee at the annual meeting in August 1903. It was alleged that he refused to serve and that he publicly declared he would not serve. At a special meeting held August 11, 1903, Rollin T. Bayne was elected trustee. Each of these men claimed to be the legally chosen trustee of the district. The said Bayne and one Morrison brought an appeal to this Department for the purpose of establishing Bayne's title to the office of trustee. The State Superintendent of Public Instruction dismissed the appeal and decided Houseman to be the trustee of the district.

Bayne and Morrison employed Harry Cooper as attorney to prepare the papers in such appeal. At the annual meeting in 1904 Bayne was elected trustee. He directed a special meeting of the district to be called for September 6, 1904, to authorize the payment of a claim of $30 presented by Cooper for services in the appeal brought by Bayne and Morrison. Such special meeting directed the payment of Cooper's bill for these services. Charles Houseman and David H. Allen appealed from the action of the special meeting in auditing the claims of Harry Cooper and of the annual meeting in auditing certain other claims against the district. Edward Posson, an attorney, was employed by Trustee Bayne in defending such appeal. In decision no. 5163, rendered January 10, 1905, this Department held as follows: "The appeal of Bayne and Morrison in 1903 was not authorized by the district. It was not brought to subserve or protect any interest or right of the district. It was brought through the influence of Bayne to establish his title to the office of trustee. The decision shows him to have been in error. There are no legal grounds or principles of equity upon which Bayne and Morrison can properly ask the district to pay the expenses of an appeal brought to gratify their personal desires. Such expenses are not a legal charge against the district and the district meeting could not legally vote to pay such expenses."

This Department also issued an order restraining Trustee Bayne or his successors in office from paying to Cooper or any other person the $30 claimed for services or any portion thereof.

Bayne called a special meeting of the district April 6, 1905, and that meeting authorized the payment of a bill of $55 to Edward Posson for professional services in defending the appeal of Houseman and Allen from the action of the district meeting in auditing the Cooper claim. As shown above, this Department held that the Cooper claim was not a district liability. If the claim of Cooper for his services to Bayne and Morrison was not a district obligation the claim of $55 in question, presented by Posson for services in an attempt to compel the district to pay an unjust claim is certainly not chargeable to the district. The special meeting of April 6, 1905 in authorizing the payment of $55 to Edward Posson for professional services in defending the appeal brought by Houseman and Allen exceeded its authority. The following principle laid down in deciding that appeal applies to the appeal under consideration: "That a majority of the voters of the district were willing to assume such expense does not confer the power to do so. A small minority might be unwilling to assume such illegal and

improper charges and in the administration of school affairs and the interpretation of school laws a minority must be given full protection."

It is claimed by respondents that questions other than the Cooper claim were involved in the appeal of Houseman and Allen. This is true. However, the principal question involved in that appeal was the Cooper claim. It may well be doubted whether such appeal would have been brought had it not been for the action of the district meeting in authorizing the payment of Cooper's bill.

The appellant herein alleges that Posson's bill of $55 is excessive for the services rendered. He also alleges that an understanding has been reached by which Cooper's claim of $30 is to be paid out of the $55 provided it is paid to Posson. The proof on this point is not conclusive but is sufficient to lead to the belief that such is the case. However, this is unimportant as the services of Posson were not to protect or defend the interests of the district and not chargeable thereto.

The appeal herein is sustained.

It is ordered, That Rollin T. Bayne, the trustee of district no. 12, town of Yates, Orleans county, and his successor or successors in office, be, and they are, hereby enjoined and restrained from paying to Edward Posson or any other person from the funds of said district no. 12, town of Yates, the sum of $55 or any portion thereof, for legal services rendered by the said Edward Posson in the appeal of Charles Houseman and David H. Allen from the proceedings of the annual school meeting held on August 2, 1904, and a special meeting held September 6, 1904, in said school district, and decided by this Department January 10, 1905; that if said Rollin T. Bayne had already paid the said $55 or any portion thereof to the said Edward Posson or to any other person, he shall refund the same to district no. 12, town of Yates, Orleans county, on or before July 20, 1905.

It is also ordered, That the said school district no. 12, town of Yates, Orleans county, be, and it hereby is, enjoined and restrained from authorizing the payment of any amount whatever, or raising any tax therefor, to Edward Posson or any other person for the services rendered by said Posson in defending this appeal.

3304

Reimbursing the collector's bondsmen for money lost by the collector

The district can not vote a tax to reimburse the bondsmen of a collector for moneys lost by the collector and paid by them.

Decided January 16, 1884

Ruggles, *Superintendent*

At the annual meeting in October 1882, Robert J. Martin was elected collector of the district, and he duly qualified by giving his bond with F. J. Heath and George D. Bement as sureties. The collector thereafter collected certain moneys upon a tax list and warrant duly placed in his hands, which moneys were

deposited by the collector with F. J. Heath, one of his bondsmen. Eight hundred and seventy-five dollars of this money was deposited by the said Heath in the bank of William C. Moore in the village of Victor, and in the name of Heath. On the 25th of November, $165 of this money was withdrawn from the bank to pay an order in favor of R. A. Kneeland. On or about the 18th of December 1882, the bank suspended payment, and the said Moore made a general assignment for the benefit of his creditors, and his assets are now in the hands of his assignee unsettled. Since the failure of the bank whenever the collector received orders for moneys from the trustees, he brought them to Messrs Heath and Bement, his bondsmen, and they furnished the money to pay them, and continued to do so until the sum of $710 had been paid by them.

The annual meeting held October 9, 1883, adopted the following resolution:

Resolved, That the trustees of school district no. 1, raise the sum of $710 in addition to the sum already voted to be raised for the ordinary expenses; the said sum of $710 to be paid to George D. Bement and Frank J. Heath, bondsmen for Robert J. Martin, collector of said district, to reimburse them for money lost by said collector by the failure of Moore's bank, in the village of Victor, December 19, 1882."

The trustees issued a tax list with the amount included.

The appeal is taken from the action of the meeting adopting the resolution, and asking that all proceedings thereunder be restrained.

It does not appear from the evidence in this case that the bondsmen did anything more or less than would be legally required of them by their bond, and I know of no principle, either in law or in equity, which would justify a tax, the purpose of which is to relieve the bondsmen and the collector from the obligations they have assumed.

The action of the annual meeting is set aside, and the issuing of a tax list and warrant for the $710 restrained.

5192

In the matter of the appeal of L. A. Havens and C. Southard from the acts and proceedings of a special school meeting of the inhabitants of school district no. 12, town of North Hempstead, Nassau county, held on the 27th day of March 1905.

This Department will not interfere with the action of a district meeting where such action appears to have been legal and regular and when good cause is not shown to demand such action.

Decided July 15, 1905

George B. Stoddard, attorney for appellants
John Lyon, attorney for respondents.

Draper, *Commissioner*

A special meeting of district no. 12, North Hempstead, Nassau county, held on the 27th day of March 1905, voted an appropriation of $8000 for the erection

of a new schoolhouse and directed the trustees to issue bonds for that amount and providing that the last instalment of such bonds shall be payable in 1925.

The appellants allege several irregularities of procedure. They allege that the vote by which this appropriation was made and authorizing the issuance of bonds, was not made in accordance with the provisions of law governing the same. Subdivision 18 of section 14 of title 7 of the Consolidated School Law provides that the vote on all propositions at school district meetings involving an expenditure of money shall be by ballot or by taking and recording the ayes and noes. Section 18 of title 7 provides that the vote on a proposition to raise by instalments appropriations for the erection of a school building shall be by taking and recording the ayes and noes. The certified records of the proceedings of the meeting in question show that such meeting adopted a resolution providing for an appropriation of $8000 to be raised in 16 annual instalments. The method by which the vote was taken was as follows: Each voter came to the desk at which the clerk and chairman were seated and stated that he voted aye or no. The clerk entered the name of each voter as he came to the desk and if he voted "aye" the figure "1" was placed opposite his name and in a column having "ayes" at its head. If a voter voted "no" the figure "1" was placed opposite his name and in a column having "noes" at its head. After all persons had voted the clerk counted the several marks in the column headed "aye" and recorded the number as the number voting "aye." The clerk entered a record in the same manner for those voting "no." Appellants object to this method of taking the ayes and noes. Their objection is not valid. The records clearly show who voted and how each voter voted on the resolution. It was a full and complete compliance with the law.

Appellants also claim that inspectors or tellers were not appointed and that the recording of the names of those voting was done by John Lyon who was not a resident of the district. There was no necessity for appointing tellers or inspectors. The vote on the question before the meeting was not taken by ballot. The vote on such questions was taken by the "ayes" and "noes" and the clerk of the district was the proper person to keep a record of the names of the voters and the record of how each person voted. The pleadings show that the clerk of the district was present and discharged his duty in this respect. It appears that for a portion of the time while the voting was occurring John Lyon who sat at the side of the clerk entered on the records the names of some of the voters. The clerk had a lame wrist and Mr. Lyon did the work to relieve said clerk. The entering which he did was under the immediate direction and supervision of the district clerk. A practice of this kind is not to be encouraged. If the clerk was physically unable to perform such work he should have so stated to the meeting and have permitted that body to select a suitable person to assist him. It was not proper to permit Mr Lyon to do such work, but it is not an irregularity sufficient to set aside the action of the meeting providing the other proceedings were regular.

It is also claimed by appellants that the schoolhouse is not centrally located and will thus operate a hardship upon a portion of the residents of the district.

The schoolhouse is to be erected on the old site. The proof offered by appellants on this point is not sufficient. The respondents contend that the schoolhouse is centrally located and easily accessible from all parts of the district.

The principal object of this appeal appears to be for the purpose of preventing a bond issue. A portion of this district desires to be formed into a new district or transferred into an adjoining district. A school district having an outstanding bonded indebtedness can not be divided. If appellants could prevent a bond issue those favoring a division of the present district would institute proceedings for the erection of a new district or to be transferred to an adjoining district. Vacating the action of the meeting in question would not enable appellants to accomplish the result desired. These bonds have already been sold and the purchasers of such bonds have an interest and claim which they could undoubtedly enforce in the courts. If valid reasons existed for preventing the district from issuing bonds appellants should have filed a petition for an order restraining the trustees of the district from issuing such bonds.

A petition for this relief was not filed.

The necessity of a new schoolhouse is not denied. The proceedings appealed from appear to have been proper and legal in every respect. There does not appear to be any good cause which demands action from this Department.

The appeal herein is dismissed.

5188

In the matter of the appeal of certain residents of union free school district no. 1, town of Hadley, Saratoga county, and town of Luzerne, Warren county, from the decision of a meeting of the electors of said district in selecting a schoolhouse site.

This Department has uniformly refused to interfere with the action of a district meeting legally and regularly taken unless it is clearly shown that such action is detrimental to educational interests or imposes a hardship upon a resident of the district requiring relief through the action of this Department.

Decided June 13, 1905

William T. Moore, attorney for appellants
Frank Gick, attorney for respondents

Draper, *Commissioner*

At a special meeting of union free school district no. 1, towns of Hadley and Luzerne, regularly held on the 26th day of September 1904, the voters of such district legally designated a new site for the schoolhouse. Such site is known as the Riverview site.

This appeal is brought for the purpose of setting aside the action of the district in selecting such site. Rule 5 of the *Rules of Practice Relating to*

Appeals to the Commissioner of Education provides, "Such original appeal and all papers etc. annexed thereto with proof of service of copies, as required by rules 3 and 4, must be sent to the Education Department within thirty days after the making of the decision or the performance of the act complained of or within that time after the knowledge of the cause of complaint came to the appellant, or some satisfactory excuse must be rendered in the appeal for the delay." The acts herein complained of occurred nearly nine months ago. Appellants have had knowledge of such acts since their occurrence. No excuse is given for failing to bring this appeal within the time prescribed by the rule above quoted. This itself is sufficient ground for dismissing the appeal. See decision of this Department rendered March 3, 1905, in Henderson v. the Board of Education of New York City.

The grounds on which appellants ask that the action of this district in selecting the site in question be set aside are that such site is unsafe for school purposes and that the price paid is exorbitant. The burden of proof on these questions rests upon the appellants. They must sustain affirmatively their allegations in this respect. This they have failed to do. This Department has uniformly refused to interfere with the action of a district meeting legally and regularly taken unless it is clearly shown that such action is detrimental to educational interests or imposes a hardship upon a resident of the district requiring relief through the action of this Department. These conditions are not shown to exist in this case.

The appeal herein is dismissed.

5208

In the matter of the appeal of William Hulse et al. from the action of the annual meeting of school district no. 1, town of Islip, Suffolk county, in the election of trustees and in increasing the number of members of the board of education.

An annual meeting will be set aside when the proceedings are characterized by confusion and irregularities.

An annual meeting of a union free school district whose boundaries do not coincide with the boundaries of an incorporated village or city can not change the number of its trustees unless the notice of such meeting states that the proposition to change the number of trustees will be voted upon at such meeting.

Decided October 24, 1905

W. H. Robbins, attorney for appellants
Ackerley & Miles, attorneys for respondent

Draper, *Commissioner*

School district no. 1 of the town of Islip, Suffolk county, is a union free school district whose boundaries do not coincide with the boundaries of an

incorporated village or city. Section 31 of title 8 of the Consolidated School Law of 1894 as amended by chapter 463 of the Laws of 1903 provides that the number of trustees in a union free school district whose boundaries do not coincide with those of an incorporated village or city shall not be changed unless notice is given in the notice of the annual meeting that the proposition to change the number of trustees will be presented to the annual meeting for consideration. The pleadings herein show that the notice of the annual meeting did not contain any notice whatever of a proposition to be presented to such meeting to change the number of trustees. The annual meeting could not, therefore, legally increase the number of trustees in this district. It appears, however, that such action was taken at the annual meeting of the district on August 1, 1905, and the number of trustees increased from five to nine. This action being illegal the election of four additional members was void.

It appears that the term of office of Dr E. S. Moore expired at the time of the annual meeting. The chair announced that nominations were in order to fill this vacancy. Arthur Dominy was placed in nomination but before other nominations were made Mr Dominy moved that the number of members on the board be increased from five to nine. This motion was then considered and adopted. Three other nominations for trustee for a term of three years were then made as follows: W. A. Hulse, J. M. Howell and L. G. Homan. The chair announced that each voter could vote for three trustees for three years. It was not determined by the meeting that any one of these four nominees should be regarded as being the successor of Doctor Moore.

It is to be presumed that one trustee was chosen to succeed Doctor Moore and two to fill additional offices created by the action of the annual meeting in voting to increase the number of trustees. It is not shown that those at the meeting generally regarded Mr Dominy as being the trustee chosen to succeed Doctor Moore. There does appear much doubt that such was the understanding. It is also impossible to determine which one of these nominees would have been chosen had there been but one trustee to be elected.

The meeting then proceeded to nominations for trustees for two years. Several nominations were made. The four members of the board of education whose terms had not expired then presented their resignations. These resignations were accepted. Three trustees were elected for two years and three for one year. It does not clearly appear which of these trustees were chosen to fill the additional offices created or which were chosen to fill the vacancies caused by the resignation of the four members whose terms had not expired.

It is contended by respondents that the Consolidated School Law distributed by the State Superintendent of Public Instruction in 1903 does not contain the amendment to section 31, title 8 of the Consolidated School Law made by chapter 463 of the Laws of 1903, requiring that notice shall be given of the intention to bring a proposition to increase the number of members on a board of education before the annual meeting. It is alleged that the board of education relied upon that law as distributed by the former Department of Public

Instruction for their guidance and that failure to give such notice should not therefore vitiate the proceedings of the annual meeting. This contention is not well founded. Neither the ignorance of the provisions of law on the part of a board of education nor the negligence or carelessness of Department officials is sufficient to excuse a school district meeting from fulfilling the requirements of the law. If the district meeting could be regarded as excusable from the law requiring the notice in question, other irregularities and illegal procedure occurred in the conduct of the annual meeting sufficient to warrant an order from this Department to vacate the proceedings of such meeting. Section 31 of title 8 of the Consolidated School Law, since its enactment in 1894, has provided that the vote authorizing an increase in the number of members on a board of education in a union free school district of this class shall be by taking and recording the ayes and noes. The proceedings of the annual meeting of this district do not show that the vote on such proposition was taken by this method. Such proceedings show such vote to have been taken by ballot which was not a compliance with the provisions of law (*See* decision no. 4465 of the State Superintendent of Public Instruction, also, decision no. 4487). The same section of law also provides that when a district meeting shall elect such additional number it shall divide such number into three several classes, the first to hold office for one year, the second two years and the third three years. No such action was taken at this meeting. This is also sufficient ground for setting aside the election in question. (*See* decisions above cited.)

The whole proceeding is characterized by confusion and irregularity. This is due to the illegal action of the meeting in voting to increase the number of trustees. The inhabitants of this district are entitled to have a board of trustees chosen in accordance with the provisions of law by a majority of the legal voters of the district. It is necessary to set aside the action of the annual meeting in voting to increase the number of trustees and in electing four additional trustees. Since it is not clearly shown which of the trustees elected at the annual meeting were elected to fill these additional places created and which to fill vacancies, it appears for the interest of all concerned to set aside the entire election and direct the district to hold a special election for the purpose of electing five trustees. This action will also afford the voters of the district an opportunity to elect in a legal manner an entire new board of education.

I decide, That the election of all trustees chosen at such meeting was illegal and therefore void; that under the provisions of the Consolidated School Law and the decisions of this Department the trustees of a district or the members of a board of education hold office until their successors are legally elected or appointed; that as the election in question was illegal it operates as though an election had not been held and the trustees of the district at the time of the annual meeting are hold-over trustees except such as have resigned; and that as all of such trustees or members of the board of education, except Dr E. S. Moore, resigned, the said Dr E. S. Moore is at the present time the only legal

trustee or member of the board of education of said school district no. 1, town of Islip, Suffolk county.

The appeal herein is sustained.

It is ordered, That all proceedings taken at the annual meeting of union free school district no. 1, town of Islip, Suffolk county, held August 1, 1905, in relation to increasing the number of members of the board of education of said district be, and the same are, hereby vacated; that all proceedings of said annual meeting by which Arthur Dominy, John M. Howell, Leander G. Homan, William S. Downs, Fred C. Hendrickson, George W. Abrams, Clarence A. Wicks, George C. White and William H. Vail are alleged to have been elected trustees or members of the board of education of said district be, and the same are, hereby vacated.

It is further ordered, That Dr E. S. Moore, a trustee of said district, shall without unnecessary delay and in accordance with the provisions of section 10, title 8 of the Consolidated School Law, call a special meeting to elect one trustee for the remainder of the current school year and the ensuing two school years to fill a vacancy caused by the expiration of the term of office of Dr E. S. Moore, and to elect two trustees for the remainder of the current school year and the ensuing school year to fill the two vacancies caused by the resignations of the two trustees whose terms would not have regularly expired until the annual meeting of 1907, and to elect two trustees for the remainder of the current school year to fill the two vacancies caused by the resignations of the two trustees whose terms would not have regularly expired until the annual meeting of 1906.

3910

In the matter of the appeal of John Van Buren, from the proceedings of the annual school meeting, held in district no. 12, of the town of Volney, county of Oswego.

A chairman of a district meeting, if he is a qualified voter, is entitled to vote when a ballot is taken upon any question before the meeting. He has no right to vote after the result has been ascertained, for the purpose of breaking a tie vote.

Decided September 23, 1890

Mead, Stranahan & Spencer, attorneys for appellant
Piper & Rice, attorneys for respondent

Draper, *Superintendent*

At the annual school election for trustee, held in district no. 12, of the town of Volney, Oswego county, the voting was by ballot. There were two candidates voted for. The ballot resulted in a tie vote whereupon the chairman voted for one of the candidates, the respondent herein, and declared him elected. From this result this appeal is taken. The chairman of the meeting, if he was a qualified elector of the district, was entitled to one vote upon the

question, but that vote should have been cast when the vote was being received, and before the poll was closed, the ballots counted, and the result ascertained. Whether he voted at that time, and then again, to break the tie, does not appear, but in any event, his ballot or vote after the result was ascertained, was improper. It follows that there was no choice of trustee.

The appeal is sustained. The district clerk will forthwith give notice of a special meeting to be held for the selection of a trustee.

3909

In the matter of the appeal of DeEtte Adsit from the proceedings of the annual school meeting, held in school district no. 5, towns of Hanover and Sheridan, county of Chautauqua.

The Department must not be expected to grant relief to persons who, through their own neglect or indifference, do not attend school meetings until long after the hour designated.

Decided September 22, 1890

Draper, *Superintendent*

Appeal from the proceedings of the annual meeting, held August 5th, last, in school district no. 5, of the towns of Hanover and Sheridan in the county of Chautauqua.

The appellant alleges that the custom in the district has been to hold the annual meeting at 8 o'clock p. m.; that on this occasion the meeting was held at about 7 o'clock, in consequence of which but three voters were in attendance, and at which the respondent was chosen trustee, with the several other officers. Some evidence is presented of persons intending to be present at the meeting, that the meeting was held before 7.30 o'clock.

The respondent shows by the affidavit of all three of the persons who participated in the meeting that the organization was not perfected until nearly 8 o'clock, and the meeting was not concluded until after that hour. It does not appear that notice of the meeting was given. The law designates the hour, 7.30 o'clock p. m. Each side of the controversy presents a communication signed by about an equal number of alleged voters favoring one side or the other, the respondent, with those who actually attended the meeting, showing the greatest number.

But this informal way of testing the question is not at all concluding. If I were convinced that any undue haste characterized the meeting, and it occurred before the legal hour of meeting, I should sustain the appeal, but such does not seem to be the fact.

Electors who do present themselves at school meetings upon time are not expected to be subjected to unnecessary delay to accommodate persons who are

so dilatory or indifferent as to attend meetings more than a half hour after the designated time. Such persons come to the Department and expect relief for their own neglect. I do not fell warranted in granting it.

The appeal is overruled.

3908

In the matter of the appeal of John R. Archibald and others v. school district no. 4, in the town of Portville, in the county of Cattaraugus.

Failure to give public notice of the time and place for holding the annual school meeting would not vitiate the proceedings of the meeting.

Decided September 18, 1890

Draper, *Superintendent*

This appeal is brought to set aside the action of the last annual school meeting, on the ground of irregularity in proceedings. It is alleged that there was no sufficient notice given of the meeting, and that votes were cast for trustee and collector by persons who were not entitled to vote, and that the person elected collector of the district was not eligible to the office.

As it was the annual school meeting, failure to give notice would not vitiate its proceedings. I have examined the papers, and find that the allegation that persons voted who were not entitled to vote, is not well sustained. It was alleged that eight persons not qualified to vote participated in the election of trustee. This certainly was not the fact. It is not shown that enough illegal votes were cast to change the result. It is admitted that the collector who was elected was not eligible to the office. There is not enough in the case to justify me in sustaining the appeal. It is dismissed.

3905

In the matter of the appeal of W. A. Cleveland v. the trustees of district no. 3, Middletown and Southfield, in the county of Richmond.

Refusal of trustees to call a special meeting when requested, sustained, when it is made to appear that the trustees are acting in good faith, and no apparent benefit would come to the district by such meeting.

Decided September 5, 1890

Draper, *Superintendent*

A new schoolhouse is now in process of erection in the above-named district. The appellant is a builder by occupation, and with other builders submitted proposals in July last for the construction of such building. He was not the lowest bidder and the contract was awarded to another. Since that time he has raised objections to the size and character of the school building to be

erected, and has demanded that a special meeting of the district be held to consider the matter. This appeal is from the refusal of the trustees to call a special meeting.

This Department will ordinarily require trustees to call a special meeting in a school district, where there seems to be any general desire for such a meeting. Even where a respectable minority in the district makes known a desire for a special meeting it should be accorded, unless circumstances are such as to justify the belief that the persons demanding a meeting are not altogether disinterested or well disposed. It is true that the appellant in this case, with several others, requested that a meeting be called. Some of those who joined with him in this request have since withdrawn their request. At the annual school meeting, held August 6th, the appellant made a statement to the meeting, setting forth his complaint for grievances, but no action was taken. I have carefully examined the records of the proceedings of the trustees touching the work in hand. It seems to me that they have proceeded with due deliberation and much caution. The plans of the building were submitted to no less than six builders who presented proposals. Time was taken for investigating the business qualifications and financial standing of the lowest bidder. When satisfied of his responsibility the contract was awarded to the lowest bidder. I am unable to see why the trustees have not exercised every care in the discharge of their duties. The building is now in process of erection, except that a stay of proceedings, granted on the 4th day of August last, was granted. I find no sufficient ground for further interrupting the work of the trustees. Indeed, there would seem to be every reason why it should be facilitated. The appeal is dismissed and the stay of proceedings heretofore granted is revoked and set aside.

3855

George E. Soper v. John H. Smith, sole trustee of school district no. 5, of the town of Smithtown, county of Suffolk.

Appeal from the neglect or refusal of a trustee to call a special meeting of the electors of the district for the purpose of considering the advisability of building a new schoolhouse, and, if deemed necessary, to consider a change of site upon request of a large number of inhabitants. No reason for such neglect or refusal appearing, appeal sustained, and district clerk ordered to give notice for meeting, as requested.

Decided February 8, 1890

Draper, *Superintendent*

This is an appeal by a resident elector of school district no. 5, of the town of Smithtown in the county of Suffolk, from the refusal of the trustee of said district to call a special district meeting upon the request of a large number of the inhabitants of said district, for the purpose of considering the advisability of building a new schoolhouse, and, if deemed necessary, to consider a change of site. The request, a copy of which I find among the appellant's papers, was

served upon the trustee on the 16th day of September 1889. This appeal was taken by service of a copy of the same upon the trustee of said district on the 6th day of December 1889, and although sufficient time has elapsed for the trustee to answer the same, no answer has been received.

I must, therefore, conclude that the grounds of appeal are truly stated, and that a special meeting of the inhabitants should have been called as prayed for by the petitioners. The appeal is sustained and the district clerk of district no. 5, of the town of Smithtown in the county of Suffolk, is hereby directed to give notice of a special meeting of the electors of the district, to consider the questions proposed in the petition above referred to within ten days from the service of a copy of this decision upon him.

4327

In the matter of the appeal of Reuben Britten from proceedings of special meeting held on October 9, 1894, in school district no. 10, town of Stillwater, Saratoga county.

This Department, when asked to set aside proceedings of school meetings, will always inquire into the *bonæ fides* thereof. Were the things done, such as it was proper to do at said meeting? Has any one been misled, imposed upon or wronged? If mistakes and irregularities have occurred, will the greater hardship be imposed upon individuals by setting aside or sustaining such acts? Notices of special meetings in common school districts, unless any such district at its annual meeting shall, by resolution, prescribe some other method, is by reading said notice in the hearing of each inhabitant of the district qualified to vote at its meetings or in case of his or her absence from home, by leaving a copy thereof or so much thereof as relates to the time, place and object of the meeting, at the place of his or her abode at least five days before the day of the meeting. No district meeting shall be held illegal for want of a due notice to all persons qualified to vote thereat unless it shall appear that the omission to give such notice was wilful and fraudulent.

Decided February 21, 1895

J. F. Terry, attorney for appellant
George B. Lawrence, attorney for respondent

Crooker, *Superintendent*

The above-named appellant appeals from the proceedings of a special meeting held on October 9, 1894, in school district no. 10, town of Stillwater, Saratoga county, upon the grounds in substance: That the notice of said meeting was not duly and legally given, and that said meeting could not legally elect a treasurer of said district. An answer to said appeal has been interposed by Joseph Holmes, who claims to have been elected as trustee of said district at such special meeting.

The following facts are established. In August 1894, an appeal was brought by Joseph Holmes and another from the election of school district officers at

the annual school meeting held in said district on August 7, 1894, upon the ground that none of said officers were elected by ballot as required by the school law, but were elected by a viva voce vote; that no answer was made to the appeal, and on September 24, 1894, the appeal was sustained by me; that in and by my decision I held and decided that no one was legally elected at said annual meeting as trustee, district clerk or collector, and so much of the action and proceedings of said annual meeting had and taken in the election of district officers was vacated and set aside; that in said decision I ordered Wilson Wylie, a qualified voter in said district, and then acting clerk thereof, to forthwith call a special meeting of the inhabitants of said school district, entitled to vote at school meetings in said district, in the manner prescribed in sections 2 and 6 of article 1, title 7, of the Consolidated School Law of 1894, for the purpose of electing a trustee, district clerk and collector of said district, said election to be conducted in the manner provided in subdivision 4 of section 14, article 1, title 7, of the Consolidated School Law of 1894; that said decision was filed with said Wylie on October 1, 1894, and on that date said Wylie posted in a conspicuous place in five public places in said school district a written notice, signed by him as acting clerk of said district, that a special meeting of the inhabitants of said district, qualified to vote at school meetings therein, would be held at the schoolhouse in said district on October 9, 1894, at 7.30 p. m., for the purpose of the election of a trustee, district clerk and collector of said district, that said Wylie did not notify every other inhabitant of said district qualified to vote at the meeting, by reading said notice of said meeting in his hearing, or in case of his absence from home, by leaving a copy thereof, or so much thereof as relates to the time, place and object of the meeting, at the place of his abode, at least six days before the time of the meeting; but it is not alleged, nor does it appear, that the omission on the part of said Wylie, to so, as aforesaid, give notice of said special meeting, was wilful and fraudulent; that said special meeting was held on said October 9, 1894, at which there were present and voting two-thirds of the qualified voters of said district, and a trustee, district clerk and collector of said district were elected in the manner prescribed by section 14, article 1, title 7 of the Consolidated School Law; that said special meeting went through the form of electing treasurer of said district, although the election of such treasurer was not specified in the notice of said special meeting as one of the purposes for which said meeting was called; that the appellant herein was present at and took part in the proceedings of said special meeting.

It is also established by the proofs herein that Joseph Holmes and Jacob Snyder were each candidates for the office of trustee of said district, and that both of them canvassed said district for support by the qualified voters thereof for said office; that said Holmes personally saw and consulted with every qualified voter in said district, except fifteen, in relation to said special meeting, the time and place when the said meeting was to be held, and the object and purpose of said meeting, and urged said voters to be present

thereat; that of the fifteen persons that he did not see personally, seven of them were present and took part in the proceedings of said meeting; that of the remaining eight, at least three of them had notice of said meeting, but purposely absented themselves therefrom, and of the others, who were married women, the husband of each was present at such meeting; that the said Wylie saw fully two-thirds of the qualified voters of said district prior to said meeting and personally informed them of the said meeting, the time when and the place where the same was to be held, and the object and purpose thereof, and also personally called the attention of many of them to the notice posted by him; that the fact that a special meeting in said district was to be held and the purposes for which it was to be held was printed in a newspaper published in the village of Stillwater, about two and one-half miles from said school district.

In the direction to Wylie to call a special meeting of said district no. 10 of Stillwater, as contained in my decision in appeal no. 4265, and in the manner prescribed in sections 2 and 6, of article 1, title 7 of the Consolidated School Law of 1894, it was a direction that said notice be served in the manner provided by the school law, and the citation of the sections, article and title, was to inform him where the law upon the subject could be found. Wylie in his affidavits stated that he was ignorant of the law, and was not in possession of a copy of the school laws. A copy of the Consolidated School Law of 1894 was printed in the appendix to volume 2 of my report for 1894 and a copy of that report was sent to, and should have been in the possession of, the school district. Besides, he could have applied to this Department for information. Had he exercised due diligence to inform himself as to the law and his duties in the matter, the appeal herein would not have been taken.

Under the provisions of the school law, the service of all notices of special meetings in common school districts, unless any such district at its annual meeting shall, by resolution, prescribe some other method, is by reading said notice in the hearing of each inhabitant of the district qualified to vote at the meeting, or in case of his or her absence from home, by leaving a copy thereof, or so much thereof as relates to the time, place and object of the meeting, at the place of his or her abode, at least five days before the day of the meeting.

Said school law also contains the provision that the proceedings of no district meeting, annual or special, shall be held illegal for want of a due notice to all persons qualified to vote thereat unless it shall appear that the omission to give such notice was wilful and fraudulent. It is clear that the qualified voters of said school district did not receive due notice of said special meeting of October 9, 1894, under the school law; but it is not claimed or proved that the omission to give such due notice was wilful and fraudulent.

I am of the opinion, from the proofs established herein, that all of the qualified voters of said district had notice of said special meeting, and the purposes for which it was called, and that if any voter failed to attend said meeting it was for some other reason than that he or she had no notice thereof. Indeed,

the appellant herein has failed to show that a single voter of said district did not have notice of said meeting, his contention being that the notice of said meeting was not served in accordance with the provisions of the school law, and hence the meeting was illegal. It is clear that the appellant herein has not been injured by reason of a failure to serve notice of the meeting as required by the school law, as he was present at such meeting and took part in the proceedings.

This Department, when asked to set aside the proceedings of school meetings, will always inquire into the *bonæ fides* thereof. Were the things done such as it was proper to do? Has any one been misled, imposed upon or wronged? If mistakes and irregularities have occurred, will the greater hardship be imposed upon individuals by setting aside or sustaining such acts?

I find and decide that the contention of the appellant, that said special meeting was not legally held for the reason that the notice of said meeting was not served in the manner provided by the school law, is not tenable, it appearing that the omission to give such notice was not wilful and fraudulent, and it further appearing that all the qualified voters of said district received in some manner a notice thereof.

The election at such special meeting of a treasurer of said district was clearly void, for two reasons: First, because in the notice of the meeting it was not stated therein that said meeting would be called upon to act relative to the election of a treasurer; and, second, that under the school law no school district can elect a treasurer of the district unless at the first meeting of the district after it shall have been formed, or at any subsequent annual meeting thereof, or at any special meeting duly called *for that purpose,* a resolution shall be adopted to elect such treasurer. It does not appear that any such resolution has been adopted.

I find and decide, That the special meeting held on October 9, 1894, in school district no. 10, town of Stillwater, Saratoga county, was legally held; that the election at said special meeting of a trustee, district clerk and collector of said district was legal and valid; that the election at said special meeting of a treasurer of said district was illegal and void.

The appeal herein is sustained as to so much thereof as appeals from the action and proceedings of said special meeting in the election of a treasurer of said district; and that as to all other matters therein, said appeal is dismissed.

3810

In the matter of the appeal of Henry W. Wolf and others v. school district no. 4, town of Westfield, county of Richmond.

Proceedings of a district school meeting will not be disturbed when regularly and fairly taken at the proper time only for the reason that absent voters did not attend at the time designated.

Appropriations of a district meeting set aside, the meeting having failed to indicate the purpose money was to be raised for.
Decided September 21, 1889

Draper, *Superintendent*

The appellants allege that the proceedings of the annual meeting in the above-named district were very irregularly taken. It seems that John J. Vaughan was elected trustee over the appellant Wolf by a vote of 14 to 9. Mr Wolf claims that there was not sufficient time afforded to permit the qualified voters of the district to vote. There were but 23 votes cast. The district is small. He admits that 15 or 20 minutes of time were occupied in taking the ballot. This would seem to be sufficient. There is no pretense that the meeting was held before the proper time. Residents of the district should have been on hand when the time arrived, if they desired to vote. It is not shown that any one desiring to vote was prevented from doing so. I think no sufficient ground appears to invalidate the election of Vaughan.

There is a claim set forth in one of the affidavits presented that Vaughan is not eligible to the position of trustee, on the ground that his name does not appear upon the assessment rolls. But he may be eligible for other reasons, and it is not shown that he is not.

The election of Mr Vaughan must therefore be sustained.

The appellants claim that the sum of $350 was appropriated at the annual meeting for general expenses of the district, without indicating precisely what it was to be used for. This is not denied by the respondents. If this allegation be true, the action of the meeting was irregular. Such action is therefore set aside, and the trustees are advised to call a special meeting for the purpose of acting upon estimates for the year's expenses.

The appeal is dismissed so far as it relates to the election of a trustee, but sustained so far as it refers to the appropriation of $350, without indicating the specific purpose for which it is to be used.

3699

In the matter of the appeal of Samuel A. Childs v. the action of a joint meeting of residents of districts nos. 2 and 5, town of Scott, Cortland county.

Proceedings of a district meeting involving important matters, marked by riotous conduct and consequent confusion, set aside.
Decided July 24, 1888

Draper, *Superintendent*

It appears that on the 25th of April 1888, a meeting was held in the town of Scott, Cortland county, at which were present numerous qualified electors of school districts nos. 2 and 5, of said town, for the purpose of taking action relative to the formation of a union free school district. The meeting was organized by the election of F. O. Burdick as chairman, and Jared E. Babcock and William N. Babcock as secretaries. The appellant states that immediately

following the organization, the chairman announced that the meeting would proceed to ballot upon the question, without giving any person an opportunity for an expression of opinion relative to the merits of the proposition. It is manifest that there was great disorder at the meeting. At one time during its progress, it was announced that there was great danger of the floor of the hall breaking down. The appellant claims that, in consequence of this statement, thirty persons left the hall and that many of them did not return. Two constables were called in to preserve the peace, and two persons were arrested by them. The respondents claim that the riotous conduct was on the part of the appellants; that they precipitated turmoil and confusion upon the meeting for the purpose of breaking it up. The vote as declared by the chair was strongly in favor of establishing a union free school district, and it seems reasonably clear that the larger part of the persons present were in favor of that course.

But I have determined, after considerable reflection upon the matter, to take that course which will necessitate another meeting. If I should uphold the proceedings which are appealed from, the result would unquestionably be that antagonisms in the district of the fiercest character would continue indefinitely. Moreover, an action of so much importance ought to be determined upon deliberately after full opportunity for discussion, and by the free and untrammeled judgment of the people interested. The people of these two districts ought to be sufficiently advanced in the ways of organized and civilized society to enable them to meet in a public gathering, compare views, treat each other decently, although they may differ in opinion, and finally reach a conclusion through the vote of a majority of their number; and it would furthermore seem that, when that has been done, the minority must submit to the determination in good spirit. In the hope that such may be the case, I sustain the appeal.

3710

In the matter of the appeal of Thornton A. Niven v. school district no. 1, town of Thompson, county of Sullivan.

A district voted at its annual meeting to appropriate money for the purpose of adding instruction in vocal music to the school; *held,* the proceeding was regular and will not be set aside.

The fact that many voters were not present at the meeting; *held,* to be no ground for setting aside the proceedings of an annual meeting.

The law fixes the time and place for the annual meeting; those who attend can legally transact the business of the district.

Decided October 1, 1888.

Draper, *Superintendent*

At the annual school meeting held in district no. 1 of the town of Thompson, Sullivan county, in 1888, the following resolution was adopted:

"*Resolved,* That an additional appropriation of $300 be added to the required appropriation for the purpose of adding instruction in vocal music to the school."

The appellant objects to this resolution, and in his appeal raises the question whether a school district has the right to raise money by tax for the purpose specified in the resolution. He also alleges that, while there are more than 250 qualified electors in the district, there were not more than 25 or 30 present at the meeting at which the resolution was adopted, and insists that the majority of the people of the district are opposed to it.

The law gives no direction as to what studies shall be pursued in the common schools. It has always been left discretionary with the people of each district or with the trustees in each case. Of course, if it should be attempted to raise a tax for the purpose of employing teachers to teach branches of subjects incompatible with the work of the common schools, the Department would be obliged to hold that such action was irregular and could not be upheld. Whatever is done in the schools must be done with a view to subserving and promoting the general purposes for which the schools are operated. It is not possible for me to say that the teaching of vocal music is inconsistent with the general purposes of the schools. I am, therefore, of the opinion that the district had the legal right to take the action appealed from if it chose to do so. The fact that not one-tenth of the voters of the district were present, is of no consequence. The action was taken at the annual meeting, of which all had notice. No special notice of such action was required to be given in advance of the annual meeting.

For these considerations I am obliged to dismiss the appeal.

Where the clerk names a wrong hour in his notice of an annual meeting, and part of the inhabitants assemble at that hour and transact business, and part assemble at the hour of adjournment, and also transact business, both meetings may be set aside, and a new one ordered.

Decided November 30, 1857

Van Dyck, *Superintendent*

It appears that an annual meeting in 1856 adjourned to October 5, 1857, at 7 o'clock, and the same is so recorded. By error, the clerk in the written notices of the meeting named 6 o'clock as the hour. A part of the inhabitants met at that hour, and transacted the ordinary business; a part, relying upon the adjournment, met at 7 o'clock, organized, and proceeded to business. The latter appeal from the action of the former.

Held, that 7 o'clock was the proper hour for meeting, but, a part of the inhabitants having been misled by the written notices, no advantage should be taken of such an official error, to deprive a considerable number of the inhabitants of a voice in the regular proceedings.

The proceedings of both meetings are therefor set aside, and the clerk of last year is directed to give notice of a new meeting within ten days after the receipt of this decision.

3726

In the matter of the appeal of Eugene H. Tiffany from the proceedings of a school district meeting held in district no. 8, town of Martinsburgh, county of Lewis, on the 5th day of June 1888.

At the time and place designated in the call for a special school district meeting the inhabitants assembled and after waiting a reasonable time for the presence of the trustee and district clerk, organized and adjourned, and many left for their homes, when later the officers of the district appeared and with those remaining organized and proceeded to transact business of importance to the district; *held,* that the action of the school meeting can not be upheld.

Decided November 14, 1888

Draper, *Superintendent*

This is an appeal brought by a legal voter of school district no. 8 of the town of Martinsburgh, county of Lewis, from the proceedings of a district meeting held under the following circumstances:

The trustee of the district had given notice of a special meeting to consider a change of schoolhouse site, to be held on the 5th day of June 1888, at 7.30 o'clock p. m., at the schoolhouse in said district; that at the time mentioned in said notice, a large number of the inhabitants and voters of said district assembled at the place designated and remained until after 8 o'clock; that neither the trustee nor the district clerk was then present; that, after 8 o'clock, the meeting was organized by the election of a chairman and a clerk *pro tem.,* and subsequently adjourned, and most of the inhabitants left the building and departed for their homes. Subsequent to such adjournment the trustee and district clerk appeared, and, with the persons who remained, proceeded to organize a meeting and transact business of considerable importance to the voters of the district. It is claimed and can not very well be denied, that, at the time the second meeting was organized, the trustee and the persons present were well aware of the previous meeting and of the adjournment, and that many of the voters had left the building. With this state of facts before me, I can not uphold the action of the second meeting.

The appeal is sustained and the proceedings of the second district meeting held on the night of June 5, 1888, are set aside, and any action there taken is declared null and void.

3563

In the matter of the appeal of J. W. Rood v. John Latimer, as trustee of school district no. 16, town of Pomfret, Chautauqua county.

A sole trustee should call a special meeting when requested by a reasonable number of the voters of his district, to consider plans for building etc., even after a site has been secured and plans adopted.

Decided February 10, 1887

Draper, *Superintendent*

This is an appeal by a taxpayer and resident of school district no. 16, town of Pomfret, Chautauqua county, N. Y., from the action of the sole trustee of said district, in refusing to call a special meeting of the inhabitants when requested by a reasonable number of the same, for the purpose of considering a change of site and plans for building a schoolhouse in the district, and the manner of building the same.

The trustee, answering the appeal, seeks to justify such refusal by the allegation that a site has already been purchased, a deed accepted and plans secured and adopted in pursuance of authority conferred by a meeting held in the district.

My opinion is that the trustee should have granted the prayer of the petitioners and called a special meeting in accordance therewith. Of course, liabilities incurred by the trustee for the district in pursuance of such authority, can not now be evaded, but if a majority of the electors desire to give expression to their wishes as to the work still to be done, or if they desire to make changes which they can properly make, and are willing to pay the expense involved, they should be accorded that privilege.

I sustain the appeal and order the trustee to call a special meeting of the inhabitants for the consideration of any question in relation to the building of a new schoolhouse not already disposed of.

3919

In the matter of the appeal of John Decker v. the Port Richmond union free school district.

Annual meeting sustained which was held at the schoolhouse (the place designated by law), and at the established time, although some irregularity about the notice of the meeting is shown. It does not appear that a sufficient number of electors were misled by the notice, or that a sufficient number of illegal votes were cast to have affected the result.
Decided October 20, 1890

Robert G. Scherer, Esq., attorney for appellant

Draper, *Superintendent*

This appeal is brought to set aside the action of the last annual school meeting in the district above named. Two reasons are alleged in support of the appeal.

1 It is said that the board of education caused a notice to be posted, that the annual meeting would be held at a place other than the schoolhouse, and within three or four days prior to the meeting changed this notice so as to provide that the meeting should be at the schoolhouse. It is claimed that this fact misled voters.

2 It is alleged that persons were intimidated from voting by reason of announcements made at the meeting concerning the alteration of the district.

The same rule applies to this case as obtains in all similar cases. The law provided that the school meeting should be held at the schoolhouse. It was held there. It also provided that it should be held at a given time. It was held at that time. The presumptions are, therefore, in favor of the regularity of the proceedings. These presumptions must be overcome by positive proof on the part of the appellant before he can succeed in his appeal. He must show by affirmative evidence that a sufficient number of persons voted at the meeting who had no legal right to vote, or that a sufficient number of persons were misled as to their rights and refrained from voting, or stayed away from the meeting under a misapprehension, to have changed the result before he can succeed. There were 304 votes cast upon the election of the member of the board of education. The successful candidate received 162 votes. The next candidate received 73 votes. The appellant entirely fails to show a state of facts which would justify me in setting aside this election. Nothing appears in the proofs submitted by the appellant which is of sufficient consequence to invalidate the meeting.

It therefore follows that the appeal must be dismissed.

3924

In the matter of the appeal of Patrick H. Ludlow v. Michael Bennett, trustee of school district no. 19, town of Watervliet, Albany county.

Special school meeting called by a notice of but two days. *Held,* invalid. Proceeding taken thereat set aside.

Decided November 13, 1890

Draper, *Superintendent*

This appeal is taken by one of the members of the board of trustees of school district no. 19, of the town of Watervliet, county of Albany, from the action of Michael Bennett, another member of said board of trustees, in calling a special meeting of the electors of said district to fill a vacancy in said board, caused by the resignation of one James J. Peyton, to be held on September 30, 1890.

The grounds upon which the appeal is based are:

1 That but twenty-four hours' notice was given of such meeting.

2 That the meeting was called by the said Michael Bennett without consultation with his remaining associate trustee. No answer has been interposed.

The appeal must be sustained. At least five days' notice of a special meeting is necessary in order to comply with the statutory requirement.

The calling of the meeting could only be legally directed by a majority of the trustees in meeting duly assembled. Any proceedings of the meeting held September 30, 1890, are therefore of no effect, and are hereby set aside.

The appeal is sustained.

3925

In the matter of the appeal of P. Phelps and others from the proceedings of a special school meeting, held June 28, 1890, in school district no. 5, town of Camden, county of Oneida.

Proceedings of a special school meeting in voting to rescind the action of a former meeting which had decided to postpone the building of a schoolhouse, will not be set aside because of a failure to state specifically in the notice of the last meeting that a proposition to rescind the vote of the previous meeting would be submitted.

The object stated in the notice was "to take action on building the schoolhouse and to provide means to build the same." *Held*, to be in effect a proposition to rescind, and the vote to build adopted at the last meeting was a substantial rescindment of the vote to postpone building, passed at first meeting.

Decided November 31, 1890

Alpha F. Orr, attorney for appellants
A. C. & E. C. Woodruff, attorneys for respondents

Draper, *Superintendent*

This appeal is taken by electors of school district no. 5, town of Camden, from the proceedings of a special meeting, held June 28, 1890. The appellants also ask for the removal of the trustee from office. The grounds of the appeal are, that at the said meeting, a vote taken at a previous meeting, to postpone the building of a new schoolhouse until fall, was rescinded without notice of such proposed action in the call for the meeting. It appears from the proofs submitted, that the object of the meeting, as stated in the notice, was "to take action on building the schoolhouse and to provide means to build the same."

The ground upon which the removal of the trustee is sought is that the trustee requested the district clerk to make a false record of the proceedings of the meeting in the clerk's book. At the meeting of June 28th, of which due notice had been given to the inhabitants, it appears that the action of the former meeting to defer action, in regard to building a new schoolhouse, was, by a unanimous vote, rescinded. It also appears that the meeting directed the trustee to proceed with the building of the new schoolhouse, and to advertise for proposals to do the work, and authorized him to levy a tax to raise the necessary amount to pay for the construction thereof. It also appears that the district clerk kept no record of the proceedings of the meeting, and prepared his minutes afterwards from memory, and that he omitted from such record some part of the proceedings; that the trustee who participated in the meeting and offered certain resolutions, supplied the clerk with a memorandum of the same, in order that he might perfect his minutes.

It is contended by the appellants that, because of the fact that the notice for the special meeting of June 28th, did not state that the action of a former meeting at which it was decided to postpone building, would be reconsidered, that the vote to reconsider was in consequence illegal. This I can not hold because of the fact that the vote of the meeting directing the trustee to proceed with the

construction of the new building, and of which action due notice had been given, was in effect a rescinding of the action of the previous meeting. The evidence shows that the district was without a schoolhouse, and the action of the meeting of June 28th directing the construction of one, was justifiable, and should be upheld.

I am not satisfied that the trustee of the district sought to induce the district clerk to insert in the proceedings of the district meeting, anything which should not have appeared therein, and in this position I am supported by the affidavit of the district clerk himself, which is submitted by respondent, and which is somewhat contradictory of his affidavit presented by the appellants.

In view of the foregoing consideration, I dismiss the appeal.

3926

Plinny Phelps and others from the proceedings of the annual meeting held in school district no. 5, town of Camden, county of Oneida, August 5, 1890.

Proceedings of annual meeting held at the place where the school had been taught, and where previous meetings of the district had been held. *Sustained,* although a district clerk, without authority, had posted notices for the meeting to be held elsewhere, in which latter place a few electors assembled, but transacted no business. Those assembled at the former place greatly exceeded the number of those at the latter, and were unanimous in the selection of officers and the transaction of business. It does not appear that the trustee and others who attended the meeting at the schoolhouse were cognizant of the clerk's notice.

Decided November 21, 1890

Alpha F. Orr, attorney for appellants
Davies & Johnson, attorneys for respondent

Draper, *Superintendent*

Appeal by electors of school district no. 5, town of Camden, county of Oneida, from the proceedings of the last annual school meeting.

The grounds of the appeal are that the appellants were misled as to the place for the holding of the annual meeting, by a notice which the district clerk had posted. It appears from the evidence submitted that the schoolhouse had been destroyed by fire; that temporary quarters for the school had been hired by the trustee in order to complete the school year; that several school meetings had been held in such temporary quarters; that, without any direction by the school trustee, the district clerk posted notices for the annual meeting at another place about a hundred yards distant from such temporary school building. It is claimed by the appellants, and denied by the trustee, that he knew that the said notice had been given. Thirteen of the voters of the district assembled at the place at which the school had been held, and at which previous meetings had been called, on the night designated for holding the annual meeting, and proceeded to transact the business of the annual meeting. A smaller number met

at the place designated in the notice of the district clerk, but it does not appear that they transacted any business, but proceeded to the building in which the other thirteen persons were transacting business.

It is claimed by the appellants that they were present at the latter place about half-past 7 o'clock, and that the business had then been transacted, and the meeting was about to adjourn. It is claimed by the respondents that it was nearly 8 o'clock when they came to the meeting. Immediately after the adjournment and the retirement of the thirteen who had participated in the meeting, the proceedings of which were unanimous, nine of the inhabitants who claim they were misled by the district clerk's notice, proceeded to organize a meeting and elect district officers.

The law makes it the duty of the trustee of the district, when the schoolhouse can not be used for the purpose of holding a district meeting, to designate the place therefor, and it would then become the duty of the district clerk to give notice accordingly. It does not appear that the trustee designated any place, but that the district clerk, upon his own motion, named a place in the notice, other than the place at which the school had been held, and in which previous meetings of the district had been held.

I should not sustain the proceedings of the first meeting if it were made to appear to me that there was any division of sentiment in the action thereof; or, if it appeared that a larger number of electors of the district constituted the second meeting. If this were the case, I should set aside the proceedings of the first meeting and order a new election; but it is clear to me that a majority of the electors who intended to participate in the annual meeting, participated in the first meeting. I conclude, therefore, to overrule the appeal, and sustain the action of the first meeting.

The appeal is overruled.

3569

In the matter of the appeal of Henry Chambers v. H. K. Salisbury, school commissioner of Montgomery county.

When the commissioners having jurisdiction over a joint district can not agree to make an alteration of the district, the State Superintendent will not interfere unless the propriety of the change is clearly manifest, and where a refusal to so order would necessarily work injustice.

Where an inhabitant of a joint district is inequitably assessed, his remedy is not by an alteration of the district, but by the proceeding provided by section 69, title 7 of the Consolidated School Act, and then by an appeal if he considers he has not been equitably dealt with.

Decided February 21, 1887

Draper, *Superintendent*

The appellant owns and resides upon a farm lying in joint school district no. 9 of the towns of Root and Charleston, Montgomery county, and of the

town of Carlisle, Schoharie county. He desires to be set off from said district no. 9 and attached to district no. 6 of the town of Carlisle. The school commissioners of Montgomery county and of the second district of Schoharie county, within whose commissioner districts the school districts which would be affected by the change are situated, met at the house of the appellant on the 21st day of September 1886, for the purpose of considering the matter. After such consideration, Commissioner Mann, of Schoharie county, announced himself as in favor of the proposed change, but Commissioner Salisbury, of Montgomery county, refused to join in an order making the same. From such refusal this appeal is taken.

The alteration of a joint school district requires the approval of at least a majority of all of the school commissioners within whose districts the school districts to be affected are situated. The law leaves it to their discretion, and requires that their judgments shall concur in the wisdom of the proposed change before it shall be made. This is intended as a check upon frequent change or changes for slight reasons. In a case where it appears that the commissioners met and deliberately considered a proposed change and disagreed as to the propriety of it, this Department will not order the change to be made except where the propriety of the change is clearly manifest, and where a refusal to so order would necessarily work injustice to an individual or injury to the school system. In this case the commissioners met upon the ground, heard the interested parties, examined the circumstances and configuration of the territory affected, deliberately considered the whole subject, and failed to agree as to the wisdom of the proposed alteration. The trustee of one of the districts affected also refused to consent to the change. After such proceedings, with the opportunities thus afforded the commissioners for observation and for gathering the information upon which to act intelligently, and with an evident difference of opinion in the locality, a clear and strong case must be presented by the appellant in order to succeed in having the refusal of one of the commissioners overruled.

In my opinion, such a case is not here presented. The real reason why the appellant desires the alteration appears to be the fact that he deems himself inequitably and unfairly taxed in joint district no. 9. He says he is assessed at a higher valuation per acre than any other farm in the district, although there are several farms no less valuable and some more so than his. If this is so the law provides a remedy. Section 69, title 7, of the Consolidated School Act, provides a way for equalizing taxes in joint districts, and if the officers therein charged with the duty of correcting an unjust valuation refuse to afford relief, this Department will do so. But the remedy for such a wrong does not lie in the alteration of school districts. The appellant urges in addition to this that his residence is nearer the schoolhouse in district no. 6 than in no. 9, and that the road to the schoolhouse in no. 9 is steep and frequently blockaded with snowdrifts in the winter; but as it appears that he has no children of school age, it would hardly seem that this is the real cause of complaint.

The appeal is dismissed.

3564

In the matter of the appeal of Edward L. Riker, Floyd Gates and Charles Eaton from the proceedings of a special school meeting held in district no. 3, town of Ontario, county of Wayne.

The proceedings of a district meeting will not be set aside because a number of voters who knew of the meeting chose to absent themselves, nor because some who attended did not vote.

The fact that a list of voters was prepared and used at the meeting, which was incomplete, is no sufficient reason for setting aside the action taken, particularly when an opportunity was publicly given to all voters whose names had been omitted from the list, to vote.

Action of another district meeting, held six months previous to the appeal, can not now be questioned. Such action, if objected to, should have been appealed from within thirty days from the date thereof.

Decided February 14, 1887

Draper, *Superintendent*

This is an appeal by residents of district no. 3, town of Ontario, county of Wayne, from the proceedings of the special school meeting held September 11, 1886, in said district, and demanding that the same be set aside. The following are the grounds stated by the appellants: that the trustee presented a list of voters which was only a partial list; that quite a number of voters did not attend the meeting because of the narrowness of the call; that several who attended the meeting did not vote, for the reason that they considered the call not sufficiently broad to admit them to vote as they saw fit; that there was a bill of costs included in the supplementary report of the trustee, incurred by said trustee in some action or proceeding affecting the district. The respondent, the trustee and other residents of the district, for answer to the appeal herein, allege: that the list of voters furnished by the trustee at such special meeting, were all that he could think of at the time and put those on the list, when the chairman announced that if any were present whose names had been omitted, they were now given an opportunity to vote; that if any voters of the district absented themselves from the meeting, it was probably due to the fact that the appellants had taken pains to inform them that no meeting would be held; that only two persons made this claim; that no exceptions were taken to the report of the former trustee when made at the special meeting; that the costs and expenses referred to were incurred by the trustee while acting in accordance with a resolution of a special meeting held in March last.

The following is the call for the special meeting, to which the appellants object:

NOTICE

By request of the supervisor of the town, I, the trustee of school district no. 3, order a special school meeting to be held in the schoolhouse, on Saturday evening, September 11, 1886, at seven o'clock p. m., for the sole purpose of accepting the supplementary report of the trustee, Emmet Teats.

JOHN H. ALBRIGHT

Ontario, N. Y., September 6, 1886

An additional pleading has been filed by each side to this controversy, but the statements contained therein do not materially change the allegations above stated.

After a careful examination of all the pleadings, affidavits and exhibits presented, I do not discover any sufficient reason why the proceedings of this district meeting should be set aside. The fact that several parties who had notice of the meeting saw fit to absent themselves, will certainly be no good reason, particularly as it is not claimed that these parties were kept away through any act of the respondents; nor is the fact that other residents of the district who attended the meeting and were entitled to vote thereat, declined to vote when they had an opportunity. The fact that a list was prepared by the trustee, which omitted some names of qualified voters, is not a sufficient ground to base a decision upon, setting aside the proceedings of a district meeting, particularly as the chairman of the meeting stated, after the list so prepared had been called, that, if any present had not voted, they then had an opportunity to vote. The only other point and the real secret of this appeal, as it appears to me, is the item presented by the former trustee of between twenty and thirty dollars for certain costs and disbursements incurred by said trustee in some proceeding relating to the school district. It is not claimed by the appellant and it does not appear from any papers before me, that this item of the trustee was disputed at the district meeting, and it does appear that the trustee was authorized by a vote of the district, held several months previous to this meeting, to defend a certain action which one Riker had brought against the trustee. It is claimed by the appellant that the meeting at which this resolution was passed was not properly called, a sufficient notice of the object thereof not having been given, but it is too late for me to pass upon that question now, as that meeting was held in March last, and it seems that the trustee acted in accordance with such resolution, and that no appeal was ever taken to this Department from the proceedings of that special meeting.

The conclusion I have reached is, that the appellants have not shown sufficient facts which would justify me in setting aside the proceedings of the special meeting held in September last, and I, therefore, dismiss the appeal.

3560

In the matter of the appeal of Frederick C. Plank, and others, from the proceedings of a special school district meeting held in district no. 17, town of Mayfield, Fulton county, N. Y., November 9, 1886.

Proceedings of a district meeting set aside, when it appears that service of notice of the meeting upon a majority of the voters was intentionally omitted, and in consequence but a minority attended the meeting and participated in its deliberations.

Decided February 4, 1887

Draper, *Superintendent*

This appeal is taken by residents and taxpayers of district no. 17, town of Mayfield, county of Fulton, from the action of a special district meeting in voting to purchase new seats for the district school in said district.

The grounds of the appeal are: That legal notice of the meeting was never given to a number of the legal voters in said district.

That several received no notice whatever.

That several received a verbal notice the day of the meeting, but the object of the special meeting was not stated to them.

That the failure to give legal notice was wilful on the part of the trustee.

No answer has been interposed by the trustee, although ample time has been allowed him to controvert the allegations of the appellants, if he chose to do so.

It seems that 18 legal voters attended the meeting, of whom 12 favored the resolution to purchase new seats. A majority of the legal voters appear to be opposed to the purchase, on the ground that the present outfit is in good repair and suitable for the school.

With these facts only before me, I am compelled to sustain the appeal. The statute prescribes the notice to be given and the manner of giving it. It is not customary to set aside the proceedings of special meetings on the ground of insufficiency of notice, where good faith is evident or it is shown that an honest endeavor was made to give notice to all, particularly not unless the meeting was closely divided upon a proposition and a sufficient number of legal voters were absent for want of notice to have changed the result. But, I do not think that the evidence before me shows sufficient effort to notify all of the meeting, and the action taken thereat can not, under all the circumstances of the case, be upheld.

The appeal is sustained.

3552

In the matter of the appeal of Alva T. Decker and others, from the proceedings of the annual school meeting held in school district no. 6, town of Sanford, Broome county, N. Y., August 31, 1886.

Proceedings of a district meeting called to order at the appointed time, and conducted in an orderly manner, will not be disturbed because certain voters of the district who were aware that the meeting had been called to order, remained outside of the room for some time, and until the proceedings objected to had been concluded.

Decided January 1887

Draper, *Superintendent*

This is an appeal taken by residents and school district electors of district no. 6, town of Sanford, Broome county, N. Y., from the action of the annual district meeting held August 31, 1886, in the matter of the election of a trustee for said district.

It is alleged as grounds for the appeal:

1 That the district has 18 voters; that at the annual meeting, notice was given that the meeting was open and ready to proceed to business, and that a majority of the voters were in attendance (but not in the room); that the appellants went into the room in less than five minutes from the time the meeting was opened, with no knowledge of what had been done, and one of the appellants

then named a person for trustee, and was told by the chairman that one Benjamin H. Hobart had been elected by the votes of two or three persons.

2 That the chairman would not then entertain a motion to elect a trustee.

3 That said Benjamin H. Hobart is not a resident of the district or of the State of New York; that he owns no real estate, and sends no children to school; that appellants believe that said Hobart was declared elected trustee to insure the employment of a certain person as teacher, contrary to the wishes of a large majority of the district.

The appeal bears twelve signatures, but is verified only by one of the appellants.

The respondents, including the said Benjamin F. Hobart and 14 other alleged voters of the district, answer the appellant's allegation; the answer on the part of the trustee being verified by him, and the answer on behalf of the residents and voters being verified by George L. Talmage, who was chairman of said meeting. The trustee denies that he is a nonresident of the district; alleges he owns real estate and personal property, and pays taxes in the district, and has children, but not large enough to attend school, and that he has employed a duly qualified teacher, who is conducting the school. The residents and voters answer that they were present at the meeting in question. That the meeting was called to order at 8.10 p. m.; that a majority of the voters of the district were present; that the meeting was orderly, and a majority of those present voted; that Benjamin Hobart was unanimously elected trustee; that a good teacher has been employed, and is teaching a good school, and that a majority of the patrons are well satisfied with the trustee.

It is singular that these contrary statements should, in several instances, be made by the same persons, but such is the fact.

After a careful examination of the facts presented, I fail to discover any reason why the proceedings of the annual meeting should be disturbed or set aside. The meeting was not called before the usual hour of meeting, and appellants admit they knew the meeting had been called to order, and yet delayed to go into the room until considerable business had been done and a trustee chosen. The charge that the person chosen trustee is not a resident and a voter, is sufficiently answered by the verified answer of the trustee.

The appeal is overruled.

4000

In the matter of the appeal of William H. Huntley and others v. school district no. 6 of the town of Williamstown, in the county of Oswego.

Proceedings of an alleged annual school meeting *set aside* where a long established custom in the district for calling the people to assemble had been purposely and intentionally omitted, thus enabling a very small minority of those intending to be present at the meeting to assemble and transact the business of the annual meeting.

Decided September 14, 1891

E. Dixson, Esq., attorney for the respondents

Draper, *Superintendent*

The purpose of this appeal is to set aside the proceedings of an alleged annual school meeting in the district above named, on the 4th day of August last. The appellants allege that it has been the invariable custom in the district for a great many years, to ring the schoolhouse bell in order to call residents to special and annual school meetings, but that this was not done at the time of the last annual school meeting; that a few interested parties assembled together promptly at the time fixed by law for the meeting, and that in five or ten minutes hastened through the forms of an annual meeting, receiving and acting upon the report of the trustees, voting moneys for the next year, and electing trustees. It is alleged and not denied, that not more than 5 or 6 persons were present at the time of these proceedings; that the great majority of the people of the district relied upon the bell being rung, and many did not go to the meeting at all because it was not done; that others went to the number of 15 or 20 at least, to find that the proceedings had been hurried through. It is shown that there are some 95 voters in the district, 60 of whom petition me to order a new meeting, and allege that they were improperly and unfairly prevented from expressing their wishes at the annual meeting.

The respondents answer and present very technical and some frivolous reasons why the appeal should not be entertained. They allege that the law requires no notice of an annual meeting to be posted, and that it does not require the bell to be rung. They say that the meeting was held at the time fixed by law and that others should have been present at that time if they wished to participate in the meeting.

The only dispute between the parties, as revealed by their affidavits, is in relation to the precise time at which the meeting was called. The appellants put it earlier than the respondents. There can be no doubt upon the papers presented, that because of the circumstances set forth by the appellants, the majority of people who desired to attend and participate in the school meeting, were prevented from doing so. The respondents say that it was their own fault; that they were bound to know the law and to be on time. This may be true, generally speaking, yet it seems conclusive upon the papers presented, that the will of the majority of the district has been thwarted by sharp practice on the part of a few who saw fit to ignore a well-settled custom in the district, in order to promote their own purposes. I think that the law intends that the State Superintendent shall interfere in such a case, when presented to him, and I am confident that in giving the district another opportunity to hold an annual meeting, so that all who wish may be present and participate therein, I shall promote the best educational interests of the locality.

The appeal is therefore sustained, the action of the said meeting is held to be void and of no effect, and the clerk will post notices of a special annual meeting to be held not less than ten days nor more than twenty days from the date thereof.

3991

In the matter of the appeal of William H. Graham and others v. school district no. 3, of the town of Mount Pleasant, in the county of Westchester.

Certain proceedings in the nature of an annual meeting *set aside* where it is claimed that a majority of the electors of the district were misled as to the hour of meeting by the notices posted, and in consequence were not in attendance while the business was being transacted by a few specially interested persons.

Special meeting ordered.

Decided August 31, 1891

Draper, *Superintendent*

This appeal is brought for the purpose of setting aside certain proceedings in the nature of an annual school meeting in the district above named, on the 4th day of August last. It is alleged on one side, that a portion of the notices posted called for a meeting at 8 o'clock. On the other side, it is alleged that all of the notices called the meeting at 7 o'clock. It is admitted on both sides that there was no action at the previous annual meeting fixing an hour for the next meeting. The law provides that in such cases the meeting shall be held at 7.30 o'clock. It is claimed by the appellant that a majority of electors in the district were misled as to the time of meeting, supposing that it would be in the neighborhood of 8 o'clock, and that a few specially interested persons assembled at 7.30 o'clock, or earlier, and rushed the business of the meeting through before the electors arrived; and that many arrived at 8 o'clock to find that the annual business of the district had been transacted.

I think the appellants make out a pretty strong case, sufficiently strong at least to justify me in setting aside the proceedings appealed from, and ordering another meeting, of which ample notice shall be given. The best educational interests of the district require that the substantial electors of the district shall have no good ground for feeling that they have been subjected to a trick, or intentionally misled. The appeal is therefore sustained, and notices will be issued by the district clerk for a special meeting to be held at a time and place therein mentioned, for the purpose of transacting all the business of the annual meeting. Notices of such meeting must be posted in the district for at least ten days.

3953

In the matter of the appeal of Charles C. Bagg and others v. union free school district no. 5, town of De Witt, county of Onondaga.

At a special district school meeting, an additional sum of money was voted to complete a new schoolhouse. The vote upon the question was close, it prevailing only by five majority. Unsatisfactory and contradictory evidence is offered to the effect that illegal votes were cast for the proposition. *Held,* that the proof not being satisfactory, the action of the meeting is sustained.

Decided January 8, 1891

Hoyt, Beach, Hancock & Devine, attorneys for appellants

J. B. Brooks, attorney for respondent.

Draper, *Superintendent*

On the 16th day of June 1890, the inhabitants of the district above named voted to erect a new schoolhouse in said district, and to issue bonds of the district for the sum of $17,000 for that purpose. The respondents issued said bonds and by the sale thereof realized their face value. On the 18th day of November 1890, a special meeting of the district was held for the purpose of voting to raise the further sum of $10,000 in order to complete the new schoolhouse, upon a plan adopted at a special meeting held August 19th. The vote to raise the additional $10,000 was close, there being 165 votes cast in all, of which 85 were in favor of the proposition, and 80 against it. The appellants seek to overturn the action of this special meeting by means of this appeal.

Different reasons are assigned for this, the only material one being that ten persons who are named, voted in favor of the proposition, when they were not qualified to vote at school meetings in the district. It turns out upon more complete investigation, that two who voted against the proposition were not entitled to vote, and it likewise turns out that several of the others who are named were entitled to vote.

The proofs do not sustain the allegation that enough illegal votes were cast in favor of the proposition to have changed the result. The appellants state that other illegal votes were cast in favor of it by the persons they name, but this allegation is too general to put the respondents to the necessity of answering it. It is made to appear in the papers, that just prior to the holding of the meeting referred to, a circular was published and distributed in the district, promising work to residents in case they would vote the proposition through. The members of the board swear that they had no knowledge of the authorship, and that they themselves were in no wise responsible for the publication. It is shown that the respondents have procured and paid for a site, and that a district meeting has adopted plans for a new schoolhouse, and that the common understanding in the district was that the new schoolhouse would cost considerably more than the sum appropriated for it. Sufficient ground is not shown for setting aside the action of the meeting of November 19th. That meeting was more largely attended than school meetings ordinarily are, and while the vote objected to was close, there is not sufficient proof that the majority in favor of the proposition was illegal.

I have been asked to send the matter to the school commissioner for the purpose of taking testimony, and have considered what I ought to do upon that request. The pleadings do not leave much at issue between the parties, and I can see no sufficient ground for granting the request, certainly not, when I consider the delay which will be involved, the expense which will be occasioned, and the ill-feeling which will inevitably be engendered by a contest over irrelevant matters before the school commissioner.

In view of these considerations, I must dismiss the appeal, and revoke the stay of proceedings heretofore granted herein.

3593

In the matter of the appeal of Smith Ovitt v. school district no. 4, of the town of Day, Saratoga county.

Proceedings of an annual meeting vacated and set aside for the reason that the meeting was disorderly and disgraceful.

Decided December 10, 1887

Draper, *Superintendent*

This appeal is brought to set aside the proceedings of an alleged annual school meeting in district no. 4, of the town of Day, Saratoga county, held on the 30th day of August 1887. The papers are exceedingly irregular and poorly prepared, but they are sufficient to show that the proceedings at the alleged school meeting were disgraceful in the extreme. The meeting was called to order at between 7 and 8 o'clock in the evening, and was characterized by a bitter quarrel until 11 o'clock, when a motion was adopted that the district be annulled. Upon this, probably about half of the persons present went away, and upon going locked the door to the schoolhouse upon the outside. Those who were left in the building remained until 3 or 4 o'clock in the morning, and in the meantime assumed to transact the business of the annual meeting, by electing a trustee and directing repairs to the schoolhouse. It is not necessary further to specify the details, except to say that the papers show the whole proceedings from first to last to have been utterly disgraceful to the district.

I will not give the sanction of this Department to a district meeting characterized by such proceedings, and I hereby set aside and declare it to be null. The district clerk will call a special meeting of the district, to be held not more than fifteen days from the date hereof, for the purpose of transacting the business which should have been done at the annual meeting. If repairs have been made to the schoolhouse which have not yet been paid for, the meeting will make provision for defraying such expenses.

3655

In the matter of the appeal of William F. Andrews, from the proceedings of a special meeting held in school district no. 16, town of Denmark, Lewis county, February 9, 1887.

A district meeting may adjourn from time to time and may transact any business at an adjourned meeting which it could have done at the first meeting held under the call. When there was some question as to the regularity of an adjournment, the transactions of the adjourned meeting were upheld upon it appearing clearly that the voters of the district very generally attended, and that the action taken was supported by a large majority.

Decided April 22, 1887

Draper, *Superintendent*

This is an appeal taken by an elector of school district no. 16, town of Denmark, Lewis county, from the action of a school meeting which voted to change a schoolhouse site and construct thereon a new schoolhouse.

The grounds of appeal alleged by appellant are that the meeting was an adjourned one, and that at the previous meeting, when the adjournment was agreed upon, no hour or place was designated, and no time or place recorded upon the clerk's minutes, and that consequently the adjournment was without day and the adjourned meeting was illegal.

The respondent, the trustee, for answer to the appeal, alleges the fact to be that the time and place of adjournment were agreed upon and duly entered in the minutes, and that the time and place of the meeting was well understood by the voters, and that the proposed meeting was the subject of much talk in the district prior thereto.

It appears that there was a full attendance of legal voters present at the meeting and a large majority voted in favor of the change.

It is conceded by the appellants that a majority of the legal voters favor the change, but claimed that, of the tax-paying portion, the division is nearly equal.

It does not appear that any voter opposed to the change was misled as to the time and place of meeting, and in view of all the facts I must decline to find that the meeting of February 9th was illegal.

The appeal is dismissed.

3841

In the matter of the appeal of Lyman A. Colson v. Calvin S. Edwards, trustee of school district no. 6, town of Edinburgh, Saratoga county.

Proceedings of an annual meeting will not be disturbed upon an appeal because notice thereof was not given. The statute fixes the time and place for the same. Nor for the reason that a delay of fifteen minutes occurred in organizing the meeting; nor because the person who acted as chairman was a nonvoter; nor because the person elected to a district office is obnoxious to voters; nor because illegal votes were received, unless it is made to appear that they were cast for the successful candidate, and in a sufficient number to give him a majority, and this, appellant must show by competent proof.

Decided December 9, 1889

Draper, *Superintendent*

The appellant preceded the respondent as trustee of school district no. 6, town of Edinburgh, Saratoga county, his term of office having expired August 6th last.

He now appeals from the proceedings of the annual meeting and the election of respondent, upon the following grounds, namely:

1 That legal notice of the meeting was not given.

2 The district clerk was absent and the meeting was not called to order until long after 7.30 p. m.

3 The chairman of the meeting was not a voter; he was under age.

4 Illegal votes were received and counted.

5 A full and fair expression of the voters present was not allowed.

6 The respondent is obnoxious to a large majority of the inhabitants and voters of the district.

From the pleadings of the respective parties, it appears that the appellant, the outgoing trustee, called the meeting to order. A nonvoter was chosen chairman. Appellant and respondent were rival candidates for trustee. The chair appointed a representative of each candidate as tellers. A ballot was taken and 16 votes were cast. The tellers announced 11 for respondent and 5 for appellant.

In answer to appellant's grounds of appeal, respondent avers that due notice of the meeting was given by appellant's direction; that any delay in calling the meeting to order appellant was responsible for, as he performed that duty; that the organization was effected about 7.45 p. m. He admits that the chairman was a minor, but made an efficient and fair presiding officer. He does not deny that illegal votes were cast, but attempts to excuse this by precedent in the district. He denies all the other charges.

The first and last objection stated as grounds of appeal are not tenable. The statute fixes the time for holding annual meetings in school districts, and failure to give notice does not render the proceedings thereat void. A person may be obnoxious to a majority of the people and yet be a legal school officer.

The delay of fifteen minutes in calling the meeting to order is not an unusual occurrence at school meetings.

The chairman being no voter and not having attempted to vote, furnishes no sufficient ground to set aside the proceedings of the meeting. I believe persons voted who were not qualified to do so, but appellant seems to claim one such voter, James Jones, whom he alleges was not a qualified voter. The respondent insists that one Edwards, also claimed by appellant, was no more qualified than Jones.

The proofs before me do not satisfy me that an opportunity for a full and fair expression of the legal voters present was not afforded. The appellant claims 6 votes were cast for him, including a vote by Jones, whom he alleges was not a voter, and one by Edwards, who respondent avers was not. He mentions the names of three other persons who voted who were not legal voters, and as he does not claim their votes, they may have voted for respondent. Assuming then, that of the 11 ballots found for respondent, 3 were illegal ones, respondent would then have 8 remaining, and as appellant claims but 6 for himself, a clear majority is left respondent which would be increased by deducting Jones' and Edwards' votes from appellant's score.

I fail to see any substantial reason why I should disturb the result of this election.

The appeal is overruled.

3741

In the matter of the appeal of Oliver H. White and other legal voters of school district no. 11, of the town of East Bloomfield, county of Ontario, from the proceedings of the annual meeting held in and for said district on the 28th day of August 1888.

Proceedings of an annual school district meeting set aside, when it appears that a large number of legal voters were unable to gain admission to the meeting and participate therein.

Decided December 15, 1888

Draper, *Superintendent*

The appellants, to the number of 23, allege that they are taxable inhabitants and legal voters in school district no. 11, of the town of East Bloomfield, county of Ontario; that the annual meeting was designated to be held at the schoolhouse on the 28th day of August last, at 7 o'clock p. m.; that at the time the schoolhouse was opened by the trustee, the approaches thereto were so crowded with persons that legal voters, including many of the appellants, were unable to gain access to the room in which the meeting was to be held; that a large number of persons who had gained access to the room proceeded with great haste to organize the meeting and select different district officers by acclamation; that the appellants had no opportunity of voting at that meeting; and that, if they had been able to secure admission to the schoolroom, they would have voted for other candidates than those declared elected by the person called to the chair.

The respondents allege that the meeting was not called until 20 minutes after 7 o'clock, and that the proceedings were regularly conducted and different officers elected, admitting that all but the librarian were elected by acclamation. The respondents deny that the appellants were prevented from entering the school building and participating in the meeting if they had so desired. They allege that the meeting was regularly conducted without undue haste, and that district officers were regularly elected.

The allegations and proofs of the respective parties are contradictory, and I do not reach a conclusion without some misgivings. But the fact is apparent that a large number of legal voters of the district did not get into the school building and participate in the election of officers, and there is a difference of opinion between the appellants and respondents as to whom the officers of the district should be.

Every legal voter of a school district should, if he desires to do so, have an opportunity to participate in district meetings and vote for persons of his choice to fill the several school offices. In order that an election, in the result of which all may acquiesce, may be had in this district, I have concluded to set aside the proceedings of the last annual meeting, and do hereby order and direct that a special meeting be held on the 28th day of December 1888, at the schoolhouse in said district, at 7.30 o'clock p. m.; that said meeting be called to order by

A. C. Aldridge Esq., school commissioner of the second district of Ontario county and that the election be conducted by ballot. At that meeting I hereby direct the officers of the district whose terms expired at the last annual meeting, to make their annual reports.

The trustee of said district, whose term of office would have expired on the 28th day of August 1888, had his successor been legally elected, is hereby ordered, within five days after notice to him of the filing of this decision, to call a special meeting of the legal voters in the manner prescribed by law, for the purpose of electing district officers and receiving the reports of district officers.

3740

In the matter of the appeals of John H. Albright v. district no. 3, Ontario, Wayne county, and Henry P. Brewer, trustee of said district.

Where it appears that although a district contracted for wood by the cord, but with the understanding that a cord should be 4 feet high, 8 feet long, and the length of the stick should be 2 feet, as required for the stove, and this dimension was shown to be the customary requirement of the district, and the price to be paid therefor sustains such an understanding, the contract will be upheld.

Decided December 14, 1888

Draper, *Superintendent*

Two appeals are taken by John H. Albright, a resident of school district no. 3, of the town of Ontario, Wayne county; one from the proceedings of a district meeting allowing a claim of $20 for fuel and authorizing a tax to be levied therefor, and one from the action of the trustee including such item of $20 in a tax levy.

The ground of the appeal is that the item is for eight cords of wood alleged to have been furnished, when, in fact, but one-half of the quantity was furnished. A further ground is, that in 1887, a tax of $10 was collected to pay for the wood.

As near as I am able to judge, there is no merit in this appeal. The contract to furnish the wood was let to the lowest bidder; to furnish wood 2 feet long, ready for the stove, and that it has been the custom for many years, in this and other districts, to consider wood cut as required for use a cord when the load is 4 feet high, 8 feet long and the length of the stick, required in this case, 2 feet. The contract to furnish the wood was let upon this understanding, and was so furnished, and the price, $2.50 per cord, would sustain such theory.

There is no allegation that the contractor has ever been paid for the wood. A claim therefor now exists against the district.

The district meeting has ratified the charge and ordered tax to pay it.

The action of the district meeting and of the trustees in levying a tax to pay for the wood is sustained, and the appeals are dismissed.

4406

In the matter of the appeal of William Middlemist from proceedings of annual school meeting held on August 6, 1895, in district no. 10, town of Andes, Delaware county.

The hour for holding the annual and special school meetings must be strictly observed. No legal authority exists for holding such meeting before the hour designated by the school law, or by or in the notice of the meeting served, and no legal obligation rests upon the qualified voters who may have assembled at the proper hour to wait for others before organizing and commencing proceedings. When it is established by the weight of evidence presented that the annual school meeting was organized and much of its business transacted before the hour of 7.30 in the evening, the action and proceedings of said meeting will be vacated and set aside as illegal and void.

Decided November 25, 1895

Wagner & Fisher, attorneys for appellant
E. E. Conlon, attorney for respondents

Skinner, *Superintendent*

This appeal is taken from the proceedings of the annual school meeting held on August 6, 1895, in school district no. 10, town of Andes, Delaware county. The appellant alleges, in substance, the following grounds of appeal:

That said meeting convened and much of the business thereat was transacted before the hour of 7.30 p. m.; that the trustee, who, it is claimed, was elected, if elected, before 7.30 p. m.; that no suitable ballot box was provided for said meeting and no inspectors of election were appointed to receive the votes cast for district officers, and to canvass such votes; that a majority of the legal voters of the district who attended at the time and place specified in the notice of said meeting, were deprived of a vote on account of said meeting being prematurely called to order, and the business rushed through before the time specified in the notice of said meeting.

The appellant, also, upon information and belief, alleges that persons were allowed to vote at such meeting who were not qualified voters at said meeting.

The pleadings herein consist of the appeal, answer, reply and rejoinder, to which are annexed respectively, affidavits in support of the allegations contained in such pleadings respectively.

The burden is upon the appellant to sustain his appeal by a preponderance of proof. A preponderance of proof does not necessarily mean the greater number of witnesses. In the consideration of the weight of the evidence produced, due regard should be given to the kind and quality of the evidence, the degree of credibility to which the testimony of the witness is entitled, the apparent probability or improbability of its truthfulness, and the interest of the witness in the matter at issue.

It appears from the proofs herein that at the time of said annual meeting in said district, and for some time prior thereto, dissensions existed in said district, causing factional quarrels and litigation, and that the qualified voters

therein were divided, about equally, into two factions, one known as the "Middlemist," and the other as the "Titch" faction or party. It is evident that both of said parties were deeply interested in the action to be taken at said annual meeting, and each party intended to be present in full force for the purpose of controlling the administration of school affairs in said district for the present school year. All of the persons whose affidavits have been annexed to the pleadings herein, containing allegations material or relevant to the issues presented for decision in the appeal herein, were interested parties in this appeal, with the possible exception of those of Anthony Huntly, White Hanmer, Wilbur Voorhees and William Scudder, each of whom alleges that he attended at the meeting only as a spectator and had no interest in the proceedings. It does, however, appear that each of the above-named affiants came to the meeting in company with some of the "Middlemist party," and it does not affirmatively appear that said affiants were wholly indifferent as to which party should control said meeting, or were impartial spectators of the action there taken, or, in other words, are disinterested witnesses in this proceeding.

I am of the opinion, from the proofs presented, that the appellant has failed to sustain the allegations made by him in his appeal that no suitable ballot box was provided and used in the election of district school officers, and that no inspectors of said election were elected or appointed. There is a conflict in the proofs as to what business was being transacted when the persons belonging to the "Middlemist party," or some of them, entered the schoolhouse. The witnesses for the respondent allege that a ballot was being had for a trustee of the district and the witnesses for the appellant allege that the result of a ballot for collector was being announced. The witnesses for the appellant state "that there was no ballot box," "that no ballot box was to be seen," "that no inspectors were canvassing the ballot," "neither were there any inspectors who received and canvassed the votes." The witnesses for the respondents state that a suitable ballot box was provided and used, and such ballot box was placed and kept on the teacher's platform in front of the room; that Lillie D. Titch and Annie T. Gavett were appointed inspectors of election and had charge of said ballot box, and received the votes of the persons present and voting, and when each ballot was closed, canvassed the votes, received and announced the result to the chairman of the meeting, who announced the result to the meeting; that the sworn copy of the record of said meeting shows that two inspectors of election were appointed and that the name of each person who voted for district clerk, trustee and collector was entered, as they voted respectively, by the clerk of the meeting. The Consolidated School Law requires that the trustee or trustees of each school district shall, at all elections of district officers, provide a suitable ballot box, and this Department has held that where the trustee has failed to provide a suitable ballot box, a hat or other receptacle for the ballots cast, in which the ballots may be safely kept apart from all other ballots and papers until canvassed by the inspectors of election, will be deemed a suitable ballot box under the school law.

I am also of the opinion that the appellant herein has failed in sustaining the allegation made in his appeal, upon information and belief, that persons were allowed to vote at such meeting who were not qualified voters at said meeting.

This Department has uniformly held that it is incumbent, in the case of an appeal from the proceedings of a school meeting on the ground that the votes of persons not qualified to vote were received, for the appellant, not only to allege the illegal voting or the disqualification of certain persons whose votes were received, but to show by evidence the lack of qualifications in such terms as necessarily to exclude every presumption that such voters could be qualified under any of the heads stated in the section of the school law prescribing the qualifications of voters at school district meetings. This the appellant herein has failed to do.

Section 11, article 1, title 7, of the Consolidated School Law of 1894, prescribes the qualifications necessary to be possessed by a person to entitle him or her to vote at school district meetings. Every person, to be entitled to vote at school district meetings, must be of full age, a resident of the district and must have resided therein for a period of thirty days next preceding any meeting held at which he or she offers to vote, and a citizen of the United States. In addition to the foregoing qualifications he or she must own real property, or hire real property, or be in the possession of real property under a contract of purchase, which real property must be situate in the school district, and subject to taxation therein for school purposes; or must be the parent of a child or children of school age, some one or more of whom shall have attended the district school in said district for a period of at least eight weeks within one year preceding such school meeting, and in such case both the father and mother can vote; or must, not being the parent, be a person who shall have permanently residing with him or her, a child or children of school age some one or more of whom shall have attended the district school in said district for a period of at least eight weeks within one year preceding such school meeting, and in such case the words "him or her" limits the right to vote to one person only, i. e., the head of the household; or must own personal property assessed on the last preceding assessment roll of the town, exceeding $500 in value exclusive of such as is exempt from execution.

The appellant claims that certain persons who were present and voted at said meeting were not qualified voters, for the reason that their names do not appear upon the tax list of the school district, and that they have not paid school taxes. A person may be a qualified voter in a school district notwithstanding his or her name is not upon the tax list of the district, and he or she has not paid a school tax. If such person owns real property subject to taxation for school purposes in the district, or hires real property subject to taxation, although the trustee has omitted to place the real property upon the tax list, he is qualified to vote in the district. If A, a citizen of the United States, of full age, and a resident of a school district, owns real property

situate in said district, which property is subject to taxation for school purposes in said district, and leases said property to B, a citizen of the United States, of full age, and a resident of the district, both A and B are qualified voters of the district, A as the owner, and B as the lessee of real property subject to taxation for school purposes in the district, although such real property has been omitted from the district tax list, and neither has paid any school tax thereon. The governing fact is the ownership or hiring of real property subject to taxation. Such ownership or hiring must be bona fide, not a mere colorable transaction to enable a person to claim a right to vote at a school meeting. The appellant alleges that five persons who voted at said school meeting were not, nor was either of them, a qualified voter at such meeting.

The courts of the State have held that an election will not be vitiated by illegal votes unless a different result would have been produced by excluding such votes. It appears that at the annual school meeting on August 6, 1895, there was but one candidate for each of the offices of district clerk, trustee and collector; that the whole number of votes cast for district clerk was 8, for trustee 9 and for collector 8, all being for Titch as clerk, Titch as trustee and Gavett for collector. Admitting, for the purpose of argument only, that said annual meeting was duly and legally held, and that five of the persons, who voted for said officers respectively, were not qualified voters, still Titch for clerk received 3 legal votes. Titch for trustee received 4 legal votes, and Gavett for collector received 3 legal votes, each respectively receiving all the legal votes cast, were each elected.

Under the school law it is the duty of any qualified voter at a school district meeting, when a person offers to vote thereat whom such qualified voter knows, or has good reason to believe, that the person so offering to vote is not qualified, to challenge such person. When a challenge is made it is the duty of the chairman of the meeting to require the person so challenged to make the declaration contained in the school law, and if the party makes the declaration his or her vote must be received; but if such person refuses to make the declaration his or her vote must be rejected. Any person so challenged who shall wilfully make a false declaration of his or her right to vote at such meeting shall be deemed guilty of a misdemeanor. A party knowing or having reason to believe a person to be unqualified, and permitting him or her to vote without challenge will not be allowed, upon appeal, to object to the proceedings of the meeting because such unqualified person participated therein.

The main contention of the appellant herein is, that said annual school meeting in said district, convened, and much of the business transacted thereat was had and done, prior to the hour of 7.30 p. m.

By section 8, article 1, title 7, of the Consolidated School Law of 1894, it is enacted that the annual meeting of each school district shall be held on the first Tuesday of August in each year, and unless the hour and place thereof shall have been fixed by a vote of a previous district meeting, the same shall be held in the schoolhouse at 7.30 o'clock in the evening. In the notice of the

annual school meeting in district no. 10, Andes, as given by the clerk of the district, named the schoolhouse in said district as the place, and the hour of 7.30 in the evening of August 6, 1895, as the time for holding said meeting.

The hour for holding the annual and special school meetings must be strictly observed. No legal authority exists for holding such meetings before the hour designated by the school law or by, or in, the notice of the meeting served, and no legal obligation rests upon the qualified voters who may have assembled at such time to wait for others before organizing and commencing proceedings. The affidavits filed by the appellant and respondents relative to this main contention of the appellant are conflicting and contradictory. The appellant has filed the affidavit of himself and nine other persons, all of whom claim to be qualified voters in said school district, and who allege that they attended said meeting for the purpose of participating in the proceedings thereof, that they arrived at the schoolhouse where the meeting was to be held, on said August 6, 1895, before 7.30 p. m. The appellant in his affidavits alleges that he arrived at the schoolhouse with one George Shaver and others at 7.15 p. m. and found some nine persons therein, Harvey Titch, presiding, and that as near as he could ascertain, such persons there present were electing a collector of the district; that after he arrived there was no action taken to elect a trustee. One Edward B. Scudder alleges in his affidavit that he was the clerk of said district for the school year 1894–95; that he left his home on the evening of August 6, 1895, to attend the annual school meeting at a quarter before 7 and arrived at the schoolhouse at about 7.15 p. m., but alleges positively that it was before 7.30 p. m. when he arrived at said schoolhouse; that he found eight or nine persons in said schoolhouse and the chairman was then announcing the election of Jacob S. Gavett as collector of the district; that at about the time he entered the schoolhouse, and within five minutes thereof, some seven other voters of the district entered said schoolhouse, and soon after two other voters of the district arrived. In the affidavit of John Smith, Hiram Shaver, Agnes Middlemist, John Scudder, Ella Scudder, George Shaver and Calvin Smith, it is alleged that they are qualified voters of said district and each and all of them arrived at said schoolhouse on the evening of August 6, 1895, before 7.30 p. m.; that they found the meeting had been organized and the persons present were electing a collector of the district; that no election of a trustee was had after their arrival at the schoolhouse; that about the time said affiants entered the schoolhouse, the affiant George Shaver looked at his watch and said, "It is only a quarter past seven now, you had better hold on." Anthony Huntley and three others, in an affidavit, allege that they are not voters in said district, but attended said meeting as spectators only; that they went to the schoolhouse with other persons, and arrived there at about 7.15 and found nine persons present; that after they arrived the election of Jacob Gavett as collector was announced by Harvey Titch as chairman; that no election of a trustee was had by the meeting after the affiants entered the schoolhouse; that after the affiants and others arrived at the schoolhouse it was stated by one George Shaver that it was only a quarter past 7 o'clock.

In answer to the statements contained in the above-mentioned affidavits the respondent, Harvey D. Titch, has filed the affidavits of himself and seven others present at said schoolhouse on the evening of August 6, 1895, in which it is alleged that they are qualified voters of said district and were present and organized a school meeting at 7.40 p. m. by the election of said Titch as chairman, and the district clerk being absent, Lola R. Titch was elected clerk of the meeting; that the report of the trustee was read and accepted; that the report of the collector was read and accepted; that a ballot was taken for a trustee and Harvey D. Titch, having received 9 votes, being all the votes cast, was declared elected; that a ballot was taken for district clerk and Lola R. Titch, having received 8 votes, being all the votes cast, was declared elected; that a ballot was taken for collector and Jacob S. Gavett, having received 8 votes, being all the votes cast, was declared elected. Said Harvey D. Titch further alleges that he arrived at the schoolhouse at 7.20 p. m. and the meeting was organized at 7.40 p. m. by his watch; that Annie T. Gavett and Lola R. Titch, present at said meeting, each had a watch and each of said watches was compared with the watch of said Titch and that said watches were about three minutes faster than his; that when the appellant and others entered the schoolhouse it was 7.50 p. m. by his watch, and the ballot for a trustee was then being taken, and that when George Shaver said "You are rushing things, it is only half past seven now," said Titch replied, "You are mistaken; it is ten minutes to eight." It is also alleged by Clarence Shaver, in an affidavit made by him, that he went to the schoolhouse about 7 p. m. on August 6, 1895, and that all of the Titch party were not in the schoolhouse, some of them were tying their teams; that there were no seats in the schoolhouse, but the persons there were laying boards upon blocks for seats; that he remained in the schoolhouse but a few minutes and when he went out a part of the Middlemist party were on the highway near the schoolhouse coming to the schoolhouse from the direction of Calvin Smith's house; that he went down the road and met, about forty rods from the schoolhouse, three more of the Middlemist party going to the schoolhouse. John G. and William Scudder and Wilbur Voorhees allege, in an affidavit, that they went to the said schoolhouse near 7 p. m. and found said house locked; that they went to the house of Calvin Smith, about 40 rods from said schoolhouse, and waited for the Titch party to come and open the schoolhouse; that they saw the said Titch party going past the house of Smith to the schoolhouse, and the affiants started and walked to the schoolhouse, arriving there about five minutes after the Titch party.

Jacob S. Gavett, on the part of the respondent, alleges he saw Clarence Shaver at the schoolhouse when he (Gavett) and others were fixing seats in the schoolhouse and saw said Shaver leave the schoolhouse and start across the fields towards the house of Calvin Smith; that soon after said Shaver left, he saw a number of men and boys pass by the schoolhouse, down the highway, and he recognized John G. Scudder as one of them.

In my opinion Harvey D. Titch was in error in stating that he did not arrive at the schoolhouse until 7.20 p. m., and that the meeting was not organized until 7.40 p. m. It was, to state it mildly, an unusually rapid dispatch of business,

between 7.20 and 7.50 p. m. to arrive at the schoolhouse, light up, arrange seats, choose a chairman and clerk, read an act upon the report of the trustee and collector, appoint inspectors of election, and ballot for a trustee, a district clerk and collector.

From a careful examination of the papers presented herein, and a due consideration of the weight of the evidence presented, and its apparent probability, I am of the opinion that the appellant herein has sustained his contention, that said school meeting on August 6, 1895, was organized and much of its business transacted before the hour of 7.30 p. m., and for that reason the appeal herein should be sustained.

The appeal herein is sustained.

It is ordered, That the action and proceedings had and taken at said school meeting, held in school district no. 10, town of Andes, Delaware county, on August 6, 1895, be, and the same are, and each of them is, hereby vacated and set aside as illegal and void.

It is further ordered, That Edward B. Scudder, the district clerk of said school district for the school year of 1894–95, be, and he hereby is, authorized and directed, without unnecessary delay, to call a special meeting of the inhabitants of school district no. 10, town of Andes, Delaware county, qualified to vote at school district meetings therein, for the purpose of transacting the business of the annual meeting of said district; that full six days' notice of the time and place of said meeting, and of the business to be transacted thereat, be given by him to each inhabitant of said district claiming to be a qualified voter in said district, as stated in section 2, article 1, title 7, of the Consolidated School Law of 1894.

4889

In the matter of the appeal of Jay Jackson and Artemus S. Barton from proceedings of a special meeting held August 21, 1900, in union school district no. 1, Pine Plains, Dutchess county, in the increase of the number of members of the board of education.

Notice of special meetings in union school districts other than those whose limits correspond to those of any incorporated village or city, must be given by publishing such notice once in each week for the four weeks next preceding the time for holding such meeting in two newspapers if there shall be two, or in one newspaper if there shall be but one, published in the district; but if no newspaper shall be published therein said notice shall be posted in at least twenty of the most public places in said district twenty days before the time of such meeting. It is only at annual school meetings, held in a union school district whose limits do not correspond to those of any incorporated village or city, that the qualified voters therein may determine by a majority vote, of such voters present and voting thereat to be ascertained by taking and recording the ayes and noes, to increase or diminish the number of members of the board of education of such district.

Decided October 4, 1900

Skinner, *Superintendent*

This is an appeal from the proceedings of a special meeting held August 21, 1900, in union school district 1, Pine Plains, Dutchess county, in increasing the number of members of the board of education from three to nine, and electing six members of such board. Annexed to such appeal is a printed copy of the call for such special meeting, as follows:

NOTICE

A special meeting of the inhabitants of school district 1, Pine Plains is hereby appointed, to be held at the union free school building in said district on the 21st of August 1900, at 7.30 p. m., to elect a trustee and treasurer for the coming school year.

J. J. JACKSON
A. S. BARTON
Board of Education

JOHN MYERS, *Clerk*
Dated August 10, 1900

Fred D. Slingerland and six others, claiming to be seven of the members of the board of education of such district, have answered the appeal herein, and allege that the notice of said special meeting, as posted in the district, contained the following: "and for the transaction of such other business as might come before the meeting."

It appears that at the alleged annual meeting held in such district August 7, 1900, William Jordan, then the supervisor of the town of Pine Plains, was voted for the office of trustee of the district and was declared elected as such trustee, and the call for a special meeting to be held August 21, 1900, was merely to elect a trustee in the place of said Jordan, as under the provisions contained in section 5 of article 1, title 8 of the Consolidated School Law of 1894, neither a school commissioner nor a supervisor is eligible to be a member of any board of education.

It further appears that Fred A. Slingerland is alleged to have been elected a trustee of such district in place of said Jordan; that a motion was adopted that the number of members of the board of education be increased from three to six, and thereupon Chester Lasher, Jacob Bowman and William Sadler, upon motion, were declared elected for the term of two years, and upon motion William Bostwick, Frank Eno and Charles S. Wilber were declared elected for the term of three years.

In section 13, article 3, title 8 of the Consolidated School Law it is enacted that the board of education of union school districts other than those whose limits correspond to those of any incorporated village or city, shall have power to call special meetings of the inhabitants of their respective districts whenever they shall deem it necessary and proper, in the manner prescribed in section 10 of said title. Section 10, article 2, title 8 of said law enacts that such notices of meetings shall be published once in each week for the four weeks next preceding such meeting in two newspapers if there shall be two, or in one newspaper

if there shall be but one, published in such district; but if no newspaper shall then be published therein, the said notice shall be posted in at least twenty of the most public places in said district twenty days before the time of such meeting.

It appears in proof of the appeal of Walter T. Wiltsie from the proceedings of the alleged annual meeting held in such district August 7, 1900, that two newspapers are published in said district. It is not alleged that the notice of the special meeting called for August 21, 1900, was published at all in either of the two newspapers. As the notice is dated August 10, 1900, and the meeting called for August 21, 1900, it is clear that the notice could not have been posted in at least twenty of the most public places in said district twenty days before the time of the meeting.

Due and legal notice of such special meeting called for August 21, 1900, not having been given, the meeting claimed to have been held August 21, 1900, was without authority of law, and hence the proceedings taken thereat have no legal force or effect whatever.

In section 31 of article 5, title 8 of the Consolidated School Law of 1894, it is enacted that *at any annual meeting* held in any union school district whose limits do not correspond to those of any incorporated village or city, the qualified voters may determine by a majority vote of such voters present and voting, *to be ascertained by taking and recording the ayes and noes,* to increase or diminish the number of members of the board of education of such district.

Taking and recording the ayes and noes of the voters present and voting upon the question of increasing or diminishing the number of members of a board of education, means that the clerk of the meeting shall record the name of each person whose vote is received and set opposite to each name whether such person votes aye or no.

Admitting, for the purpose of argument only, that said alleged meeting, held August 21, 1900, was duly and legally called and held, the proceedings taken thereat, relative to the election of said Slingerland as trustee, and in increasing the number of trustees of the district from three to six, and the election of six trustees, were not in conformity with the requirements of the school law, and the uniform rulings of this Department, Slingerland was not elected a trustee in the manner required by the school law. A proposition to increase or diminish the number of members of the board of education of such district can only be presented and acted upon at an annual meeting of the district, that is, on the first Tuesday of August in each year. The vote upon the proposition to increase the number of members of such board was not ascertained as required by the school law, and the alleged election of the six persons was not in accordance with the provisions of the school law.

I decide that the special meeting held August 21, 1900, in union school district 1, Pine Plains, Dutchess county, was not a legally called special school meeting under the provisions of title 8 of the Consolidated School Law of 1894, and the acts amendatory thereof.

That a proposition to increase the number of members of the board of education of said district can not be legally acted upon until the annual meeting to be held therein for the school year of 1901.

The appeal herein is sustained.

It is ordered that all proceedings taken at the meeting held in such union school district 1, Pine Plains, Dutchess county, August 21, 1900, be, and the same are, hereby vacated and set aside.

5094

In the matter of the appeal of Henry E. Town and others from proceedings of annual meeting held August 4, 1903, in school district no. 6, Nunda, Livingston county.

Section 8 article 1 title 7 of the Consolidated School Law of 1894 enacts that the annual meeting of each school district shall be held on the first Tuesday of August in each year, and, unless the hour and place thereof shall have been fixed by a vote of a previous district meeting, the same shall be held in the schoolhouse at 7.30 o'clock in the evening. Where there is no proof that at a previous district meeting any other time for holding the annual meeting of the district than at 7.30 in the evening was fixed, the hour designated for holding such annual meeting in common school districts must be strictly observed and no authority exists for holding such meeting before the hour designated.

Decided October 9, 1903

Skinner, *Superintendent*

This is an appeal from the proceedings of an annual meeting claimed to have been held August 4, 1903, in school district 6, Nunda, Livingston county.

The principal grounds alleged by the appellants for bringing their appeal is that the entire alleged meeting was held and such meeting adjourned prior to 7.30 o'clock in the evening on August 4, 1903.

No answer has been made to such appeal and the material allegations contained in the appeal are deemed admitted.

It appears that notice was given calling the annual meeting in said school district to be held August 4, 1903, at 7.30 p. m. On August 4, 1903, *and prior* to 7.30 o'clock p. m. a few of the inhabitants of said district, including Mr and Mrs E. O. Brainard, Mr and Mrs F. A. Seager, O. B. Brainard and Thomas Turbush, assembled at the schoolhouse in district 6, Nunda and organized by the choice of E. O. Brainard as chairman and O. B. Brainard as clerk. Mrs E. O. Brainard and Mrs F. A. Seager were appointed inspectors; the trustee's report was approved; voted that F. A. Seager be trustee of 1903–4; Tom Turbush was elected collector and W. E. Petteys clerk, and it was voted that the expenses for the year 1903–4 be left to the judgment of the trustee, and such meeting adjourned. The entire proceedings of such alleged meeting took place and the meeting adjourned prior to 7.30 p. m., August 4, 1903. At 7.30 p. m. of said August 4, 1903, the appellant herein, and other qualified voters, arrived at the schoolhouse and were informed that such annual school meeting had been held.

In section 8, article 1, title 7 of the Consolidated School Law of 1894, it is enacted that the annual meeting of each school district shall be held on the first Tuesday of August in each year, and, unless the hour and place thereof shall have been fixed by a vote of a previous district meeting, the same shall be held in the schoolhouse at 7.30 p. m.

There is no proof that at a previous district meeting any other time for holding the annual meeting of the district than at 7.30 p. m. was fixed.

This Department has uniformly held that the hour fixed for holding the annual meeting in the common school districts of this state must be strictly observed; that no authority exists for holding such meeting before the designated hour.

I decide, That no legal annual school meeting was held in school district 6, Nunda, Livingston county August 4, 1903.

The appeal herein is sustained.

It is ordered, That all proceedings had and taken at the meeting held in the schoolhouse in school district 6, Nunda, Livingston county, on the evening of August 4, 1903, be and the same are hereby vacated and set aside.

It is further ordered, That Henry E. Town, an inhabitant of school district 6, Nunda, Livingston county and a qualified voter therein, without unnecessary delay, call a special meeting of the inhabitants of such district qualified to vote at school meetings therein, in the manner prescribed in sections 2 and 6 of article 1, title 7 of the Consolidated School Law of 1894 for calling special meetings in such district for the purpose of transacting the business of the annual school meeting of such district.

4922

In the matter of the appeal of George G. French and Jedediah Hoose from proceedings of annual meeting held August 7, 1900, in union school district no. 7, Mexico, Oswego county, directing the board of education not to defend a certain action brought against it in the Supreme Court.

The qualified voters present and voting at an annual meeting in a union school district have the authority to adopt a resolution directing the board of education of the district not to defend an action brought in the courts against the district.

Decided December 31, 1900

Skinner, *Superintendent*

This is an appeal from the action of the annual meeting held August 7, 1900, in union school district 7, Mexico, Oswego county, in the adoption of the following preamble and resolution, to wit:

Whereas, There is an action now pending in the Supreme Court of the State of New York, brought by Melzar C. Richards against the board of education of union school district 7, Mexico, to recover the amount of three promissory notes for $300 each and interest thereon since the 4th day of September 1895,

made, executed and delivered by the said board of education on the 4th day of September 1895;

And whereas, It is the sense of this meeting that said notes, or the sum represented by them, is a just and valid claim against this school district, it is

Resolved, That the board of education of union school district 7, Mexico, N. Y., be, and hereby is, instructed and directed not to defend said action.

The appellants herein allege, as the principal ground for bringing the appeal herein, that said annual meeting had no authority, right or jurisdiction to instruct or direct the board of education of said district not to defend the action mentioned in said preamble.

Frederick A. Thomas, a resident, voter and taxpayer, has answered the appeal herein, and to such answer the appellants have made a rejoinder.

The sole question presented for my decision by the pleadings and proofs filed herein is, Did the qualified voters present at said annual meeting, held in said district August 7, 1900, have authority to adopt the preamble and resolution appealed from?

It is conceded that union school district 7, Mexico, Oswego county, was established in August 1895, under and pursuant to the provisions of title 8 of the Consolidated School Law of 1894, chapter 556 of the Laws of 1894, and that the limits of such school district do not correspond to those of any incorporated village or city.

Section 13, article 3, title 8 of said Consolidated School Law enacts that in union school districts, other than those whose limits correspond to those of any incorporated village or city, the *annual school meeting shall be held on the first Tuesday of August;* that the boards of education shall have power to call special meetings of the inhabitants of their respective districts whenever they shall deem it necessary and proper, in the manner prescribed in section 10 of said title 8, and shall in like manner give notice of the time and place of holding the annual school meeting.

Section 10, article 2, title 8 of the Consolidated School Law of 1894 enacts that notices by boards of education of school meetings shall be published once in each week for four weeks next preceding such district meeting, in two newspapers if there shall be two, or in one newspaper if there shall be but one, published in such district.

The appellants admit that on August 7, 1900, the annual meeting of said union school district 7, Mexico, was held pursuant to a printed notice thereof, duly published in the *Mexico Independent,* the only newspaper published in said school district.

Section 10, article 2, title 8 of the Consolidated School Law enacts that a majority of the voters of any union school district, other than those whose limits correspond to those of an incorporated village or city, present at an annual or special meeting of the district, duly convened, may *authorize such acts* and vote such taxes *as they shall deem expedient,* for making additions . . . *or for such other purposes relating to the support and welfare of the school as they may, by resolution, approve.*

This Department has uniformly held that the inhabitants of every school district, qualified to vote at school meetings held therein, assembled at the time and place fixed by the school law, for holding the annual school meeting, are authorized and empowered to act upon all questions presented for action thereat, relating to school matters and the support and welfare of the school therein, except such matters as are expressly forbidden to be acted upon by said school law.

This Department has also uniformly held that the school law having fixed the time for the annual meeting in the school districts the regularity of such meeting does not depend upon any call for, or notice of, such meeting by trustees or clerks.

There is no provision of the Consolidated School Law that requires any statement in the notice given of the annual meeting to be held in a union school district of the business to be transacted thereat, except that contained in subdivision 3 of section 13, article 3, title 8 as amended by section 1, chapter 195 of the Laws of 1897, that is, relating to the tax for the purchase of free textbooks to be used in the schools of the district.

It would seem, therefore, that there is no provision of the school law requiring the giving in the notice of the annual meeting to be held in a union school district, the presentation thereat of a resolution directing and instructing the board of education of the district not to defend an action brought in the courts against such board, that such resolution may be properly presented at such meeting, and the meeting would have the power and authority to adopt or reject such resolution.

A resolution not to defend an action brought against a union school district or its board of education is clearly a matter relating to and affecting the support and welfare of the school therein. Whatever would relate to or affect the finances of the school, its integrity and honesty, is a matter relating to and affects its support and welfare. If the annual meeting has not the power and authority to adopt a resolution directing the board of education not to defend an action brought against it then the anomalous condition is presented of an action being brought against it upon a claim which the majority of the qualified voters therein believe to be valid, and do not desire to defend, and the voters therein would be helpless if the board, for some reason of its own, insisted on defending.

The board of education of union school district 7, Mexico, has not appeared in any way in the appeal herein, or evinced any desire to disobey the resolution adopted at the annual meeting therein:

I decide that the annual meeting, held August 7, 1900, in union school district 7, Mexico, Oswego county, had the power and authority to adopt the preamble and resolution appealed from by the appellants herein.

The appeal herein is dismissed.

4924

In the matter of the appeal of Thomas B. Chilton v. Fred C. Loucks as trustee of school district no. 18, Russell, St Lawrence county.

Under the provisions of the Consolidated School Law of 1894 a school district meeting, duly assembled, has the power to alter, repeal or modify its proceedings from time to time as occasion may require. A school district meeting does not possess the power to direct how the public money apportioned for teachers' wages shall be expended. When a school district, at a meeting duly called and held, has empowered the trustee to enter into a contract with the school authorities of some other district or districts by which all the children of school age in the district may be taught in the schools of the other district, for not less than 160 days in a school year, and the sum contracted to be paid is less than the district quota of $100, received from the state, the trustee may expend any surplus in the conveyance of children, under rules and regulations to be made by him, to and from the school in the district with which such contract is made.

Decided December 31, 1900

D. R. P. Parker, attorney for appellant
G. T. Chaney, attorney for respondent

Skinner, *Superintendent*

This is an appeal from the refusal of Fred C. Loucks, as trustee of school district 18, Russell, St Lawrence county, to engage conveyance for the transportation of the children of school district 18, Russell, St Lawrence county, to the school in school district 1, Hermon, St Lawrence county, in conformity with a resolution to that effect, adopted at the annual meeting held in said district 18, Russell, August 7, 1900.

Trustee Loucks has answered said appeal and to such answer the appellant has replied, and to such reply the respondent has made a rejoinder.

A verified copy of the proceedings of the annual meeting in said district 18, Russell, and of a special meeting held therein October 19, 1900, has been filed in the appeal herein.

The following facts are established by the pleadings and proofs filed herein:

The appellant is a resident and qualified voter in school district 18, Russell, St Lawrence county, and has residing with him a son of the age of 9 years, and a grandson of the age of 5 years and upwards; that the residence of appellant is about two and one-half miles from the schoolhouse in district 1, village of Hermon, St Lawrence county; that in former years the appellant sent two of his children to the school in district 1, Hermon, and paid tuition although a school was maintained in district 18, Russell; that the appellant owns a horse and his son Henry, who resides with him, owns a horse, and the two are engaged in the business of teaming for a livelihood; that at the annual meeting held August 7, 1900, in school district 18, Russell, at which the appellant was chairman, a resolution was adopted that Trustee Loucks be empowered to enter into a written contract with the trustees of school district 1 of Hermon village,

whereby all the children of school age in the district shall be taught in the public school of district 1 in Hermon village for the term of not less than 160 days, beginning with the school year of August 1, 1900. It was also resolved that the trustee of the district be directed to engage conveyance for the transportation of the children of this district to the school of Hermon village for the year. September 1, 1900, a contract between Trustee Loucks of district 18, Russell, and the president and secretary of the board of education of the union school of Hermon, was made whereby all the children of school age in said district 18 were to be taught for not less than 160 days during the school year of 1900–1901 in said union school district in Hermon, at the sum of two-thirds the amount of tuition established in said union school, and a copy of said contract was filed in, and duly approved by, the Department November 13, 1900; that at the date of said contract there were six children of school age, including the son and grandson of the appellant, residents of district 18, to be taught in the union school in Hermon, the tuition of whom would cost about $50, and the sum of $60 of the public money would be available for the purpose of providing for the transportation of such children to and from said school district in the village of Hermon; that Trustee Loucks contracted with the parents and guardians of each of such children, except the appellant, to carry such children to and from such school at times when it was not fitting for them to walk, and in consideration thereof the balance of the public money apportioned to the district after paying for the tuition of such children should be divided between the respective parents or guardians of such children according to their attendance at school; that the appellant demanded of Trustee Loucks that his son and grandson be conveyed from the residence of the appellant, each school day, to the school in Hermon village, and from said school to his residence; that said Trustee, being unable to make any arrangement with the appellant, called a special meeting to be held in said district 18 October 19, 1900, for the purpose of considering the matter of conveying the children of the district to and from the school in Hermon village; that such special meeting was held at which all the parents of children of school age of the district were present, including the appellant, and various propositions were made the appellant relative to the conveyance of his son and grandson all of which he rejected, and thereupon the following resolution was adopted, to wit: "Resolved, that the trustee be instructed to use the public money apportioned to the district, first, in paying the tuition of the children of school age attending the Hermon school for the present year; second, to divide the balance between the parents or guardians of such children according to their attendance in said school for getting them to school;" that at the time the appeal herein was brought there were six children of school age, including the grandson of appellent in said district 18, all of whom were attending the school in Hermon village, and had attended thereat since the contract of September 1, 1900, was made; that since the making of the contract one James Chilton, having a child of school

age, has become a resident of district 18, and said child attends the school in Hermon village.

Section 14, article 4, title 15 of the Consolidated School Law of 1894, as amended by section 1 of chapter 294 of the Laws of 1897, provides, that when the qualified voters of a school district duly empower the trustees of the district, they shall enter into a written contract with the trustees or board of education of some other district or districts, that all the children of school age in such district may be taught in the school of such other district for not less than 160 days in the school year.

This Department has held that when any such contract shall be duly made and the sum paid for teaching such children shall *not* amount to the sum of the district quota of $100, the trustee may use the surplus in transporting the children to the school in the district in which the children are taught.

Under subdivision 19 of section 14, article 1, title 7 of the Consolidated School Law, which subdivision was added to section 14 by section 5, chapter 264, Laws of 1896, it is provided that when a district *has contracted* with another district to teach the children of the district, the qualified voters of such district are *authorized* that is, *permitted, not directed,* to provide by tax or otherwise for the conveyance of such children, etc.

A school district meeting does not possess any power to direct how the public money apportioned for teachers' wages, shall be expended.

The resolution was adopted at the annual meeting in district 18, directing the trustee to engage conveyances for the transportation of the children of the district to the school in Hermon village, did not provide by tax or otherwise for such conveyance, and was adopted prior to any contract being made with the school in Hermon village and, hence, is but an expression of opinion as to what action the trustee should take in the event of a contract being made.

The contention of the appellant that by the adoption of such resolution it was *mandatory* upon Trustee Loucks to engage such conveyance at the expense of the district, and that such resolution could not be altered, repealed or modified at a subsequent district meeting, is not well taken.

Subdivision 13 of section 14, article 1, title 7 of the Consolidated School Law provides that a school meeting duly assembled has the power to alter, repeal and modify their proceedings from time to time as occasion may require.

The resolution adopted at the special meeting held in district 18, October 19, 1900, was an alteration and modification of the second resolution adopted at the annual meeting of such district and an expression of opinion of the persons present as to the action which should be taken by Trustee Loucks in providing for the conveyance of the children attending the school in Hermon village, under the said contract of September 1, 1900.

The appeal herein is dismissed.

4445

In the matter of the appeal of Thomas Penney v. board of education of union free school district no. 6, town of North Greenbush, Rensselaer county.

It is the duty of trustees of school districts, when requested by a respectable number of the inhabitants of their respective districts, to call a special meeting for the transaction of any proper and legal business which such petitioners might desire to bring before it.

Decided April 18, 1896

John S. Wolfe, attorney for appellant
Charles J. Buchanan, attorney for respondents

Skinner, *Superintendent*

This is an appeal from the refusal of the board of education of union free school district no. 6, town of North Greenbush, Rensselaer county, upon the applications of inhabitants of said school district qualified to vote at school meetings therein, to call a special school meeting or meetings therein for the purpose of considering and acting upon the proposition to change the schoolhouse site, and to designate a new schoolhouse site for said district upon which to construct a new schoolhouse of the district.

The appellant alleges in his appeal that during the month of September 1895, a committee of thirteen duly appointed by the legal voters of said school district, presented to the respondents herein a request that said respondents call a special meeting of the district for the purpose of considering a change of schoolhouse site, and the designation of a new site, and the question of whether the new schoolhouse should be constructed on the old site or not; that on or about January 15, 1895, a petition was presented to the board of education, signed by 210 of the legal voters of said school district, of which the following is a copy: "To the Honorable Board of School Trustees of Union Free School District no. 6, of the town of North Greenbush: Gentlemen:— We, the undersigned, would most respectfully request you to call a district meeting, at which the subject of a schoolhouse site may be considered, or that you call an election and submit the direct question, Shall the old site be used?" that said application of the committee of thirteen and said petition of 210 legal voters were, and each of them, refused by the respondents.

The respondents in their answer to the appeal herein deny that said appeal states facts sufficient to constitute an appeal against any action by the respondents, and that the same is not sufficient and does not in any wise constitute an appeal from any action by the respondents as stated therein. Said respondents admit that said application of said committee of thirteen, and the petition of the 210 legal voters were, and each of them was, received, and that they refused to call said meetings applied and petitioned for. The respondents deny that they were obliged legally or otherwise to submit any of the resolutions referred to in the appeal herein to the voters of said school district.

It appears that at a special meeting of the inhabitants of said school district, held on June 17, 1895, among other proceedings taken thereat, a resolu-

tion was adopted by a vote of 155 in the affirmative and 129 in the negative, that the board of trustees of the said district raise by tax, to be levied by instalments, the sum of $25,000, for the purpose of building a new schoolhouse upon the site then owned by the district, provided no new site is purchased, and that bonds be issued and sold, as in said resolution specified. It does not appear that said resolution has ever been rescinded, reconsidered or amended, or that any appeal has been taken to the State Superintendent of Public Instruction from said action of said meeting.

Under the provisions of title 14 of the Consolidated School Law of 1894, it is enacted that any person conceiving himself aggrieved in consequence of any decision made by any school meeting, by any other official act or decision concerning any other matter under said act, or any other act pertaining to common schools, may appeal to the Superintendent of Public Instruction.

This Department for forty years has entertained and decided appeals from the acts or decisions of trustees of school districts in refusing, when requested by a respectable number of the inhabitants of their district, to call a special meeting for the transaction of any legal and proper business which such petitioners might desire to bring before it.

It is clear from the action of the said special meeting, held in said district on June 17, 1895, authorizing a tax of $25,000 for a new schoolhouse upon the site then owned by the district, provided no new site is purchased, that the changing of the site and the designation of a new site, was being considered and might be made before the construction of the new schoolhouse was commenced. In fact, it appears that a proposition to designate the Wiggins property as a new schoolhouse site was acted upon at a special meeting of the district held on August 26, 1895.

The power to designate schoolhouse sites is given by the school law to district meetings and such meetings can not delegate that power to trustees.

I am clearly of opinion that the qualified voters of union free school district no. 6, North Greenbush, have the right and should have an opportunity to fully discuss and consider the question of a change of the schoolhouse site therein and to designate a new schoolhouse site upon which to construct their new schoolhouse, and it was the duty of the respondents herein to have granted the petition presented to them on January 15, 1896, and to have called a special district meeting to consider and act upon the matters stated in said petition.

I decide that the appeal herein is sufficient under the school law relating to appeals and the rules of practice of this Department relative to appeals, and that I have jurisdiction to entertain, hear and decide the same; that it was a violation of duty on the part of the respondents herein in refusing to call a special district meeting for the purposes asked for in the petition of the legal voters of the district presented to them on January 15, 1896.

On January 29, 1896, I made an order herein enjoining and restraining the board of education of union free school district no. 6, town of Greenbush, Rensselaer county, from advertising for bids to construct a new school building upon the present schoolhouse site of said district; and from opening said bids

should such advertisement have been made; and from making or letting any contract for the building of said new schoolhouse upon the present schoolhouse site of said district; and from doing any act, matter or thing in relation to the construction of said new school building until the hearing and decision by me of the appeal herein, or until any further order shall be made by me in the premises.

The appeal herein is sustained.

It is ordered, That the board of education of union free school district no. 6, town of North Greenbush, Rensselaer county be, and it is hereby, directed, without unnecessary delay, to call a special meeting of the inhabitants of said union free school district qualified to vote at school meetings therein, pursuant to the provisions of section 10, article 2, title 8 of the Consolidated School Law of 1894, chapter 556 of the Laws of 1894, and the acts amendatory thereof, for the purpose of considering the proposition whether the new schoolhouse for said district shall be constructed upon the present schoolhouse site; and if such proposition shall be decided in the negative, then to consider the proposition of changing the present schoolhouse site, and the designation of a new schoolhouse site.

It is further ordered, That the order made by me herein on January 29, 1896, enjoining and restraining said board of education from advertising for and opening bids for the construction of the new schoolhouse, and from letting any contract for the building of such new schoolhouse, and from doing any act, matter or thing in relation to the construction of said new schoolhouse be, and the same hereby is, continued in full force and effect until a further order shall be made by me in the premises.

4465

In the matter of the appeal of John C. Runkle and Howard L. Waldo, from proceedings of annual school meeting held August 4, 1896, in union free school district no. 3, town of Castleton, Richmond county.

In union free school districts other than those whose limits correspond with those of an incorporated village or city, at the annual school meeting thereof, the vote to make appropriation for school purposes and to levy taxes therefor, must be taken by ballot or ascertained by taking and recording the ayes and noes of the qualified voters attending and voting at such meeting. Where at any such meeting the clerk of the meeting is instructed to cast a ballot for or against any such appropriation, by a viva voce vote, and thereupon the items were read and the clerk cast one ballot for each, such proceedings were not in accordance with the provisions of the school law; that a vote to increase or diminish the number of members of the board of education of any such union free school district can only be taken at an annual meeting of the district, and the proposition must be determined by a majority vote of the qualified voters of the district present and voting, and such vote must be ascertained by taking and recording the ayes and noes. Where the vote upon a motion, that the members of the board of education be increased, was taken viva voce or by acclamation, such proceedings were not in

accordance with the provisions of the school law. The trustees of such union free school districts must be elected by ballot, and a motion made, upon a vote taken viva voce or by acclamation, that the secretary of the meeting be instructed to cast a vote for each of the persons nominated for the office of trustees, is not a compliance with the provisions of the school law.

Decided September 14, 1896

J. L. Davenport, attorney for appellants

Skinner, *Superintendent*

The appellants in the above-entitled matter appeal from the following proceedings had and taken at the annual school meeting held on August 4, 1896, in union free school district no. 3, town of Castleton, Richmond county:

1 From the action and proceedings of said meeting, purporting to increase the number of members of the board of education of said district from five to nine.

2 From the action and proceedings of said meeting in the alleged election of six members of said board of education.

3 From the action and proceedings of said meeting in the alleged authorization of the levy of a tax or taxes for the items named in the budget presented by the board of education as necessary to defray the expenses incident to conducting the school in said district, etc.

4 From the action and proceedings of said meeting in the alleged election of a clerk of said district.

Annexed to the appeal is a copy of the minutes of the said annual school meeting, and annexed to said copy of minutes is the affidavit of Joseph Quinlan, clerk of said district, in which Quinlan alleges that the said copy of minutes is a true copy of the minutes of said meeting kept by Thomas J. Fetherstone, as secretary of said meeting, and as copied by said Quinlan into the minute book of the district.

An answer to the appeal has been made by George Sheridan, jr, who claims to have been elected at said annual meeting as one of the trustees and one of the members of the board of education for said district for the term of two years. Annexed to the answer are the affidavits of George Bowman, the chairman, Thomas J. Fetherstone, secretary of said annual meeting, and the joint affidavit of Andrew Fetherstone, and Michael Mahoney, who claim to have acted as inspectors of election at said annual meeting.

From the proofs presented in said appeal and answer, the following facts are established:

That on August 4, 1896, the board of trustees or education of said union free school district consisted of five members, the term of office of two of such members expiring on said August 4, 1896; that at the annual school meeting in said district held on August 4, 1896, George Bowman was elected chairman and Thomas J. Fetherstone secretary; that the financial report of the board of education was read and on motion was received as read; that the statement of money required for the ensuing school year for school purposes, exclusive of public

moneys, was read, and motion made and seconded that the clerk be directed to cast one ballot in favor of each item as read, which motion was lost, and a motion duly seconded that the said items be voted on separately as read, was adopted; that a ballot was commenced to be taken on voting a tax to raise the sum of $13,000 for teachers' salaries and 66 votes received, when a motion that the motion to vote on appropriations separately be reconsidered and the clerk be instructed to cast one ballot for or against each item of the budget as read was made, seconded and adopted; that the items of said budget were read and the clerk cast one ballot for each item; that a motion was made and seconded that the board of education be increased to seven members, to which an amendment was offered that said board of education be increased to nine members, and that the vote upon the amendment was taken by dividing the house and the amendment declared by the chairman to have been adopted, and thereupon the motion as amended was put to a viva voce vote or to a vote by acclamation, and declared by the chairman to have been carried; that thereupon a protest was made by one E. J. Schriver that the action of the meeting in the increase of the number of members of the board of education was illegal; that the following persons were nominated for members of the board of education, namely, George Sheridan, jr and Michael Smith, for two years; Dr J. J. Van Rensselaer and Charles Schneider, for one year; and James McNally and Timothy P. Hurley, for three years; and thereupon the chairman declared the nominations closed, and motion was adopted instructing the clerk to cast one ballot for each of the said persons so nominated; the clerk cast one ballot for each of said persons so nominated and the chairman declared them elected as members of said board of education; that the following persons were nominated for district clerk, namely, Joseph Quinlan, William J. Edwards, James T. Ellets and D. J. Donovan; that a ballot was taken for district clerk, which resulted as follows: whole number of votes 273, of which Joseph Quinlan received 137, William J. Edwards 54, James T. Ellets 46, D. J. Donovan 30, and 6 scattering, and the chairman declared said Quinlan elected district clerk.

There is no contention between the appellants and respondents as to the action and proceedings of said meeting upon authorizing the levy of a tax for the items contained in the statement of the board of education for school purposes, or upon the proposition to increase the members of said board and the election of the members thereof, or in the election of the district clerk.

The papers in the appeal herein call for my decision upon the following matters:

1 Did said annual school meeting legally authorize the board of education to levy a tax for the items reported necessary to be raised by tax for school purposes, or any of said items?

2 Did said annual school meeting legally adopt a proposition or resolution increasing the number of members of the board of education thereof from five members to nine members?

3 Did said annual school meeting legally elect said six persons, or any of them, as members of said board of education?

4 Did said annual school meeting legally elect Joseph Quinlan as district clerk?

In section 18, article 4, title 8, of the Consolidated School Law of 1894, it is enacted that it shall be the duty of the board of education, at the annual meeting of the district, besides any other report or statement required by law, to present a detailed statement in writing of the amount of money which shall be required for the ensuing year for school purposes, exclusive of public moneys, specifying the several purposes for which it will be required, and the amount for each.

By section 19, article 4, title 8, of the Consolidated School Law of 1894, it is enacted that after the presentation of such statement the question shall be taken upon voting the necessary taxes to meet the estimated expenditures, and when demanded by any voter present, the question shall be taken upon each item separately, and the inhabitants may increase the amount of any estimated expenditure, or reduce the same, except for teachers' wages and the ordinary contingent expenses of the school or schools.

In section 10, article 2, title 8, of the Consolidated School Law of 1894, it is enacted that in union free school districts other than those whose limits correspond with an incorporated city or village, on all propositions arising at the meetings thereof involving the expenditure of money, or authorizing the levy of a tax or taxes in one sum, or by instalments, the vote thereon shall be taken by ballot, or ascertained by taking and recording the ayes and noes of such qualified voters attending and voting at such meetings.

The board of education presented to said annual meeting the statement required by section 18, article 4, title 8, of the Consolidated School Law, and thereupon it was the duty of the qualified voters attending such meeting to vote the necessary taxes to meet such expenditures, by ballot, or by the clerk or secretary of the meeting taking and recording the name of each qualified voter present and voting and setting opposite the name of each such person voting whether he or she voted aye or no. Such vote could have been taken upon the aggregate sum of the items in the statement, or, when demanded by any voter present, the vote could be taken upon each item separately. The method prescribed by the school law, as above quoted, was not pursued at said annual meeting. A ballot was taken upon the item of $13,000 for teachers' salaries, and after 66 votes had been received a vote theretofore taken to vote upon each item separately was rescinded and a motion instructing the clerk to cast a ballot for or against each item as read, was adopted by a viva voce vote, or a vote taken by acclamation, and thereupon the items were read over and the clerk cast one ballot for each item. It is clear that said proceedings were not in accordance with the provisions of the school law. Under the school law every qualified voter present at said meeting had the right to cast his individual ballot upon the question of authorizing a tax for the items contained in the statement of the board of education, or to have his or her name recorded and the fact set opposite to said name whether he or she voted aye or no. The chairman or any other officer of the meeting had not, nor had the voters present by a majority vote or otherwise, the

lawful authority to deprive any qualified voter of such right. The ballots cast by the clerk for such items were not a compliance with the provisions of the school law.

I decide that the action and proceedings of said annual meeting relative to authorizing the levy of a tax or taxes for the items contained in said statement of the board of education required for school purposes, were illegal and void. That upon an appeal to me from any tax levied by the board of education under and pursuant to such proceedings, said tax would be set aside as illegal and void and not authorized under the provisions of the school law.

In section 13, article 5, title 8, of the Consolidated School Law of 1894, it is enacted that at any annual meeting held in any union free school district whose limits do not correspond to those of an incorporated village or city, the qualified voters may determine by a majority vote of such voters present and voting, to be ascertained by taking and recording the ayes and noes, to increase or diminish the number of members of the board of education of such district. If such board shall consist of less than nine members, and such meeting shall determine to increase the number, such meeting shall elect such additional number so determined upon, the first to hold office one year, the second two years, and the third three years.

The proceedings to increase or diminish the number of members of the board of education of union free school districts whose limits do not correspond to those of any incorporated village or city, are provided by statute and the statute must be strictly complied with. Such proceedings must be taken at an annual meeting, and the proposition must be determined by a majority vote of the qualified voters of the district present and voting, and such vote must be ascertained by taking and recording the ayes and noes, that is, the clerk of the meeting must record the name of each qualified voter who votes upon the proposition, and must set opposite to the name of such voter whether he or she votes aye or no upon such proposition.

It is not claimed, and the facts established do not show, that, in the proceedings had and taken at said annual meeting, the vote upon the proposition to increase the number of the members of the board of education of the district was ascertained in the manner provided by the school law as above quoted. A motion was made and seconded that the number of members of the board of education be increased to seven; that thereupon motion was made and seconded that such motion be amended by increasing said number to nine; that the vote upon such amendment was taken by dividing the house and the amendment declared adopted; that the vote upon the motion thus amended was not adopted by a majority of the voters present and voting thereon, ascertained by taking and recording the ayes and noes, but was declared adopted by a viva voce vote, or by acclamation. The said proceedings were not in accordance with the provisions of the school law. Under the provisions of the school law every qualified voter of the district present at such annual meeting had the right to vote upon said proposition, and it was the duty of the officers of said meeting to

ascertain such vote by taking and recording the name of each qualified voter who voted thereon, and setting opposite to each name so recorded whether such person voted aye or no.

I decide that the action and proceedings of said annual meeting relative to, and upon, the proposition to increase the number of members of the board of education of said district were illegal and void, and that no increase of the number of members of said board of education was legally made; but the number of members of said board remains as originally established, namely, to consist of five members.

Under the school law, members of the board of education of union free school districts must be elected by ballot, and receive a majority of the votes cast for each of said members, respectively. At the annual meeting in said district no. 3, Castleton, it is claimed by the respondents herein that six members of the board of education were elected and by ballot, namely, two for one year, two for two years, and two for three years; that the persons so claimed to have been elected were put in nomination at said meeting and the nominations being closed, and no other persons being nominated, a motion was made and adopted by a vote of the meeting, taken viva voce, or by acclamation, that the secretary of the meeting be instructed to cast a vote for each of the persons so nominated; that thereupon the secretary did cast such ballot for said persons, and that said persons were declared elected by the chairman of the meeting. The records of this Department show that at the meetings held at which a union free school was established the number of persons fixed upon for members of the board of education was five, and that John J. Santry was elected a member for the term of one year from the first Tuesday of August 1895, Thomas H. Harper and Charles D. Freeman for two years from the first Tuesday of August 1895, and John Seaton and John J. Travers for three years from the first Tuesday of August 1895. If since the election of the aforesaid persons as members of said board of education and prior to said annual meeting of the district, none of them has removed, died or resigned, said annual meeting had no legal authority to elect but one member of said board for a term of three years, in place of Santry, whose term expired on the first Tuesday of August 1896. If any member or members of said board have vacated his or their office, and such vacancy or vacancies have been supplied by the board, the annual meeting had authority to elect a person or persons for the balance of the unexpired term or terms of those removing, resigning or dying. It does not appear from the papers filed in this appeal whether or not said annual meeting had authority to elect more than one member of said board, namely, in the place of Santry. As stated above, I have decided that the proposition to increase the number of members of said board from five to nine was not legally adopted, and hence the election or attempted election of four additional members of the board by said annual meeting was illegal and void.

Admitting for the purpose of argument only, that the proposition to increase the board to nine members was legally adopted, and that there were two vacancies

to be filled in the five members, the election of the six persons was not in accordance with the provision of the school law.

At said annual meeting, after the proposition to increase the number of members of the board of education was declared by the chairman to have been adopted, the chairman stated that the nominations for trustees were in order and thereupon six persons were nominated, two to hold two, two to hold one, and two to hold three years; that no other nominations being made, on motion, the chairman declared the nominations closed; that a motion was then adopted by a viva voce vote or acclamation, that the secretary cast one ballot for the six persons so nominated, which was done, and said persons declared elected, etc., etc.

The nomination of persons for school district officers at meetings at which any such officers are to be elected is not recognized in the school law, and its breach is more to be honored than its observance. Such nominations have no binding effect upon the qualified voters of the district who can vote for whom they desire for such offices regardless of such nominations; and such nominations furnish no evidence that a majority of the qualified voters present, or any considerable number of them, desire the election of the persons so nominated, or would vote for them upon the ballot which the school law requires shall be taken. On the contrary, the voters may have come to the meeting prepared with ballots containing names of persons either partially or entirely different from those put in nomination at the meeting. The contention that as no other than the six persons nominated could be voted for and that the failure of the meeting to put in nomination other persons, was proof that said persons were acceptable to the voters present or a majority of them, is untenable. The wishes of a majority of the voters present and voting could only be determined by a canvass of the ballots cast, and every qualified voter present had the legal right to vote and to have such vote received and counted.

The method taken at said annual meeting in the election of members of the board of education by which the secretary of the meeting, pursuant to a motion adopted by a viva voce vote, cast one ballot for the six persons nominated at the meeting, is not approved and is not deemed to be an election of such persons as such members by ballot, as required by the provisions of the school law. The school law nowhere authorizes the voters at a school district meeting to delegate to any one the power to elect such officers, or any of them, by directing any person to cast a ballot for such officers, thereby depriving all other voters of their right to vote for such officers.

I decide that the action and proceedings of said annual meeting relative to, and had and taken in, the election of trustees or members of the board of education of said district were illegal and void; and that the six persons declared by the chairman of the meeting to have been elected as such members were not, nor was either or any of them, legally elected, nor was any person at such meeting legally elected a member of the board of trustees or board of education of said district.

Under the provisions of section 7, article 1, title 8 of the Consolidated School

Law, said district, at its annual meeting, had authority to elect a clerk of said district, who should also act as clerk of the board of education of the district, and that such clerk shall be elected by ballot and must receive a majority of the votes of the qualified voters of the district present and voting. At said annual meeting a ballot was duly taken for clerk of the district and Joseph Quinlan received a majority of the votes of the qualified voters of the district present and voting for clerk of said district. No proof is presented herein of the ineligibility of said Quinlan.

I decide that said Joseph Quinlan was duly elected clerk of said district at said annual meeting.

The said annual meeting of said district, held on August 4, 1896, adjourned sine die. As I decide, upon the appeal herein, that the action and proceedings of said meeting relative to authorizing the levy of a tax for the sum or sums stated by the board of education of the district as necessary to be raised for school purposes were illegal and void, a special meeting of the inhabitants of the district, qualified to vote at school meetings therein, should be held for the purpose of acting upon the question of authorizing the levy of such tax or taxes.

As I decide that the action and proceedings had and taken at said annual meeting of said district upon the proposition to increase the number of members of the board of education of said district were illegal and void, and, as under the provisions of the school law, a proposition to increase or diminish the members of said board can only be taken at an annual meeting of said district, and the annual meeting of said district for the school year commencing August 1, 1896, having been held and adjourned sine die, no action or proceedings relative to increasing or diminishing the number of members of said board of said district can be legally had or taken until the annual school meeting, held in said district for the school year, commencing August 1, 1897.

Upon the adjournment sine die of said annual school meeting, held on August 4, 1896, the board of education of said district consisted of at least three members, and possibly four, and as I decide that six persons, claimed to be elected members of said board, were not, nor was either or any of them, legally elected as such members of the board of trustees of the district, the special meeting of the district, called to vote upon the question of the levy of a tax or taxes, should also elect a member or members of the board of education of the district to fill the vacancy or vacancies existing therein at the time said annual meeting adjourned sine die, to the end that said board shall consist of five members.

The appeal herein is sustained as to all matters, except that from the election of Joseph Quinlan as clerk of the district, and to such election said appeal is dismissed, and his election is sustained.

It is ordered, That all action and proceedings had and taken at the annual school meeting, held on August 4, 1896, in union free school district no. 3, town of Castleton, Richmond county, relative to the following matters, namely: authorizing the levy of a tax for the support of the schools of said district for the

school year commencing August 1, 1896, as contained in the statement of the board of education of said district, presented to and read at said annual meeting; all action and proceedings had and taken upon the proposition to increase the number of members of the board of education of said district from five members to nine members; all action and proceedings had and taken in the election or alleged election of George Sheridan, jr, Michael J. Smith, Dr J. J. Van Rensselaer, Charles Schneider, James McNally and Timothy P. Hurley, or either of them, as trustees or members of the board of education of said district, be, and each and all of said actions and proceedings of said annual meeting herein specified, is and are, vacated and set aside as illegal and void, and altogether held for naught.

It is further ordered, That the trustees or board of education of said union free school district no. 3 of Castleton, Richmond county, without unnecessary delay, call a special meeting of the inhabitants of said district, qualified to vote at school meetings in said district, said notice to be given in the manner prescribed by section 10, article 2, and section 13, article 3, title 8, of the Consolidated School Law of 1894, and the amendments thereof, for the purpose of acting upon the statement presented by the board of education of said district to the annual meeting of said district held on August 4, 1896, of the sum or sums required to be raised by a tax or taxes for the support of the schools of said district, for the school year commencing August 1, 1896, and also to elect one or more trustees or members of the board of education of said district to fill any and all vacancies existing in said board, to the end that said board shall consist of five members.

4497

In the matter of the appeal of W. D. Griffin v. Henry L. Lounsbury and Samuel D. Peterson, trustees of school district no. 17, town of Cortlandt, Westchester county.

It is the duty of the trustees of a school district to call a special meeting of the district when requested to do so by a respectable number of the qualified voters of the district for a legitimate object. While the occasion for a special meeting must be of enough importance to warrant the trustees in assembling the inhabitants, on the other hand the trustees should not refuse or neglect to call a special meeting when the interests of the district plainly demand it, or when petitioned by a respectable number of the inhabitants.

Decided October 23, 1896

Skinner, *Superintendent*

On August 24, 1896, a petition signed by twenty-five residents, taxpayers and voters of school district no. 17, town of Cortlandt, Westchester county, addressed to the school trustees of school district no. 17, town of Cortlandt, Westchester county, requesting said trustees to call a special school meeting

within the next ten days, for the purpose of taking into consideration the selection of a school house site, and the building of a schoolhouse thereon, and all things necessary for the carrying out of the same, was presented to said Henry L. Lounsbury and Samuel D. Peterson, trustees of said school district. That said Lounsbury was willing to call said meeting, but said Peterson opposed the calling of said meeting. That on September 24, 1895, no special meeting of said district having been called by said trustees pursuant to the prayer of said petitioners, W. D. Griffin, a resident taxpayer and voter in said school district, and one of said petitioners, appealed from the refusal of said trustees to call said meeting. The appeal herein alleges that the schoolhouse and grounds in said district are in a deplorable condition for the accommodation of school children and for school purposes, and that a large majority of the taxpayers in the school district are desirous of having a new schoolhouse and better accommodations. That there are but two trustees acting in said district.

No answer has been made to the appeal herein, and under the rulings of this Department the facts alleged in said appeal are deemed admitted by the said trustees, Lounsbury and Peterson.

This Department has uniformly held that it is the duty of the trustees of a school district to call a special meeting of the district when requested to do so by a respectable number of the qualified voters of the district for a legitimate object. While the occasion for a special meeting must be of enough importance to warrant the trustees in assembling the inhabitants, on the other hand the trustees should not neglect or refuse to call a special meeting when the interests of the district plainly demand it, or when petitioned by a respectable number of the inhabitants.

The appeal herein shows that the interests of said district plainly demand that said special meeting petitioned for should be called, and that said trustees have been petitioned for said special meeting by a respectable number of the inhabitants.

The appeal herein is sustained.

It is ordered, That Henry L. Lounsbury and Samuel D. Peterson, trustees of school district no. 17, town of Cortlandt, Westchester county, without unnecessary delay, call a special meeting of the inhabitants of said school district qualified to vote at school meetings therein, for the purpose of taking into consideration and acting upon the proposition of changing the schoolhouse site and designating a new schoolhouse site, and directing its purchase and authorizing the levy of a tax to pay for said site; and also take into consideration the erection of a new schoolhouse upon the present school site or upon a new site, and to authorize the construction of a new schoolhouse, and the levy of a tax or taxes in one sum or in equal annual instalments, to pay for the erection of such new schoolhouse.

4504

In the matter of the appeal of Thomas H. Madigan, Thomas S. Ryan and Nicholas J. Mahoney from proceedings of annual school meeting held on August 4, 1896, in union free school district no. 10, towns of Half Moon and Stillwater, Saratoga county; and from district election held August 5, 1896.

When at an annual school meeting it became impossible to transact the business of the meeting by reason of the noise and disorder existing; *held,* that the declaration of the chairman adjourning the meeting was proper; that after such adjournment by the chairman the powers of the meeting were exhausted, and neither the chairman of the meeting nor any other person or persons could legally reconvene said annual meeting or organize a new meeting, and that all proceedings taken by the persons remaining in the building after such adjournment and after the chairman, clerk and other persons left the hall and building, were illegal and void; that election of trustees and clerk of the district, held on the Wednesday following the annual meeting, not being an adjournment of the annual meeting nor a special meeting duly called and held, was illegal and void.

Decided October 31, 1896

O. Warner, attorney for appellants
J. F. Terry, attorney for respondents

Skinner, *Superintendent*

The appeal is taken from the action of the annual school meeting held August 4, 1896, in union free school district no. 10, of the towns of Half Moon and Stillwater, Saratoga county; and from an alleged election of two trustees of said district and a clerk of said district, held on August 5, 1896, in said district, and the declaration that Edgar Holmes and W. B. Neilson were elected as trustees, and Herbert R. Baker clerk; and from the decision of the board of education recognizing said Holmes, Neilson and Baker as such trustees and clerk, and refusing to recognize the appellants as such trustees and clerk.

With the appeal herein, the joint affidavit of the appellants and eight other persons, in support of the allegations contained in the appeal, was filed.

Messrs Daniel E. La Dow and others, claiming to be members of the board of education of said district, have filed an answer to the appeal, and with such answer have filed the joint affidavit of the respondents and sixty or more qualified voters of the district in support of the allegations contained in the answer.

The main contentions of the respondents are that, at the time the chairman of said annual meeting adjourned said meeting, the noise and disorder was of such a character as to render it impossible to transact any business; and that the action of the meeting upon the resolution to postpone the election of trustees and clerk until Wednesday, the day following said meeting, and the amendment thereof that said election be then held, and to reconsider its action upon holding such election on Wednesday, were in effect and equivalent to an affirmative majority vote and determination of said meeting to hold such election on Wednesday, the next following day after said meeting.

The following facts are established:

That the annual school meeting of union free school district no. 10, towns of Half Moon and Stillwater, Saratoga county, was held on the evening of August 4, 1896, and was duly organized by the choice of Herbert O. Bailey as chairman, Herbert R. Baker, the clerk of the district, acting as clerk of the meeting; that after the reading and adoption of reports of school officers and voting appropriations for the ensuing year, the chairman announced that the next business in order was the election of two trustees and a clerk of the district, and thereupon a motion was made that such election be held on Wednesday, the next following day, which motion was amended to the effect that such election be then held; that objection was taken to the amendment, that it should be declared not in order, as the election must then be held unless the meeting should determine that it should be held on Wednesday, or, in other words, that vote in favor of the original motion would determine that the election would be held on Wednesday and a vote against the motion would require the election to then be held, and therefore the amendment was not in order and should not be entertained; that the chairman entertained the amendment and directed that all persons in favor of the amendment should take the east side of the hall, and those opposed, the west side, and the chairman appointed two tellers to count the persons on the east side and two other tellers to count the persons on the west side of the hall; that the tellers on the west side proceeded to count the persons on that side of the hall, and completed said count without trouble, interference or delay; that the tellers on the east side, after making several unsuccessful attempts to count the persons on that side, informed the chairman that many persons on said east side were standing on the floor and on chairs, and others moving about, and that it was impossible to count the persons unless they were seated and in order; that the chairman requested said persons to take their seats and to keep quiet and in order, but that but few complied with such request, but continued to stand and move about, and persons having been counted by the tellers moved ahead of the tellers and were again counted; that there were in said hall at the time of said count many persons not qualified to vote at said meeting who were counted by the tellers; that by reason of the noise and disorder prevailing among the persons on the east side of said hall, and the crowding and pushing of the persons moving about it was impossible for the tellers to make an approximately correct account of such persons; that the tellers of the persons on the east side of the hall reported to the chairman the number of persons to be 508, and the tellers on the west side reported to the chairman the number of persons to be 302, the result of the vote upon said amendment being 508 in favor and 302 against; that upon the announcement of the result by the vote upon such amendment the chairman then stated the question was upon said motion amended, and requested those in favor to say aye and the response of aye was made on the east side, and thereupon those opposed were requested to say no, and the response of no was made on the west side, and the chairman declared that the motion as amended was lost; that upon said declaration of the chairman the persons on the west side cheered and those on the east side screeched and hissed, and fists

were shaken at the chairman and threats made to throw him from the platform; that order was partly restored and a motion was made to adjourn, whereupon shouting and yelling ensued which continued for some time, when the motion was put by the chairman and declared lost, which declaration was followed by shrieks, yells and groans; that after some effort the chairman succeeded in restoring partial order, and stated in substance that it was impossible to transact any business on account of the noise and disorder; that he was unable to tell who addressed him or what they said, or in all cases to determine the result of a vote, and that if order was not maintained he would adjourn the meeting of his own motion, which statement was received with hisses, shaking of fists and threats to throw the chairman from the platform and to elect another chairman in his place; that a motion was then made that the vote on the motion as amended in relation to the time for holding the election be reconsidered, which motion was put by the chairman and declared lost, and thereupon another scene of noise, confusion and disorder occurred, increasing in volume and virulence; vile epithets were applied to some of the persons and to the chairman; several persons rushed upon the platform shouting and demanding that another chairman be chosen, several persons shaking their fists in the face of the chairman, and threatening two members of the board of education with personal violence; that after this scene of disorder had continued for a period of five to ten minutes, the chairman stated to those present, in substance: "It is impossible to transact any further business at this meeting on account of the noise and disorder, and I therefore declare this meeting adjourned", that upon said adjournment of said meeting the president of the board of education announced to the persons present that the election for trustees and district clerk would be held the next following day at the school building in said district from 12 o'clock noon until 4 o'clock in the afternoon, and thereupon the chairman and clerk of the meeting and the persons on the west side of the hall left the hall and did not return that night; that after the persons so as aforesaid left said hall the persons remaining therein organized by electing a chairman and clerk and choosing inspectors of election and proceeded to ballot for two trustees and a clerk for said district, such balloting being held open until 10 o'clock p. m.; that the ballots received were canvassed by said inspectors and the result announced by them as follows: Whole number of votes cast 245, of which the appellants, Thomas H. Madigan and Thomas S. Ryan, received 245 votes for the office of trustee, and the appellant, Nicholas J. Mahoney, received 245 for district clerk, and thereupon said meeting adjourned; that on the day following said annual school meeting, to wit, on Wednesday, August 5, 1896, a meeting or election was held in said school building, conducted by the board of education of said district as inspectors of election, for the election of two trustees of said district and for a district clerk; that the polls of said election opened at 12 o'clock noon and closed at 4 o'clock in the afternoon of said day; that at said election 550 ballots were cast by an equal number of qualified voters of said district, and of said ballots cast, Edgar Holmes and Willie B. Neilson each received for trustee 548 votes, and Thomas H. Madigan and Thomas

S. Ryan each received for trustee, 2 votes, and that Herbert R. Baker received for district clerk 548 votes, and Nicholas J. Mahoney received 2 votes; that at the organization of said board of education, on August 11, 1896, the said Holmes and Neilson were recognized and received as members of said board and said Baker as district clerk, and ever since have acted as such, and that said Madigan and Ryan, who claimed to have been elected trustees, and said Mahoney, who claimed to have been elected district clerk, on August 4, 1896, were not received nor recognized by said board as such trustees and clerk.

It further appears that besides the qualified voters in the hall in the school building on the evening of August 4, 1896, there were outside of said building a large number of qualified voters of the district, a majority of whom were women, all of whom were assembled for the purpose of attending and voting at the election of district officers if such election had been held.

It is not shown how many qualified voters there were residing in said district on August 4, 1896. I assume that said union free school district no. 10 is one whose limits do not correspond to those of an incorporated village or city, and that the number of children of school age in said district exceeds 300.

It was the duty of the qualified voters of said district at its annual meeting held on August 4, 1896, to elect the trustees and district clerk, unless said meeting, after transacting the other business required by the school law, legally adjourned said meeting to a day named for the purpose of completing its business and electing its district officers, or, under the provisions of section 14, article 3, title 8, of the Consolidated School Law of 1894, the qualified voters of such district, by a vote of a majority of those present and voting at any annual meeting, or any duly called special meeting, to be ascertained by taking and recording the ayes and noes, determined that the election of the members of the board of education and clerk of said district shall be held on the Wednesday next following the day designated by law for holding the annual meeting.

It is clear that when the annual meeting of said district was adjourned by the chairman it was not adjourned to a day certain, but sine die.

It is not shown that the voters of said district at any annual meeting, or at any duly called special meeting, ever determined under the said provisions of section 14, article 3, title 8, of the Consolidated School Law of 1894, above cited, that the election of the members of the board of education and district clerk shall be held on the Wednesday next following the day designated by law for holding the annual meeting therein. The disgraceful and riotous manner in which persons attending said annual meeting acted authorized the chairman of said meeting to adjourn the same. After such adjournment of said annual meeting by the chairman, the powers of said meeting were exhausted, and neither the chairman of said meeting nor any other person or persons, could reconvene said annual meeting or organize anew the annual meeting of the district, and all proceedings to that end taken by the persons remaining in said school building after said adjournment and after the chairman, clerk and other persons left the hall and building were illegal and void.

I decide: 1 The chairman of said annual school meeting, held in said district on August 4, 1896, in adjourning said meeting acted properly, and his action is sustained.

2 That the alleged meeting organized and held in said school building in said district on August 4, 1896, after the annual school meeting had been adjourned and the chairman, clerk and others had left the hall and building, was neither the annual meeting nor a special meeting duly called, and was illegal and void; that all proceedings had and taken thereat were illegal and void.

3 That the appellants Thomas H. Madigan and Thomas H. Ryan were not legally elected as trustees of said school district, and that the appellant Nicholas J. Mahoney was not legally elected district clerk of said district.

4 That the meeting or election held in said district on Wednesday, August 5, 1896, not being an adjournment of the annual meeting nor a special meeting duly called and held, was not duly and legally called or held, and that Edgar Holmes and Willie B. Neilson were not legally elected trustees of said district, and that Herbert R. Baker was not legally elected district clerk of said district.

The appeal herein is sustained as to so much thereof as is taken from the election of Messrs Holmes and Neilson as trustee of the district, and said Baker as district clerk, and dismissed as to all other matters.

It is ordered, That all proceedings had and taken at the alleged annual school meeting held in said school district on August 4, 1896, after the adjournment of the annual school meeting held therein on said date, by the chairman, be, and the same are, and each of them is, vacated and set aside as illegal and void.

It is further ordered, That all proceedings had and taken at the alleged meeting or election held in said district on Wednesday, August 5, 1896, be, and the same are, and each of them is, vacated and set aside as illegal and void.

It is further ordered, That the board of education of union free school district no. 10, towns of Half Moon and Stillwater, Saratoga county, without unnecessary delay, call a special meeting of the inhabitants of said district qualified to vote at school meetings therein for the purpose of electing two trustees of said district, and a district clerk of said district, in place of the two trustees and of said district clerk, whose respective terms of office expired on August 4, 1896.

3513

Alonzo B. Wright, appellant, v. Edward Bleeker, A. C. Graham, Robert Willets, R. S. Munson, I. J. Merritt, composing the board of education, and Thomas A. Harris, S. DeWitt Smith and David R. Fowler, inspectors of election, district no. 3, town of Flushing.

Notice of a special district school meeting; what is sufficient. District organized under special acts of the Legislature subject to supervision by State Superintendent of Public Instruction.

To appropriate money for the improvement of a school building, the vote need not be by ballot, unless the statute specifically requires it.
In such a case, although the vote is taken by ballot, chapter 366, Laws of 1880, known as the "uniform ballot act," does not apply.
Quaere, whether said act is applicable to any school district election.
Vote by ballot at school meetings, when necessary.
Decided August 4, 1886

Draper, *Superintendent*

School district no. 3 of the town of Flushing is subject to the operation of a special act of the Legislature, being chapter 638 of the Laws of 1857, as amended by chapter 367 of the Laws of 1873, and chapter 559 of the Laws of 1875, and chapter 434 of the Laws of 1885. A special school meeting was held in said district on Monday, the 12th day of July, 1886, pursuant to the following notice:

NOTICE.—A special school meeting of the electors of school district no. 3, town of Flushing, is hereby called on Monday, July 12, 1886, between the hours of two o'clock and seven, p. m., at the village hall, Whitestone, with a view of submitting plans, specifications and cost for the enlargement of the present school building in said district.

(Signed) Edward Bleeker, *President*
D. R. Fowler, *Clerk*

Whitestone, June 30, 1886

At such meeting the plans and specifications and proposed cost for the enlargement of the school building in said district were submitted to the electors, and election held with a view to determine whether or not said electors would appropriate the sum of $7500 to meet the expense of said improvement, and whether or not bonds should be issued for the purpose of raising the said sum. The vote was taken by ballot, printed ballots being used different in color and in size. The polls remained open from two in the afternoon until seven in the evening, and the voting was supervised, and the count made by three inspectors of election appointed by the board of education for that purpose. The inspectors of election reported at the conclusion of the voting that 124 ballots had been cast, of which 101 were in favor of appropriating the sum named, 3 against such appropriation, 6 in favor of issuing bonds and 13 against the same, with 1 blank ballot. From this action the appellant appeals to the Superintendent of Public Instruction upon the following grounds:

1 That the call for such meeting did not, as the notice shows, refer to the statute or authority by which such call could be or was made, and did not fully and fairly set forth the object, intent and purpose of the election or special meeting.

2 That the ballots used, as shown by such report, were illegal and void inasmuch as they did not conform to the provisions of chapter 366 of the Laws of 1880.

3 That at the closing of the polls the inspectors did not openly and before the meeting declare the result of such election, but reported to the president of the board, who, in that capacity, announced and declared the result.

4 That only 124 votes were cast and that there were over 300 legal voters in the district, and that, therefore, the 101 votes cast in favor of the appropriation did not show the sentiment of the majority of the voters in the district in favor thereof.

5 That said election was held pursuant to a special statute, and hence is without the jurisdiction of the State Superintendent of Public Instruction.

6 It is insisted that if the Superintendent holds that such election is within his jurisdiction and supervision, he must determine whether the election was legal or illegal, whether or not the result was binding upon the district, and in the event of finding that it is not binding, then he must decide that no other election can be held in said district for a similar purpose within the ensuing six months.

In consequence of the foregoing objections, the Superintendent is prayed to set aside such election and declare the results thereof illegal and of no effect.

The board of education was proceeding in this matter under section 11 of chapter 434 of the Laws of 1885, which provides as follows: "Whenever the said board of education shall deem it necessary to erect one or more schoolhouses in said district, or to enlarge the schoolhouse or schoolhouses, or to purchase sites or lots for said buildings, in said district, before they shall proceed to levy any tax for the same, they shall prepare an estimate and plan showing the location proposed, cost of ground and plans and estimated cost of buildings; and shall submit the same to the electors of said district at its annual meeting, or at a special meeting to be called for that purpose; and if a majority of the electors voting at such election shall vote in favor of the same, then the said board of education may proceed to acquire title to such sites or lots, and to erect or enlarge said schoolhouse or schoolhouses in the manner proposed in said estimate and plan." This section did not require that the notice of the special meeting should refer to the statute or authority by which such call could be made. It only required that before proceeding to levy any tax for such purpose, the board should prepare an estimate and plan showing the location proposed, cost of ground and plans and estimated cost of improvement, and that they should submit the same to the electors at an annual or special meeting. Section 12 of the original act provides that notices of special meetings shall be posted in eight or more public places and published in a county paper at least one week previous to such meeting. There is no suggestion that the provisions of the statute relative to the posting and publishing of said notice were not literally complied with, and I am of the opinion that the requirements of the law in relation to the notice of the proposed action were satisfied. The appellant objects, secondly, to the ballot on the ground that the provisions of chapter 366 of the Laws of 1880, commonly known as the "uniform ballot act," were not observed. The first section of this act is as follows:

"Section 1 At all elections hereafter held within the limits of this State for the purpose of enabling electors to choose by ballot an officer or officers under the laws of this State, or of the United States, or to pass upon any amendment,

law or public act, or proposition submitted to the electors, to vote by ballot under any law, each and all ballots used at any such election shall be upon plain white printing paper, and without any impression, device, mark or other peculiarity whatsoever upon or about them to distinguish one ballot from another in appearance, except the names of the several candidates; and they shall be printed in plain black ink."

It is conceded by the respondents that the ballots used were not in compliance with the provisions of this act. They varied in color, in size, they were without the prescribed captions, and they were not printed in the prescribed size of type.

Whether or not it was the intention of the Legislature that the provisions of the "uniform ballot act" should apply to elections held at school meetings, is a question which is by no means free from doubt. It is not necessary to determine that question, however, in order to dispose of the present case. Section 1 of the "uniform ballot act," above set forth, limits the operation of that act, and to cases where an officer is to be elected or an act or proposition to be determined, is "submitted to the electors to vote by ballot *under any law.*"

There is nothing in the provisions of the statutes governing this meeting which required that the question here at issue should be determined by ballot. It was only required of the board of education that they "shall submit the same to the electors of said district at an annual or at a special meeting to be called for that purpose." It is true that section 3 of the special act, as amended, does provide that "all elections shall be by ballot," but this unquestionably refers to elections for members of the board of education, and I can see no requirement of the statute which necessitated the taking of the vote in this instance by ballot, however proper and perhaps desirable that it should be done in that way. Furthermore, if the "uniform ballot act" does apply to school meetings, and if the law had required that the vote in the present case should have been taken by ballot, and if said law as to uniformity of ballots had not been observed, the result would not, on that account, have been rendered void. Any person who knowingly or wilfully violates or attempts to violate the statute relating to uniformity of ballots would be subject to a fine or imprisonment; but there is nothing in the law which would have set aside the results of an election held in violation of its provisions. The objection that the result of the balloting was not announced by the inspectors, but rather by the president of the board of education, has no force. They canvassed the vote, made and signed the certificate of the result, and passed it to the president of the board, who announced the result in their presence and at the proper time; and the act must be deemed to have been their own act. The fourth objection of the appellant, namely, that there were not a majority of all the votes in the district cast in favor of the improvement, and that, consequently, the sentiment of the district is not shown to have favored the same, is likewise without force. All had notice and should have attended, and the votes of those who did attend preponderated heavily in favor of the expenditure. The fifth objection, that the question is not within the juris-

diction of the Superintendent of Public Instruction, can not be sustained. It was undoubtedly the intention of the Legislature to permit this district to operate its schools upon a system peculiarly its own; but to concede that it was thereby removed from the supervision of the State authorities would be destructive of the educational system of the State.

In view of the foregoing considerations the appeal must be dismissed.

3534

Warren J. Alfred and others v. the trustees, etc., of school district no. 5, town of Waverly, Franklin county.

This Department, when asked to set aside the proceedings of a school meeting will always inquire into the *bonae fides* thereof.

A notice to "taxable inhabitants," while irregular, will not be considered sufficient ground to set aside the business of an important special meeting, unless it is made to appear that some one has been misled by it.

Bad spelling in a notice of a meeting will not invalidate the proceedings thereof. Failure to give notice of a meeting to every person entitled thereto will be excused unless done wilfully, or it appears that the failure prevented such persons from attending, and their attendance would have changed a declared result.

No one is bound by the trustee's announcement of what qualifies a school district voter, particularly as no one was deterred from participating in a meeting thereby.

Decided November 10, 1886

Draper, *Superintendent*

This is an appeal from the action of a special meeting of district no. 5, town of Waverly, Franklin county, held on the 14th day of November 1885, in voting to build a new schoolhouse and levy a tax to pay for the same, and from the action of the trustee and collector in levying and collecting such tax. It seems that a special meeting was first called to be held on the 31st day of October 1885, at 1 o'clock in the afternoon, which was not called to order until about 4.30 o'clock, and then, without any material action, was adjourned to meet on the 14th day of November 1885, at 6 o'clock, p. m., and at the latter time the meeting reconvened and voted to purchase a site and build a schoolhouse. It was resolved to let the work to the lowest bidder, and bids were received at this meeting, the lowest of which was by one Frank Trim, for the sum of $405. The work was let to him and a tax ordered levied for the amount. Mr Trim went on and erected the building, the trustee accepted it, and the tax was levied and the collector was engaged in raising the sum when, about the 1st of June 1886, this appeal was brought.

The appellants allege various irregularities. They say the special meeting of October 31st had no jurisdiction, and that consequently an adjourned meeting thereof had none; that the notice of such meeting was defective, as it was a notice only to "taxable inhabitants," while others were entitled to vote at school meetings, and that it contained misspelled words and some abbreviations; that such notice was not served upon persons entitled to notice, as the law provides; that while the meeting was called at 1 p. m., it did not convene until 4.30 p. m.,

and that some persons left in the meantime, and that when the meeting did convene the trustee announced that only real estate owners and taxpayers could vote, etc. There are other objections urged, but these are the essential ones, and if they are not availing, none set up can be.

This Department when asked to set aside the acts of school meetings or school officers always inquires into the *bonae fides* of such acts. Were the things done such as it was proper to do? Did they undertake to do them properly according to such knowledge as they had? Has any one been imposed upon or wronged? If irregularities have occurred, will the greater hardship be imposed upon individuals and greater help be given to the cause of education by setting aside or sustaining such acts?

In the present case there is absence of proof of bad faith. The notice of the special meeting should have called all legal voters of the district rather than "taxable inhabitants," but there is no proof that anybody was misled by it. Indeed the appellants, nearly if not quite all of them, attended the meeting. There was some bad spelling in the notice, but to hold that this invalidated it would be so far reaching in its consequences that the result would be appalling. The notice may not have been served on every person entitled to notice as it should have been, but it does not appear that this was wilful, or that any were without actual notice. There is absence of evidence that the meeting was held without the knowledge of persons who desired to be present, unless in a single instance which is too isolated to be of weight. If this person had been present the result would not have been changed. If the trustee did announce his legal opinion as to who could vote, no one was bound by it. It does not seem to have deterred any person entitled to vote from doing so.

The adjournment from October 31st to November 14th seems to have been regular. It indicates deliberation and absence of any purpose to deceive.

But other facts are to be taken into consideration. The district had no schoolhouse, and sorely stood in need of one. The undertaking to erect one was commendable. The building had been erected before the appeal was taken. To set aside the acts pursuant to which it has been constructed would be to deprive the builder of his pay, or to throw the expense upon a portion only of the district, and then they would have on their hands a building which would not be the district schoolhouse.

I have not lost sight of the fact that there are separate settlements in this school district, and that the location of a school in either one does not meet the convenience of the other. But this fact can not be allowed to have much weight in the determination of the pending case. Perhaps it would be well if the two settlements were separated into two school districts, which, should the population continue to increase, might appropriately be done after a schoolhouse shall have been erected at the other settlement. It seems that a school is now being sustained there. If this is to be continued, a house is needed. If this should be erected, the tax should be borne by both settlements, as in the present case.

In view of the foregoing considerations, I feel compelled to dismiss the appeal, and discontinue the stay of proceedings heretofore issued by me herein.

3539

Cyrus Collins and others, from the action and proceedings of the annual school meeting held August 31, 1886, in district no. 8, town of Whitehall, Washington county.

Proceedings of an annual meeting will be set aside, and a special meeting will be ordered when it seems that the trustee who called it to order arbitrarily prevented it from selecting whomsoever it would for presiding officer, and where the proceedings are shown to have been so turbulent and disorderly as to prevent a free expression of the will of the legal voters present.

Decided November 20, 1886

Draper, *Superintendent*

This is an appeal by Cyrus Collins and others, residents and taxpayers in school district no. 8, town of Whitehall, Washington county, New York, from the proceedings of the annual school meeting held in said district August 31, 1886.

The appellants' allegations are substantially as follows:

That the meeting was called to order by the trustee whose term of office would expire by the election of a successor at such annual meeting; that said person nominated his brother for chairman; that many persons not qualified to vote at school district meetings were in attendance at said annual meeting; that duly qualified voters demanded that the house be divided to ascertain who were qualified voters before a vote for chairman was taken; that this was refused by the trustee, who called for the "ayes" on the selection of the chairman, but did not call for "noes," and thereupon declared his brother elected chairman; that this action precipitated great confusion, tumult and disorder, and that it became impossible to secure an intelligent vote in consequence; that Charles Chapman was nominated for trustee, and the nomination was seconded, and the chair refused to put the nomination to a vote; that subsequently the nomination of the present incumbent was made for trustee, and amidst confusion and excitement, the chair took a vote by ayes and noes, and declared him elected; that appeals from the decision of the chair, calls for a ballot and for a division of the house were disregarded and not heeded; that in the excitement the district clerk, who was engaged in keeping the minutes of the meeting, abandoned his post, and left the meeting; that before the close of the meeting at least two-thirds of the taxpayers, voters in said district, withdrew.

The respondent, Warner MacFarran, answers and alleges as defects in the appellants' case, as presented, that appellants ask for no specific relief; that because of the allegations of appellant the appeal should be dismissed; that there is no allegation that illegal votes were cast at the meeting, nor did any unqualified persons take part in the proceedings of the meeting; that there is no allegation that respondent did not receive a majority of the votes of legal voters of the district present at the meeting; that respondent was properly declared elected trustee; that there is no allegation that the confusion was created by friends of

the chairman and respondent; that it is the practice of the Department of Public Instruction to dismiss appeals when allegations of appellant are vague and uncertain; that there is no allegation of any grievance or injury whatever; that certain of the appellants are not taxpayers, although some of them are.

The respondent admits that he called the annual school meeting to order, but denies that he nominated his brother, Seth MacFarran, for chairman, but avers that a legal voter did, and that the nomination was duly seconded, and that respondent put the nomination to a vote; that he called for the ayes, and that there seemed to be an almost unanimous response; that he then called "contrary," and there being no negative votes, he declared Seth MacFarran elected chairman. He denies that there was a call for a division of the house at the time stated, as alleged by appellants, and that such demand was not made until after the election of chairman and trustee; he denies that any other person than himself was nominated for trustee at said meeting. He claims that on the vote by ayes and noes, the ayes had a decided majority, and he was declared elected; and that certain of the appellants made the disturbance by walking, shouting and calling for a division of the meeting on chairman, trustee and clerk; that soon after certain of the appellants left, and order was restored; that the confusion had become so great that the respondent, although he attempted to do so, could not read his report as trustee until said parties had left the meeting; that as respondent is informed and believes, none but legal voters took part in the meeting; that the proceedings were regular and in order, except as interrupted by the appellants.

Respondent asks that the appeal be dismissed.

This appeal presents a state of affairs which should never exist at any school meeting. It is surprising that orderly school meetings can not be held, particularly as the principal officers to be elected are chosen to fill positions of trust and without compensation. From all the statements before me on this appeal, I find many direct contradictions. On the side of the appellants I have the sworn statements of thirteen persons. On the other side, the sworn statement of the acting trustee and of the person, the validity of whose election and acts are questioned by this appeal. But I do not allow this single fact to determine the case. It is clear from the statements on both sides, that the annual meeting was disorderly; that no vote was taken by which a fair decision could be arrived at, either by ballot, division of the meeting or by a roll call of the legal voters. The respondent called the meeting to order, and if he and his friends were in such an undoubted majority as he avers, it would at least have been wise (as some opposition was manifested) to have taken such a vote as would have shown the sense of the meeting clearly and beyond dispute.

If the respondent and the other officers who are alleged to have been elected are the choice of the voters entitled to vote at school meetings, they can establish the fact at another meeting called for that distinct purpose. A school meeting, held under the circumstances as above set forth, should not be upheld.

I, therefore, set aside the proceedings of said annual meeting, and direct that a special meeting be held to transact the business of the annual meeting, within fifteen days from the date of this order, and that the last acting district clerk shall proceed to give the notices of such meeting, as provided by law.

It is further directed that School Commissioner William H. Cook, of commissioner district no. 2, of Washington county, attend such meeting, call the meeting to order and preside until a chairman is elected.

4201

In the matter of the appeal of Nathan Johnson and Theodore D. Rich, from proceedings of a special meeting held on July 5, 1893, in union free school district no. 1, town of East Chester, Westchester county.

Where a special meeting of a district, duly called, was held, meeting duly organized, a motion was made to adjourn sine die, such special meeting, under the call of the trustees had been duly held and no legal meeting of the inhabitants of the district could be held except in pursuance of a legal call therefor as required by the school law. Boards of education of union free school districts have no authority, under the school law, to decide whether or not the special meeting or the annual meeting of their respective school districts had been legally conducted or not, nor whether or not the proceedings thereof, furnished to them by the clerk or secretary of the meeting are correct, or whether the action and proceedings had and taken at said meetings are legal or not. The power to decide such matters is given by the school laws only to the Superintendent of Public Instruction in an appeal taken from the action and proceedings of such meetings.

Decided November 16, 1893

Herbert D. Lent, attorney for appellants
Stephen J. Stilwell, attorney for respondents

Crooker, *Superintendent*

The above-named appellants, two of the members of the board of education of union free school district no. 1, town of East Chester, Westchester county, appeal from the action and proceedings of an alleged special meeting held in said district on July 5, 1893, at which it was claimed it was voted to raise $8000 for the purchase of a site and the building of a new schoolhouse thereon, and the bonding of said district therefor. Also, from the action of the majority of the board of education of said district in refusing to record the proceedings of a special meeting duly held in said district on said July 5, 1893, and in recording the proceedings of said alleged special meeting; also, from the refusal of said board to record the proceedings of the annual meeting of said district, held on August 22, 1893.

An answer to the appeal has been filed by Messrs Roedel, Tolles, Reid and Yale, four of the members of said board.

From the papers presented upon said appeal, it appears that a special meeting of the legal voters of union free school district no. 1, town of East Chester,

to be held at the primary schoolhouse, Garden avenue, between Fourth and Fifth streets, Mount Vernon, on Wednesday, July 5, 1893, at 7 o'clock, p. m., for the purpose of appropriating the sum of $8000 for the purchase of a site and the erection of a suitable schoolhouse thereon, in the upper end of the district, and making provision for the payment of said sum, was duly called by the board of education of said district. That at the time and place above mentioned a large number of the inhabitants of said district assembled, and said meeting was called to order by Nathan Johnson, president of the board of education, who, on motion of John H. Davis, was elected chairman of the meeting, and William F. Johnson was elected secretary; that the chairman stated the call for the meeting, and after some discussion a motion was made and adopted that the meeting adjourn sine die, and thereupon a large number of persons left the room. That after the adjournment of said meeting and such persons had left the room, those remaining in the room organized a meeting by the election of S. J. Stilwell as chairman and J. M. Reid, clerk; that a resolution, stating in substance that a meeting had been legally called for the purpose of raising funds for the purchase of a site and the erection of a schoolhouse in the district, and whereas a certain number of persons forcibly entered the schoolhouse, and in a violent and boisterous manner, interfered with the object for which the meeting was called, and whereas said body of people have declared the meeting adjourned sine die, without legally organizing the same; therefore, be it resolved, that we now proceed to organize the meeting in accordance with said call, was then adopted; that two tellers were appointed and a resolution was made and seconded that, in accordance with the call for this meeting, an appropriation of $8000 be made for the purchase of a site and the erection of a schoolhouse thereon, in this section, appropriation to be obtained at once by the issue of interest-bearing bonds of the district, a portion of which, not exceeding $1000, to be retired each year until the whole sum is paid, and that we now proceed to a ballot, which was adopted; that a ballot was had at which 59 votes were cast, of which 55 were for the resolution and 4 against; that a motion was adopted that the poll list and ballots be kept under seal by the secretary of the meeting for future reference, and that the minutes of the meeting be signed by the chairman and secretary and forwarded to the board of education, and thereupon the meeting adjourned. That at a special meeting of the board of education held on July 25, 1893, the proceedings of the two meetings held on July 5, 1893, duly signed by the chairman and clerk of the respective meetings were presented and said board, by a vote of 4 to 1, adopted a resolution that the minutes of the meeting at which Mr Stilwell was chairman be received and approved as minutes of said meeting, the board deeming said meeting to be the regular and lawful meeting held in response to the call for a special meeting to be held on said July 5, 1893, and the minutes of the meeting at which Nathan Johnson was chairman and W. F. Johnson was secretary were, as the clerk of said board states in his letter, under date of July 26, 1893, to W. F. Johnson, "ignored." That said board refused by a majority vote to enter the minutes

of the annual school meeting, held in said district on August 22, 1893, as signed by the chairman and secretary of the meeting, upon the minute book of the district, for the reason that they were incomplete and were improper.

That no appeal has been taken from the action and proceedings had and taken at the special meeting of said district, held July 5, 1893, at which Nathan Johnson was chairman, and W. F. Johnson was secretary.

The allegations in the appeal relative to the proceedings at the special meeting held on July 5, 1893, at which Nathan Johnson was chairman, are supported by a copy of the minutes of the meeting, signed by the chairman and secretary, and the affidavits of nine qualified voters who were present at said meeting. Each of said affiants states that said meeting was duly organized at the time and place appointed, and was properly conducted, and that the minutes of the meeting are a true record of the proceedings of said meeting.

The respondents allege in their answer that a certain number of persons forcibly entered the schoolhouse and in a violent and boisterous manner interfered with the object for which the meeting was called; as soon as said boisterous persons could be gotten from the meeting the secretary of the board called the meeting to order, etc. The respondents allege as grounds of the invalidity of the first meeting that no secretary was elected or tellers appointed, neither was any call read nor any vote taken on said call. Three of the respondents, Messrs Roedel, Toiles and Reid, deny that they were present at said first meeting, and therefore can not know of their own knowledge, whether their allegations are true. Annexed to the answer and in support thereof, are the affidavits of James M. Reid and George S. Yale, each of whom avers that he was present at the first meeting. Mr Reid admits that a chairman was elected and that a motion was made to adjourn sine die, and that said meeting adjourned; he alleges no secretary was elected, no minutes taken, no tellers appointed, and no call read; no discussion was had relative to the raising of funds; and that everybody was shouting and that his request to be heard was refused. Mr Yale alleges that the meeting was not duly organized and was illegally conducted; but does not aver that the meeting was boisterous or noisy. He avers no minutes were taken, no tellers appointed, no call read; but admits a chairman was elected and a motion made to adjourn sine die, which was adopted.

The allegations contained in the appeal, that said board of education refused to record the proceedings of the meeting held on July 5, 1893, at which Nathan Johnson was chairman, and W. F. Johnson secretary, and the minutes of the annual school meeting, held on August 22, 1893, are admitted by the respondents.

I am clearly of opinion that the appellants have, by a preponderance of proof, established that the meeting held in said district on July 5, 1893, of which S. J. Stilwell was chairman and James M. Reid, secretary, was not a valid and legal meeting of the voters of said district. At the time and place named in the call issued and served by the board of education, a large number of the inhabitants assembled; the appellants say "between 100 and 150, and

all the room could hold," and respondents do not controvert said statement. The hour of holding the meeting must be strictly observed and there is no allegation that anything was done prior to the hour at which the meeting was called. No authority exists for holding the meeting before the designated hour, and no legal objection rests upon the inhabitants who may have assembled at such time to wait for others before organizing and commencing the proceedings. The duty to call a meeting to order is not enjoined upon any particular person, and any voter of the district may do this. Nathan Johnson called the meeting to order and he had the legal right to do so. The school law directs that such district meetings shall appoint a chairman, and such district meeting has the legal right to elect their chairman. Nathan Johnson was duly elected chairman, and the meeting, having authority, elected W. F. Johnson as secretary. As soon as a chairman and secretary of the meeting were elected said meeting was duly organized and was in a position to transact any business pertaining to the matter for which the meeting was called to act upon. It was not necessary to the legality of the meeting that the call by virtue of which the inhabitants had assembled, should be read. It must be assumed that the board of education had given legal notice of the meeting and the objects for which it was called, and the inhabitants present were fully informed thereof; but it is established by a preponderance of proof that the chairman stated the call for the meeting. There being no provisions of law nor code of rules to regulate the proceedings of district meetings; that must be held to be in order to which a majority consents. The office of the chairman is to facilitate the ascertaining of the wishes of the majority. If their determination is illegal the remedy is by appeal. It appears that some discussion was had relative to the business stated in the call, but that no motion or resolution relating thereto was made, but that a motion to adjourn sine die was made and upon a vote taken thereon was adopted and thereupon the said meeting was declared adjourned sine die. It is the duty of a chairman to put every question to vote which is made and seconded. A motion for adjournment takes precedence of all others. Such motion, however, can not be received after another question is actually put and while the meeting is engaged in voting upon it; but in such case the vote must be concluded and the result announced. No allegation is made or proof presented that, when the motion was made to adjourn, another question had been put, nor that the meeting was engaged in voting upon it. The special meeting, under the call of the board of education, having been duly held, organized and adjourned sine die, no legal meeting of the inhabitants of the district could be held except in pursuance of legal call therefor, as required by the school laws.

In refusing to record the proceedings of said special meeting of July 5, 1893, and the proceedings of the annual meeting, held on August 22, 1893, upon the records of the district, the said board of education acted without authority of law and in violation of its duty. No authority is given by the school law to boards of education to decide whether or not the special meeting or the annual

meeting, of their respective school districts, have been legally conducted or not; nor whether or not the proceedings thereof, furnished to them by the clerk or secretary of the meetings, are correct or not, or whether the action and proceedings had and taken at said meetings, are legal or not. Neither district meetings nor district officers have any authority, under the school laws, to decide or declare that a special or annual meeting was not legally held, nor that the action and proceedings had and taken at such meetings are irregular, incorrect or illegal. The power to decide such matters is given, by the school laws, only to the Superintendent of Public Instruction, in an appeal taken from the action and proceedings of such meetings. It was the plain duty of the board of education of district no. 1 of East Chester to have directed the record of the proceedings of the special meeting held July 5, 1893, presented to it by Mr W. F Johnson, the secretary of said meeting, and also the proceedings of the annual meeting held on August 22, 1893.

The respondents ask that the appeal herein be dismissed on the ground that it was not brought until more than sixty days after the performance of the acts complained of, or the appellants had knowledge of said acts, and allege that the board of trustees have been misled, and has allowed the board to obligate the school district by the purchase of property, etc., etc., which was not done until after the time for an appeal had expired.

Assuming, for the sake of argument, that the alleged meeting of which Mr Stilwell was chairman was legal, no action was had and taken that authorized the board of trustees to purchase, or to contract for the purchase, of any property whatever without further action of the qualied voters of the district, duly and legally assembled. Such alleged meeting voted an appropriation of $8000 be made, for the purchase of a site and the erection of a schoolhouse thereon, in that section, appropriation to be obtained, etc. Under the school laws the authority to designate a school site is given only to the qualified voters of the district in meeting assembled, and the said district can not delegate the power to select and designate such site to the trustees, or a committee, or any person or persons. No site was designated at such alleged meeting, and hence the trustees had no authority in law to purchase, or contract to purchase, a site, and, hence, had no authority in law to contract for the erection of a schoolhouse anywhere in said district, at least until a site had been legally designated. If said trustees have entered into contracts for the purchase of a site or the erection of a schoolhouse, the district is in no wise bound by such action, and hence the delay in bringing this appeal in no way affects the district.

The appellants allege "that the reason the appeal was not taken before was an error of judgment on the part of the appellants and their advisors." The alleged meeting of which Mr Stilwell was chairman was so clearly illegal and void, and the action of the trustees, or a majority of them, in refusing to permit the proceedings of the special meeting of July 5, 1893, and the annual meeting of August 22, 1893, to be recorded in the records of the district, was so clearly a violation of duty on the part of said trustees, that the appellants might well

have believed that, upon reflection and consideration, the said trustees would agree with the appellants, and reverse their action. In such judgment the appellants erred. The appellants have rendered a satisfactory excuse for their delay in bringing the appeal.

The appeal herein is sustained.

I do find and decide that the meeting held on July 5, 1893, in union free school district no. 1, town of East Chester, Westchester county, of which meeting S. J. Stilwell was chairman and J. M. Reid was secretary, and alleged to be the special meeting of said district, held under the call of the board of education of said district, issued by said direction of said board at its regular monthly meeting, held on June 1, 1893, was not a legal valid special meeting of said district. That the action and proceedings alleged to have been had and taken at said meeting are, and each of them is, illegal, invalid and void, as the action and proceedings of a legal and valid called and held special meeting of said district.

It is ordered that the action and proceedings of said meeting be and they are hereby vacated, set aside and altogether held for naught, as the action and proceedings of a legally called and held special meeting of said district.

It is further ordered that the board of education of union free school district no. 1, town of East Chester, Westchester county, forthwith cause to be recorded in the records of said district the minutes of proceedings of a special school meeting of said district, held on July 5, 1893, of which meeting Nathan Johnson was chairman and William F. Johnson was secretary, and which said minutes were duly delivered to said board; and that said board also forthwith cause to be recorded in the records of said district the minutes of proceedings of the annual meeting of said district, held on August 22, 1893, of which meeting Nathan Johnson was chairman and W. E. Hayward was secretary, and which said minutes were duly delivered to said board.

4204

In the matter of the appeal of Albion Norris Fellows from action and decision of David Fox and Theodore F. Clay, trustees of school district no. 3, town of Ramapo, Rockland county, and from proceedings of a special meeting of said district, held September 19, 1893.

Where, in a school district at the annual meeting, a trustee and other district officers were elected and the business of the annual meeting transacted, and after said meeting the trustees of the district learned that there were over 300 children of school age reported in the district, and a special meeting was called for the election of district officers, trustees assuming that the election of officers at the annual meeting was invalid, and at such special meeting a person other than the one elected trustee at the annual meeting was elected trustee. *Held,* that said trustees had no power, under the school laws, to hold and declare the election of the trustee at the annual meeting as illegal and void, and that so much of the special meeting as related to the election of a trustee be vacated and set aside as illegal, invalid and void.

Decided November 24, 1893

Crooker, *Superintendent*

The above-named appellant appeals from the action and decision of Messrs Fox and Clay, two trustees of school district no. 3, town of Ramapo, county of Rockland, in refusing to recognize the appellant as a duly elected trustee of said district, and in refusing to permit him to act as such trustee; and also from the proceedings of a special meeting of said district held therein on September 19, 1893.

An answer has been made by said Fox and Clay to said appeal.

It appears that an annual meeting of said district was held on the fourth Tuesday of August 1893, to wit, August 22, 1893; that at said meeting the business of the annual meeting was transacted; that the appellant was duly elected a trustee of said district, in place of James M. Cookson, whose term of office as a trustee of said district expired on said fourth Tuesday of August 1893, 38 votes having been cast, of which the appellant received 20, and said meeting adjourned; that at two meetings of said trustees, held shortly after said annual meeting, of each of which meetings the appellant received notice from the clerk of the district. The appellant attended at the first of said meetings and the respondents expressed doubts as to the legality of the appellant's election as a trustee; that at the second of said meetings the respondents still refused to recognize the appellant as a trustee, and thereupon called a special meeting to be held in said district on Tuesday, September 19, 1893, at 7.30 p. m., for the purpose of electing a trustee in place of James Cookson, and appropriating the sum of $2500 to meet the expenses for maintaining the school during the current year. That said special meeting was held on said September 19, 1893, and H. C. Wanamaker was elected chairman; that Peter D. Johnson and the appellant herein were nominated for trustee; that a ballot was taken, 107 votes being cast, of which said Johnson received 66 and the appellant 41; that an appropriation of $2400 was voted by ballot, the whole number of votes cast being 33, of which 29 were in favor and 4 against the appropriation; that thereupon the meeting adjourned.

That on September 25, 1893, a meeting of said trustees was held at which the appellant was present and made formal effort to obtain recognition by the respondents as a trustee of said district, which was refused, and that said Peter D. Johnson was recognized by the respondents as such trustee.

No appeal has been taken from the action and proceedings had and taken at the annual meeting of said district, held on the fourth Tuesday of August 1893.

The respondents allege that after the annual meeting in said district, on August 22, 1893, it was discovered by them that there had been over 300 children of school age reported, and that the meeting for the election of district officers had been held upon an improper day, and that they thereupon concluded that the election for officers which had taken place was void; that the respondents, acting upon the advice of the school commissioner of the commissioner district in which the said school district is situate, ordered the calling of the

said special meeting that was held on September 19, 1893, as hereinbefore stated.

The respondents deny the claim of the appellant that the meeting at which he was elected a trustee was a lawful meeting for the election of district officers; and allege that the meeting for that purpose should have been held on the last Wednesday next following the last Tuesday of August, "as demanded by the Code of Public Instruction of the State of New York, at section of chapter 248 of the said code." They further state that the mistake was made inadvertently, and that they, on finding out said mistake, proceeded in good faith, and the advice of said school commissioner, to remedy the same by calling a special meeting for the purpose expressed by them.

From the papers presented in this appeal, it is clear that the respondents, as trustees of said school district, have acted under a misapprehension of their powers and duties as such trustees, under the laws of the State relating to common schools, and under a misapprehension of the laws of the State in force at the time of the two meetings mentioned in said appeal papers, relating to the election of school district officers.

Trustees of school districts have no power, under the school laws, to set aside or invalidate the proceedings of a district meeting upon the assumption by them that such proceedings are or were illegal and void. The respondents herein had no power to hold or declare the election of a trustee at the annual meeting of said district, held on August 22, 1893, as illegal and void; nor that the election of said trustee was had upon the wrong day; nor to set aside or invalidate the proceedings of said meeting in such election, nor to call a special meeting to elect a trustee upon the assumption that the election at said annual meeting was invalid and void.

The respondents as such trustees have acted, in the matters stated in the appeal papers, under a misapprehension of the laws of the State in force in the time said annual and special meetings were held, relative to the election of district officers. Under the school laws in force on July 1, 1893, the annual meeting of each school district (except where the Legislature by a special act has designated a different day) shall be held on the fourth Tuesday of August in each year, and to choose one or three trustees, as hereinafter stated, a district clerk, collector etc. In districts that have three trustees, one trustee shall be elected at each annual meeting to fill the office of the outgoing trustee. (See sections 16 and 27 of title 7 of the Consolidated School Laws of 1864, and the amendments thereof.)

By chapter 248, of the Laws of 1878, and acts amendatory thereof, in force on July 1, 1893, being "An act in relation to the election of officers in certain school districts" (said chapter not forming any part of the Consolidated School Laws of 1864) it is enacted: "Section 1. In all school districts in this State in which the number of children of school age exceeds 300, as shown by the last annual report of the trustees to the school commissioner, all district officers, except the treasurer and collector of union free school districts, shall be elected

by ballot." This section remains the same as when adopted on May 13, 1878. It has always been the law that trustees of union free school districts should be elected by ballot. Since April 29, 1893, it has been the law that all district officers in common school districts shall be elected by ballot. (See section 5, chapter 500, Laws of 1893.) When the annual school meeting was held in district no. 3, town of Ramapo, on August 22, 1893, assuming that the trustees of the district and the qualified voters thereof had knowledge that the number of children of school age in the district exceeded 300, the method of electing one of its district officers, namely, a trustee, required by section 1, above quoted, was complied with, that is, he was elected by ballot.

Section 2 of said chapter 248 of the Laws of 1878, as amended by section 11 of chapter 245 of the Laws of 1889, and as said section has stood since May 6, 1889, provides such election (that is, district officers in school districts where the number of children of school age exceeds 300) shall be held on the Wednesday next following the first Tuesday in August in each year (not on the Wednesday next following the last Tuesday of August, as assumed by the respondents), between the hours of 12 o'clock midday and 4 o'clock in the afternoon, at the principal schoolhouse in the district, or at such other suitable place as the trustees may designate. When the place of holding such election is other than at the principal schoolhouse, the trustees shall give notice thereof, etc. The trustees may, by a resolution, extend the time of holding the election from 4 o'clock until sunset. Section 3 of said chapter provides that the trustees or board of education, or such of them as may be present, shall act as inspectors of election, and immediately after the close of the polls shall proceed to canvass the votes and declare the result; if any such district shall have but one trustee, the district clerk shall be associated with him as inspector; if a majority of the trustees shall not be present at the time of opening the polls, those in attendance may appoint any of the legal voters present to act as inspectors in place of the absent trustees; if none of the trustees shall be present at the time for opening the polls, the legal voters may choose those of their number to act as inspectors. Section 4 enacts, that the trustees shall, at the expense of the district, provide a suitable ballot box, in which the ballots shall be deposited as they are received; such ballots shall contain the names of the persons voted for, and shall designate the office for which each one is voted, and the ballots may be either written or printed, or partly written and partly printed. Section 5 enacts that the district clerk or clerk of the board of education shall attend the election, and record in a book to be provided for that purpose, the name of each elector as he deposits his ballot; the method of counting the ballots, etc. Section 6 provides for the challenging of voters and states the declaration to be made by a voter so challenged, etc. Section 7 enacts that disputes concerning the validity of any such election, etc., shall be referred to the Superintendent of Public Instruction, whose decision shall be final, and authorizes such Superintendent, in his discretion, to order a new election. Section 8 enacts that the persons having the highest number of votes respectively for the several offices shall be declared

elected, and in the case of a tie, how a decision shall be made. Section 9 enacts that the annual meeting, in the several districts, shall be held as now provided by law, for the purpose of transacting all business, except the election of officers.

In the enactment of said chapter 248 of the Laws of 1878, the intent of the Legislature seems to have been to provide to school districts having more than 300 children of school age a method of holding elections for their school officers on the next day after their annual meeting, and that a plurality of votes should elect. The Legislature, assuming that in said districts the number of qualified voters residing therein would be largely in excess of those residing in the ordinary districts, containing a less number of children, and that the ordinary business of the annual meeting and election of officers could not be disposed of between 7.30 p. m. and a proper hour of adjournment; and that a full representation of the district could be had in the selection of district officers by keeping the polls of said election open for at least four hours during the day following such annual meeting than could be obtained in the time usually allowed for a ballot at the annual meeting. At the time of the enactment of said chapter 248, common school districts were not required to elect their district officers by ballot. Last winter the Consolidated School Law of 1864 was amended, requiring such election to be by ballot. As now, all school districts, whether common or union free school districts, are required to elect their district officers by ballot, and said districts, in the absence of specific enactments as to the method of taking such ballots or the length of time the polls may be open, can adopt its own method in that regard, and if unable to finish the transaction of its business at the annual meeting can adjourn to the next day or any subsequent day, the provisions contained in said chapter 248 do not seem to be necessary, as the intent of the Legislature, in its enactment, can be carried out under the provisions of the Consolidated School Act of 1864 as amended and now in force.

The time of holding the annual meetings in the school districts having been fixed last winter on the fourth Tuesday of August in lieu of the first Tuesday, it was by inadvertence that section 2 of said chapter 248 of the Laws of 1878 was not also amended by inserting the fourth instead of the first Tuesday of August, therein.

It is apparent that the special meeting held in said district on September 19, 1893, was not an election of school district officers, nor were the action and proceedings then and there had and taken under and in accordance with the provisions contained in said chapter 248 of the Laws of 1878 and the amendments thereto. The meeting or election was not held on the day named in section 2 of said chapter 248, and there does not appear to be any provision in said chapter for an election on any other day than the one named therein; there was no attempt to elect any school district officers thereat, except a trustee; the trustees did not act as inspectors of election, nor were the polls of said election kept open from 12 o'clock midday until 4 o'clock in the afternoon; business was transacted that should have been transacted at the annual meeting.

As the respondents allege that they did not discover, until after the annual meeting of the district, that the number of children of school age in the district

exceeded 300, and it does not appear that the voters of the district had such knowledge, the district could not, if it desired, avail itself of the provisions contained in said chapter 248 of the Laws of 1878 until the next annual meeting of the district after such knowledge was discovered.

I find and decide that as no appeal has been taken from the said annual meeting, held in said district on August 22, 1893, that said meeting was a legal and valid meeting, and that the action and proceedings had and taken at said meeting are, and each of them is, legal and valid. That the respondents, as trustees of said district, had no legal authority to hold, declare or decide that the election of appellant as a trustee of said district, at said annual meeting of said district, was either illegal, invalid or void. That the action and proceedings had and taken at said special meeting of said district, held on September 19, 1893, so far as they relate to the election of a trustee, are, and each of them is, invalid and void.

The appeal herein is sustained.

It is ordered that the action and proceedings had and taken at a special meeting of school district no. 3, town of Ramapo, county of Rockland, on September 19, 1893, so far as they relate to the election of a trustee of said district, are, and each of them is, hereby vacated and set aside as illegal, invalid and void.

It is further ordered that the respondents herein, as trustees of school district no. 3, town of Ramapo, county of Rockland, be, and they are, hereby directed to recognize the appellant herein, Albion Norris Fellows, as the legally elected trustee of said district and as duly elected as such trustee in place of James H. Cookson, whose term of office expired on August 22, 1893.

4240

In the matter of the appeal of Elias Bryant v. school district no. 3, Mount Pleasant, Westchester county.

Where four resolutions are submitted to a meeting of a school district, the first directing the board of education to purchase a new schoolhouse site, the second empowering the board to build a new schoolhouse on said site at a cost not to exceed $4500, the third that an amount of $6000 be raised by tax, payable in ten annual instalments, and the fourth empowering the sale of the present schoolhouse and site, and said four resolutions are voted not separately, but in gross and by vive voce vote. *Held,* that the action of the meeting was illegal and invalid.

Decided April 24, 1894

W. H. H. Ely, attorney for appellant
L. T. Yale, attorney for respondent

Crooker, *Superintendent*

This is an appeal from the action and decision of a special meeting of school district no. 3, town of Mount Pleasant, held on March 4, 1893, in the alleged adoption of four resolutions, as follows:

Resolved, That the board of education be empowered and instructed to purchase a new school site as follows: A tract of land on the south corner of Dayton and Highland avenues, with a frontage of 125 feet on Highland avenue and 262 feet on Dayton avenue, containing two-thirds of an acre, more or less, and to pay for the same the price of $1500.

Resolved, That the board of education be further empowered and instructed to build a new schoolhouse upon said site, according to such plans and specifications as the said board may approve, at a cost not to exceed $4500.

Resolved, That the amount of $6000 required for the foregoing purposes be raised by taxation in ten annual instalments of $600 each.

Resolved, That the board of education is hereby empowered to sell the present schoolhouse and site for an amount not less than $1500, said amount to be disposed of as may be determined by the annual meeting of the district next succeeding such sale.

The appeal is supported by the affidavit of the appellant and a large number of voters in said school district.

The appellant alleges several grounds of appeal, the principal ones being that the vote was taken upon the four resolutions together and by a viva voce vote.

The respondent has answered the appeal, and which answer is supported by the affidavit of the clerk of the district, and a copy of the proceedings of said special meeting as kept by the secretary thereof.

It appears that on or about February 9, 1893, a call for a special meeting of said district, to be held on March 4, 1893, was made and signed by four of the members of the board of education, to act upon the resolutions hereinbefore stated, and which notice was duly and legally given to the voters of said district; that about sixty persons assembled at the time and place named in said notice and organized by the election of a chairman, the clerk of the district acting as secretary; that the call for the meeting was read, whereupon statements were made, both for and against the resolutions set forth in the call for the meeting, by persons present; that a motion was made that the resolutions as read be adopted, and the chairman asked if the motion referred to one or all of such resolutions, and the reply was made that the motion referred to all of the resolutions as read; that the chairman then put the motion by stating: "You have heard the motion. All in favor say aye," upon which there was a response of "aye," and upon the chairman calling for the noes there was no response; that a Mr Acker thereupon handed a paper to the secretary of the meeting which the secretary handed to the chairman, and while the chairman was examining the paper a motion was made that the meeting adjourn, which motion was put by the chairman and declared by him as carried and the meeting adjourned.

In the affidavits presented by the appellant it is alleged that there were no statements made upon the matters embraced in the resolutions; that the vote taken at the meeting was not that the resolutions be adopted, but that "the call be adopted as read"; that no "nay" vote was asked for by the chairman.

I am of the opinion that motion voted upon was that the resolutions as read be adopted. It clearly appears that the resolutions were not voted upon separately, but in gross, and that the vote was a viva voce one. The first resolution

was one changing the site and designating a new site, and directing its purchase by the board of education.

Section 20, title 7 of the school law requires that the site of the schoolhouse "shall not be changed unless a majority of all the legal voters of said district, present and voting, to be ascertained by taking and recording the ayes and noes, at a special meeting called for this purpose, shall be in favor of such new site." The intention of the statute is to preserve the record, not merely of the majority, but of those who constituted the majority of the legal voters of the district who were present and took part in the proceedings; the names of the voters, as well as the way they voted, must be recorded. This Department has held that the provisions of section 20, title 7, above cited, apply to action taken to change a site in a union free school district.

Aside from action to change a schoolhouse site, the voters at a meeting in a union free school district, may determine the method of voting upon questions coming before the meeting. This Department does not favor a viva voce vote upon any important question, and especially any question involving the expenditure of money or authorizing a tax. At a school meeting in any school district none but qualified voters should be permitted to participate in any manner in the deliberations had, and upon all important question the vote should be taken either by ballot or ascertained by taking and recording the ayes and noes.

The adoption by the meeting of the four resolutions, namely, one changing a school site and designating a new site; one authorizing the construction of a new schoolhouse; one authorizing a tax of $6000, and one authorizing the sale of the school site and house in gross, and the failure to have such meeting pass upon each resolution separately was improper and such action was invalid and void.

The appeal herein is sustained.

It is ordered, That so much of the action and proceedings of a special meeting, held on March 4, 1893, in school district no. 3, town of Mount Pleasant, Westchester county, alleged to have been had and taken, as relates to the change of a school site and designation of a new site; the building of a new schoolhouse; the raising of $6000 by taxation in instalments, and authorized the sale of the present schoolhouse and site, are, and each of them is, hereby vacated and set aside as invalid and void.

4271

In the matter of the appeal of Charles Lamoreaux and others, from proceedings of annual meeting held in district no. 7, town of Schoharie, Schoharie county, on August 7, 1894.

Where, at the annual meeting in the school districts of the State, the election of school district officers was not held in accordance with the provisions of section 14, article 1, title 7 of the Consolidated School Law of 1894, and an appeal is taken from the proceedings of such meeting relative to such election, such action and proceedings will be vacated and set aside and a special meeting ordered for the transaction of the business of the annual meeting of the district.

Decided October 5, 1894

Crooker, *Superintendent*

This appeal, taken from the proceedings of the annual school meeting, held on August 7, 1894, in district no. 7, town of Schoharie, county of Schoharie. The principal irregularities related in the appeal are: That a suitable ballot box was not provided by the trustee; that in the election of district officers only one office, that of trustee, was elected by ballot; that the result of the vote for said trustee was not announced by the chairman of the meeting, but by one of the inspectors or tellers; that the ballots were defective in this, that said ballots contained only the name of the person voted for and not designating the office; that illegal votes were received, and that one person who was challenged was permitted to vote without making the declaration required by the school law, such challenge not having been withdrawn; that no poll list was kept; that the person who was elected collector of the district was also elected treasurer of the district, without any resolution having been adopted by the meeting to elect a treasurer; that the vote to raise money by tax, or making appropriations, was not taken as required by the school law. The appeal is verified, and a copy thereof duly served upon Daniel Waterbury, the person alleged to have been elected trustee of the district at said annual meeting. No answer has been made to the appeal, and I am in receipt of a letter written for said Waterbury, submitting the appeal to me for examination and decision.

The allegations contained in the appeal are deemed by me to be admitted by said Waterbury.

Subdivision 4 of section 14, article 1, title 7 of the Consolidated School Law of 1894, provides that all district officers shall be elected by ballot; that at elections of district officers the trustees shall provide a *suitable* ballot box; two inspectors of election shall be appointed in such manner as the meeting shall determine, who shall receive the votes cast, and canvass the same and announce the result of the ballot by the chairman; a poll list, containing the name of every person whose vote shall be received, shall be kept by the district clerk or the clerk for the time of the meeting; the ballots should be written or printed, or partly written and partly printed, containing the name of the person voted for, and designating the office for which each is voted for; the chairman shall declare to the meeting the result of each ballot, as announced to him by the inspectors, and the persons having a majority of votes, respectively, for the several offices, shall be elected.

By the provisions of law above cited, *a suitable ballot box* shall be provided by the trustee. The law does not describe the *kind* of ballot box which shall be used, but the same shall be *suitable* for the purpose. Such ballot box should be, during the election of officers, in the possession of the inspectors of election, and each voter should deliver his or her ballot to such inspectors, or one of them, and when the name of the voter is recorded upon the poll list by the clerk, and the vote *is not challenged,* should be deposited in the ballot box by the inspector. The ballot should be written or printed, or partly written and partly printed, containing the name of the person voted for and designating the office for which

each is voted for. This latter provision has especial reference to where *all* the district officers are elected *upon one ballot.* When each district office is balloted for separately, the ballot will be valid, having thereon only the name of the person voted for, as each voter has knowledge of the office for which the ballot is being taken, and the ballot is for that office only.

Section 11, article 1, title 7 of the Consolidated School Law of 1894 specifies the qualifications which a resident of any school district of the State must possess to entitle such resident to vote in the district in which he or she resides. Any person to be entitled to vote must possess at least *one* of the qualifications specified in said section. Section 12, article 1, title 7 of said school law provides that any person offering to vote at any district meeting may be challenged by any qualified voter of such district, as unqualified, and when so challenged, such person shall be required by the chairman of the meeting to make the declaration specified in said section 12, and if said person makes such declaration he or she shall be permitted to vote; but if such person refuses to make such declaration his or her vote shall be rejected.

The treasurer of a common school district is a new officer provided for under the new Consolidated School Law of 1894. Under the provisions of subdivision 5 of section 14, article 1, title 7 of said law, at the annual meeting of any such district, or at any special meeting called for that purpose, the qualified voters therein are authorized to adopt a resolution by a majority of such voters present and voting, such vote to be ascertained by taking and recording the name of the voter and whether such voter votes aye or nay upon said resolution to elect a treasurer of said district. If said resolution *is adopted* the meeting shall thereupon elect by ballot a treasurer. No person shall be eligible to the office of treasurer unless he is a qualified voter in and a taxable inhabitant of said district. No district meeting can legally elect a treasurer of the district until a resolution shall be adopted to elect such treasurer in the manner above stated.

Under the school law no person can legally hold two district offices at one and the same time.

Under subdivision 18 of section 14, article 1, title 7 of the Consolidated School Law of 1894, it is enacted that in all propositions arising at said district meeting involving the expenditure of money or authorizing the levy of a tax or taxes, the vote thereon *shall be by ballot or ascertained by taking and recording the names of the voters and how each said voter votes, that is, either aye or no upon each proposition.*

Under section 86, article 7, title 7 of the Consolidated School Law of 1894 the collector of a district shall keep in his possession all moneys received or collected by him, and the same shall not be paid out by him except upon the written orders of a trustee or trustees, or a majority of said trustees; and any moneys remaining in his hands when his successor in office shall be elected and shall have executed a bond, shall be paid by him to his successor. He shall report in writing at the annual meeting his receipts and disbursements.

Under section 55, article 6, title 7 of said Consolidated School Law of 1894 the trustee or trustees of a district shall, at the annual meeting, render a just, full and true account in writing under his or their hand or hands, of all moneys received for the use of the district, or raised or collected by tax the preceding year, and the manner in which the same has been expended, etc.

At an annual school meeting the order of business shall be as follows:

To appoint a chairman of the meeting, and if the district clerk is absent, to appoint a clerk for the meeting; the trustee or trustees should present to the meeting his or their report, which should then be acted upon by the meeting; then the report of the collector should be presented and acted upon; then the trustee should present a statement of the amount of money needed for payment of teachers' wages, fuel, repairs, insurance, furniture, books for school library, hiring janitor, etc., etc., and the items should be voted upon and taxes ordered to be assessed in the manner hereinbefore stated; the meeting should then proceed to elect its district officers in the manner hereinbefore stated. Every district officer must be a resident of his or her district and qualified to vote at its meetings, and no person shall be eligible to hold any district office who can not read and write; but a treasurer of a district must also be a taxable inhabitant of said district.

It is clear that the actions and proceedings at the annual meeting, held on August 7, 1894, in district no. 7, town of Schoharie, were not in accordance with the provisions of the school law. I have stated thus fully what can be legally done at an annual school meeting, in order that there should be no want of information as to the action and proceedings which shall be taken at the special meeting which I shall direct to be called in said district, to transact the business of the annual meeting.

The appeal herein is sustained.

It is ordered, That the action and proceedings had and taken at the annual school meeting held on August 7, 1894, in district no. 7, town of Schoharie, county of Schoharie, be and the same hereby are, and each of them is, vacated and set aside.

It is further ordered, That Daniel Waterbury, a qualified voter of said district, is hereby authorized and directed to forthwith call a special meeting of the inhabitants of said school district no. 7, town of Schoharie, county of Schoharie, entitled to vote at school meetings in said district, in the manner prescribed in sections 2 and 6 of article 1, title 7 of the Consolidated School Law of 1894, for the purpose of transacting the business of the annual meeting; such business to be conducted in the manner provided in title 7 of the Consolidated School Law of 1894, and as stated in this decision; but no business shall be done or performed at such special meeting, other than that which, under said school law, could have been done or performed at said annual meeting on the first Tuesday of August 1894.

4293

In the matter of the appeal of Joseph Seery from proceedings of a special meeting held September 4, 1894, in joint school district no. 8, towns of Lorraine and Worth, Jefferson county, in the election of a trustee.

At an annual school meeting when a vote is being taken upon the election of officers or motion or resolution and the right of a person offering to vote is challenged, it is the duty of the chairman of the meeting to require said person to make the declaration prescribed in section 12, article 1, title 7 of the Consolidated School Law of 1894, and said chairman has no right or authority to require said person to take an oath or answer any questions relative to his or her qualifications as a voter. Said chairman must entertain every challenge that is made; that in voting upon all resolutions involving the expenditure of money and authorizing the levy of taxes the vote thereon must be by ballot, or ascertained by taking and recording the ayes and noes of such qualified voters attending and voting at such meeting.

Decided November 5, 1894

A. T. & F. T. Saunders, attorneys for appellants
E. F. Ramsdell, attorney for respondent

Crooker, *Superintendent*

The appellant in the above-entitled matter appeals from the proceedings of a special meeting held on September 4, 1894, in joint school district no. 8, towns of Lorraine and Worth, Jefferson county, in the election of a trustee for said district.

The appellant alleges as grounds of appeal that legal notice of the time, place and object of such special meeting was not given to the inhabitants of said school district; that the person declared elected as chairman of said special meeting did not receive a majority of the votes given or cast; that two inspectors of election were not appointed to receive the votes cast and to canvass the same, and announce the result of the ballot to the chairman; that a correct list of the persons whose votes were received was not kept by the clerk of the meeting; that the ballots for the appellant had his name thereon with the words " for trustee," while the ballots for his opponent for said office had the name of his opponent only; that the ballots for the appellant were wider than those of his opponent, and folded, and that the chairman, when such folded ballots were handed to him, opened and read them; that when the balloting was completed the chairman alone counted the ballots and announced the result; that the chairman, when the right to vote by friends of the opponent of appellant was challenged, except in one instance, refused to entertain such challenge, and required the person so challenged to make the declaration required by the school law; but when the friends of the appellant offering to vote were challenged, such challenges were entertained; that in no instance where the right of a person to vote was challenged, did the chairman require such person to make the declaration required by the school law, but required said persons in substance to swear that he or she would make true answers touching his or her right to vote, and would then interrogate such person as to his or her qualifications as a voter; that certain persons were permitted to vote who were not qualified voters in the district.

The appeal is supported by the affidavits of a large number of persons. An answer to the appeal has been made denying most of the allegations in the appeal, which answer is supported by a large number of affidavits. A reply has been made to the answer. The papers are quite voluminous and very contradictory.

The following facts, however, are admitted: that two inspectors of election, to receive the votes cast and canvass the same, and announce the result to the chairman, were not appointed; that a correct list of the names of every person whose vote was received was not kept by the clerk of the meeting; that when the right of a person offering to vote was challenged, the chairman did not require such person to make the declaration required by the school law.

In subdivision 4 of section 14, article 1, title 7 of the Consolidated School Law of 1894, it is enacted that "two inspectors of election shall be appointed in such manner as the meeting shall determine, who shall receive the votes cast, and canvass the same, and announce the result of the ballot to the chairman. . . . The chairman shall declare to the meeting the result of each ballot, as announced to him by the inspectors, and the persons having the majority of votes respectively for the several offices shall be elected."

The provision relating to the appointment of two inspectors of election, of the school law, is mandatory upon school district meetings in the election of district officers. It is not *optional* with a meeting to appoint such inspectors or not, nor can such meeting *refuse* or *neglect* to appoint such inspectors, but on the contrary the meeting *must* appoint them. At an election of district officer or officers, the chairman of the meeting has no authority, under the school law, to receive a single ballot cast by any voter, nor to canvass the ballots cast for district officers.

It is admitted that when the polls of the election were closed and the votes counted there were 44 votes cast, and the names of but 36 persons upon the poll list, an excess of 8 votes. This is a remarkable showing in a poll of but 44 votes, and to my mind is conclusive evidence of carelessness, at least, upon the part of the clerk of the meeting.

Section 12, article 1, title 7 of the Consolidated School Law of 1894 enacts: "If any person offering to vote at any school district meeting shall be challenged as unqualified by any legal voter in such district, the chairman presiding at such meeting *shall require* the person so offering to vote to make the following declaration: 'I do declare and affirm that I am, and have been for thirty days last past, an actual resident of the school district, and that I am qualified to vote at this meeting"; and any person *making such declaration shall be permitted to vote* on all questions proposed at such meeting; but if any person *shall refuse* to make *such declaration, his or her vote shall be rejected.*"

The statute above quoted is perfectly plain, and *is mandatory* upon the chairman at every district meeting. When at a school district meeting, the right to vote of any person offering to vote is challenged by any legal voter of said district, the chairman *must* entertain such challenge. The chairman must, upon such challenge require the person offering to vote to make the declaration stated

in the school law, and if such person makes such declaration the inspectors of election must receive the vote of such person; but if the person challenged refuses to make the said declaration the vote of such person can not be received by said inspectors of election. The chairman of a district meeting, when a person offering to vote is challenged, has not the right or authority, nor has any other person the right or authority, to administer to such person or to require such person to take any oath whatever, nor to ask any person so challenged any questions whatever, relative to his or her qualifications as a voter, but solely and simply to require the person to make the declaration required by the school laws.

The record of the proceedings of the meeting kept by the district clerk should show the names of every person challenged and the fact as to whether such person made the declaration required by the school law.

It is clear, from the admitted facts in this appeal, that in the matter of challenges as to the right to vote at such special meeting, the action of the chairman was unauthorized and illegal.

Sufficient cause has been established by facts admitted in this appeal, relative to the manner in which said special meeting, held on September 4, 1894, was conducted to make it imperative upon me to vacate and set aside the proceedings had and taken at said meeting in the election of a trustee and to order that a special meeting be called to elect a trustee for said district.

School district officers and the qualified voters in school districts should understand, that in the calling of special school meetings, the organization of such meetings, when duly assembled, and in the action and proceedings had and taken at such annual or special meetings in the election of district officers, the voting upon resolutions involving the expenditure of money and authorizing the levy of taxes, the provisions of the Consolidated School Law, relative to such matters, must be obeyed, or upon appeal such action and proceedings had and taken not in accordance with, or in obedience to, the provisions of said law, will be vacated and set aside.

From the view taken by me in this appeal, it is not necessary for me to attempt to reconcile the contradictory statements contained in the affidavits presented, in relation to the other various grounds, alleged by the appellant herein, for his appeal.

I will, however, state for the information of the voters in said district that under the Consolidated School Law, when a special meeting of a district is called, the notice of such meeting *must state the purposes for which it is called*, and no business shall be transacted at such special meeting, except that which is specified in the notice. That the qualified voters of any district may, *at any annual meeting, adopt* a resolution prescribing some mode of giving notices of special meetings. If no such resolution shall be adopted *at an annual meeting*, such notice of such special meeting must be made as prescribed in section 2, article 1, title 7 of the Consolidated School Law of 1894, namely: The clerk or inhabitant *shall* notify every inhabitant of the district qualified to vote, by reading the notice in his or her hearing, or in case of his or her absence from

home, by leaving a copy thereof, or so much thereof as relates to the time, place and object of the meeting, at the house of his or her abode *at least six days before the time of the meeting.*

The method of electing a chairman of a district meeting by a viva voce vote, or the uplifted hand, except where there is no opposition to the person placed in nomination, is not approved. By such methods of election persons not qualified may vote. The election should be by ballot or by taking and recording the names of the persons voting and setting opposite to each how he or she votes.

As heretofore stated by me, a chairman of a district meeting at which an officer or officers of the district is or are elected, can not receive the ballots from the persons voting, but such ballots must be presented to, and be received by, one of the two inspectors of election. No chairman of such meeting, nor any inspector of election has any legal right or authority to open a ballot handed to him by any voter, nor to examine or read such ballot, nor to open such ballots for the purpose of ascertaining whether two or more votes are folded together. After the polls at the election are closed said inspectors should proceed to canvass the votes, first counting the ballots found in the ballot box *without unfolding them, except so far as to ascertain that each ballot is single,* and then comparing the ballots found in the ballot box with the number shown by the poll list to have been deposited therein. If the ballots found in the box shall be more than the number of ballots shown by the poll list to have been deposited therein, such ballots shall be replaced, *without being unfolded,* in the box from which they were taken and one of the inspectors shall, without seeing the same, publicly draw out as many ballots as shall be equal to such excess and, without unfolding them, destroy them. If two or more ballots shall be found in the ballot box so folded together as to present the appearance of a single ballot, *they shall be destroyed if the whole number of ballots in such box exceeds the whole number of ballots shown by the poll list to have been deposited therein, and not otherwise.*

This Department has uniformly held that any qualified voter of a district, present at a meeting, knowing a person at such meeting to be unqualified, and permitting him or her to vote without challenge, will not be allowed to object to the proceedings of the meeting because such unqualified person participated in such proceedings. It is also well settled that proceedings of a meeting will not be vitiated by illegal votes unless a different result would have been produced by excluding such votes. To warrant setting aside an election on the ground that illegal votes were received, it must affirmatively appear that the successful ticket received a number of illegal votes which, if rejected, would have brought it down to a minority. It is incumbent, in case of an appeal, upon the appellant not only to allege the illegal voting or the disqualification of certain persons, but to show *by evidence* the lack of qualifications of certain persons in such terms as necessarily to exclude every presumption that the voter could be qualified under any of the heads stated in section 11, article 1, title 7 of the Consolidated School Law of 1894.

The appeal herein is sustained.

It is ordered, That all action and proceedings had and taken at the special school meeting held on September 4, 1894, in joint school district no. 8, towns of Lorraine and Worth, Jefferson county, in the election of a trustee for said district, be, and the same are, and each of them is, hereby vacated and set aside.

It is further ordered, That the district clerk of said joint school district no. 8, towns of Lorraine and Worth, Jefferson county, be and he hereby is, authorized and directed to forthwith call a special meeting of the inhabitants of said school district, qualified to vote at the school meetings in said district, for the purpose of electing a trustee of said district. That notice of the time, place and object of said special meeting be served upon each of the inhabitants of said district qualified to vote at said special meeting, at least six days before the time of such meeting, in the manner prescribed by section 2, article 1, title 7 of the Consolidated School Law of 1894. That the proceedings had and taken at such special meeting, when assembled, shall be in accordance with, and pursuant to, the provisions of section 14, article 1, title 7 of the Consolidated School Law of 1894.

It is further ordered, That immediately upon the organization of said special meeting said district clerk shall read this decision and order to said meeting, or cause the same to be read to said meeting.

4370

In the matter of the appeal of Truman H. Cox from proceedings of annual school meeting held on August 6, 1895, in union free school district no. 1, town of Lee, Oneida county, in voting a tax.

Where in a union free school district at the annual meeting the vote to appropriate the sum of $450 and authorizing a tax to be levied to collect the same, the vote was taken viva voce and not by ballot or ascertained by taking and recording the ayes and noes of such qualified voters attending and voting at such meeting; *held,* that the action of the meeting was illegal and void, and in direct contravention of the provisions of section 10, article 2, title 8 of the Consolidated School Law of 1894.

Decided September 20, 1895

W. L. Wilson, attorney for appellant
A. T. Wilkinson, attorney for respondent

Skinner, *Superintendent.*

This appeal, although taken from the ruling of the chairman of the annual meeting held on August 6, 1895, in union free school district no. 1, town of Lee, Oneida county, is in fact from the action and proceedings of said meeting in voting a tax upon the said district by a viva voce vote.

An answer to the appeal has been made by Henry S. Hall, the chairman of said meeting. The uncontroverted facts established by the papers filed herein are:

That at the annual meeting of said union free school district no. 1, town of Lee, Oneida county, Henry S. Hall was chosen chairman; that a statement

made by the president and clerk of the board of education of said district of the receipts and disbursements for conducting the schools in said district for the school year of 1895–96 was presented to the meeting by the president of the board, by which it appeared that it was necessary to raise the sum of $450 by tax upon the taxable property in said district for school purposes for said school year; that a viva voce vote being about to be taken by said meeting to authorize the levy of a tax for said sum of $450 the appellant herein demanded that the vote directing or authorizing the levy of a tax must be taken by ballot or ascertained by taking and recording the ayes and noes of the qualified voters attending and voting at such meeting, but no action was taken thereon, and subsequently a resolution was adopted that a viva voce vote be taken upon appropriating said $450 and authorizing a tax to be levied to collect the same, which was done.

In section 10, article 2, title 8, of the Consolidated School Law of 1894, which became operative on June 30, 1894, relative to annual or special school meetings in union free school districts other than those whose limits correspond with an incorporated village or city, it is enacted that "on all propositions arising at said meetings involving the expenditure of money or authorizing the levy of a tax or taxes in one sum or in instalments, the vote thereon shall be by ballot, or ascertained by taking and recording the ayes and noes of such qualified voters attending and voting at such meetings."

The action of the annual school meeting in union free school district no. 1, town of Lee, Oneida county, by a viva voce vote, appropriating the sum of $450 for school purposes or authorizing the levy of a tax of $450, was illegal and void, and in direct contravention of the provisions of the school law. Such action by said meeting conferred no authority upon the board of education of said school district to assess, levy and collect any tax for said $450 or any part thereof, and any tax list and assessment for said sum, made and issued by said board, upon an appeal would be vacated.

The board of education should call a special meeting of the qualified voters of the district for the purpose of voting in accordance with said provisions of law, an appropriation of money for school purposes and authorizing the assessment and levy of tax to raise the sum so appropriated.

The appeal herein is sustained.

4399

In the matter of the appeal of Delos Wentworth, A. M. Bliss and Peter Hess from proceedings of special school meeting held on September 6, 1895, in district no. 6, town of German Flats, Herkimer county.

Where the clerk of a school district did not serve or attempt to serve the notices of a special meeting called for September 6, 1895, until September 2, 1895; *held*, that no lawful notice of said meeting was served upon the qualified voters of said district, and said special meeting was illegal and void.

Decided October 31, 1895

Skinner, *Superintendent*

This appeal is taken from the action of a special school meeting held on September 6, 1895, in school district no. 6, town of German Flats, Herkimer county, in the election of a trustee of said district.

Two grounds are alleged in said appeal as reasons why said appeal is brought, namely, first, that said school meeting, being a special school meeting, was not legally called, and that notice of said meeting was not legally served upon the inhabitants of said district qualified to vote at its school meetings; and second, that persons not qualified voters of said district voted at said meeting.

An answer has been made by Thomas Muldoon to said appeal, and to the answer the appellants have filed a reply, and to the reply the respondent has filed a rejoinder.

The following facts are established:

That at the annual school meeting held in said district on August 6, 1895, one James Golden was elected trustee; that subsequently and prior to August 31, 1895, said Golden sent his resignation of said office of trustee to Ellis D. Elwood, School Commissioner, and said Elwood accepted said resignation and sent to one James M. Petrie, the district clerk of said district, an order to call a special meeting of said district to be held on the evening of September 6, 1895, for the election of a trustee to fill the vacancy in said office by reason of the said resignation of Golden; that said order was received by said Petrie on August 31, 1895, but (as Petrie alleges) too late for him to write out said notices and serve them on said August 31, 1895; that on September 2, 1895, said Petrie, as said district clerk, served notice of said special meeting to be held on September 6, 1895, upon the inhabitants of said district qualified to vote at the school meetings in said district.

It clearly appears that said Petrie did not serve said notice of said special meeting for September 6, 1895, or attempt to serve said notice until September 2, 1895.

Under section 6, of article 1, title 7, of the Consolidated School Law it is enacted that a notice of a special school meeting shall be served upon each inhabitant of the district qualified to vote at the school meetings therein in the manner prescribed in section 2, of said article and title at least five days before the day of meeting. In computing said time of five days the first day, that is, the day on which the time begins to run, is to be excluded. Petrie, if he could not serve said notice on August 31, 1895, should have at once notified School Commissioner Elwood so that said Elwood could have fixed a later date for said special meeting.

The provisions of section 7, article 1, title 7, of said school law enacting that the proceedings of no district meeting, annual or special, shall be held illegal for want of a due notice to all the persons qualified to vote thereat, unless it shall appear that the omission to give such notice was wilful and fraudulent, is applicable only where an attempt is made to give the notice required by law

to any of the inhabitants, and through accident or mistake said legal notice was not served upon all of said inhabitants. In the appeal at bar Petrie made no attempt whatever to serve notice of said meeting until September 2, 1895.

It appears that Golden resigned the office of trustee and forwarded such resignation to Commissioner Elwood, who accepted the same. Commissioner Elwood should have forwarded such resignation and his acceptance thereof to the district clerk Petrie whose duty it was to have filed the same in his office, and then, under subdivision 10, of article 4, title 7, of the Consolidated School Law, to call a special meeting of said district for the purpose of electing a trustee to fill such vacancy in said office.

I am clearly of the opinion that said special meeting of said district was illegal and void for the reason that no legal notice of such meeting was served upon the inhabitants of said district qualified to vote at such school meetings therein.

I do therefore find and decide that said special meeting held on September 6, 1895, in said district was not a legal school meeting for the reason that there was no legal service of a notice of said meeting upon the legal voters in said district, and that proceedings had and taken at said meeting were illegal and void.

In the view taken by me in the disposition of this appeal it is not necessary that I should examine or decide as to the second ground of appeal.

For the information and guidance of the voters of said district I state that section 11, of article 1, title 7, of the Consolidated School Law prescribes the qualifications necessary to entitle a person to vote at school district meetings.

By the provisions of said section, there are four classes of persons entitled to vote at school district meetings in this State. First, every person of full age who is a citizen of the United States and a resident of the district, and who has resided therein for a period of thirty days next preceding the meeting at which he or she offers to vote, and who owns or hires, or is in the possession under a contract of purchase, of real property in such district liable to taxation for school purposes. Second, every resident of the district, and who has resided therein for a period of thirty days next preceding the meeting at which he or she offers to vote, who is a citizen of the United States, 21 years of age, and who is a parent of a child of school age, provided such child shall have attended the district school (in the district in which the meeting is held), for a period of at least eight weeks within one year preceding such school meeting. Third, every resident of the district, and who has resided therein for a period of thirty days next preceding the meeting at which he or she offers to vote, who is a citizen of the United States, 21 years of age, not being a parent, who shall have permanently residing with him or her a child of school age, which shall have attended the district school in said district for a period of at least eight weeks within one year preceding such school meeting. Fourth, every resident of the district, and who has resided therein for a period of thirty days next preceding the meeting

at which he or she offers to vote, who is a citizen of the United States, 21 years of age, who owns any personal property, assessed on the last preceding assessment roll of the town, exceeding $50 in value, exclusive of such as is exempt from execution.

In either of said classes the voter may be male or female. In the first, third and fourth classes, the voter may be either married or single. In the second class, both father and mother are entitled to vote. In the third class (cases of children residing with others than their parents), the phrase "him or her" in the statute must be held to limit the suffrage to one person only and that the head of the household. Therefore, where husband and wife, living together, have such a child or children residing with them, and are not the parents of such child or children, the wife is not on that account entitled to vote, although she may be a voter by reason of possessing one or more of the other qualifications mentioned in the statute. Any person qualified as aforesaid to vote at any school meeting can vote upon all questions brought before the meeting for consideration including propositions to raise money by tax, etc., etc.

I further state that it is the duty of any legal voter at any school meeting when any person, whom he knows or has reason to believe, is not a legal voter, offers his or her vote, to challenge such vote; that it is then the duty of the chairman of the meeting to require the person so offering to vote, to make the declaration contained in section 12 article 1, title 7 of said Consolidated School Law of 1894. If the person makes the declaration his or her vote must be received; but if the person refuses to make the declaration his or her vote must be rejected. Any person who wilfully makes a false declaration shall be deemed guilty of a misdemeanor.

It does not appear from the papers herein that any person offering to vote at such special meeting was challenged. This Department has held that a party knowing a person to be unqualified and permitting him or her to vote without challenge will not be allowed upon appeal, to object to the proceedings of the meeting because said unqualified person or persons participated in them.

The appeal herein is sustained.

It is ordered, That the special meeting held on September 6, 1895, in school district no. 6, town of German Flats, Herkimer county, and all action and proceedings had and taken thereat be, and the same are, and each of them is, hereby vacated and set aside as illegal and void.

It is further ordered, That the district clerk of said district call a special meeting of the inhabitants of said school district, qualified to vote at school meetings therein, and that personal service of the notice of the time and place and object of said meeting, upon each qualified voter of said district be made at least six days prior to the time of said meeting, the business to be transacted at said special meeting being to elect a trustee of said district to fill the vacancy created by the resignation of said James Golden.

It does not follow of course that a petition to the trustees for a special meeting, however numerously signed, is to be granted.

Decided June 15, 1861

Keyes, *Acting Superintendent*

On appeal from the refusal of the trustee to call a special meeting, on the application of a majority of the voters of the district, it appears that the object of a new meeting is to rescind the action of a previous meeting changing the site and voting a tax to build a new house. The meeting which took this action was well attended, every voter in the district being present but one, and the vote in favor of the resolution to change the site was confirmed by 21 to 7.

The petition to call a new meeting bears date more than two months after the above decisive action had been taken. Meantime, the trustees had completed their tax list, and, at the least, had entered into negotiations concerning the sale of the old house and site. It is remarked by the counsel for the appellants that it would seem as though an application for a school meeting, made by a clear majority of the legal voters of the district, ought upon the face of it to be granted. The general principle enunciated is, doubtless, in its broad and unrestricted sense, true; but, in its application to individual instances, it may, in a majority of cases, be found unwise and unjust, for the reason that it is scarcely possible to recognize, in the statement of such general principles, the thousand and one conditions that render it inapplicable.

I can conceive of no good resulting from an effort at so late a day to disturb what has been so deliberately and fairly and decisively determined. If it is true that so large a number of the voters have changed their minds, it betrays a fickleness and instability of purpose that give little assurance that proceedings had at any future meeting will be permitted to rest.

I regard the discretion of the trustee as judiciously exercised, and the appeal is, therefore, dismissed.

4203

In the matter of the appeal of Owen Mathews, from proceedings of the annual meeting, held in union free school district no. 2, Flatbush, Kings county.

A person present at a school meeting, knowing a person offering to vote not to be qualified and permitting him to vote without challenge, will not be allowed to object to the proceedings of the meeting, because such unqualified person participated therein. Where an appeal is brought from the action of a meeting in the election of trustees, on the ground that the persons are not eligible to the office, the appellant must show by competent legal proof that the persons alleged by him not to be qualified voters did not possess such qualification in such terms as necessarily to exclude every presumption that such voters could not be qualified under section 12 of title 7 of the school law.

Decided November 18, 1893

John E. Simpson, attorney for respondents

Crooker, *Superintendent*

This appeal is taken from the action and proceedings of the annual meeting held in union free school district no. 2, Flatbush, Kings county, on August 22,

1893, in the election of Edward R. Bennett and Oscar L. Steves, as trustees of said district.

The appeal contains thirteen allegations as grounds for appeal, the principal ones being that the meeting was conducted without any regard to the rights of the qualified voters of the district; that the chairman was not elected by a majority of the qualified voters present and voting; that the chairman refused to entertain the challenges duly made; that the chairman threatened to expel, and instructed a police officer to expel, from the meeting a qualified voter for challenging a person offering to vote, and accepted the vote of such person without requiring him to make the declaration required by law; that illegal votes were cast, and that neither the said Bennett nor the said Steves, declared to be elected trustees, was a qualified voter in the district. Affidavits of a large number of persons have been filed in support of the appeal.

An answer to the appeal has been interposed by Messrs Bennett and Steves and the affidavits of a large number of persons filed in support of the answer.

It appears that the annual meeting held in said district on August 22, 1893, was largely attended and much feeling in the result of the election of trustees was manifested, and while the meeting was not as quiet as one would desire, it was not riotous or boisterous and no qualified voter was obstructed in the exercise of his right or prevented from voting at the meeting. That said meeting was called to order by John W. Buckley, then one of the trustees of said district, and one Evans and one Graham were each nominated for chairman, and upon a viva voce vote Evans was declared elected, whereupon an appeal was taken and a division of the house demanded and had, and upon a count Evans received 98 votes and Graham 90 votes. That Edward R. Bennett and Joseph Nettleton were nominated for trustees for three years and ballot taken, which resulted in Bennett receiving 86 votes and Nettleton receiving 84 votes. That during said ballot the appellant herein occupied a position at which he could see each person offering to vote and challenged the vote of two persons, namely: W. Hurst and Patrick Cassidy, and that two persons were challenged by the supporters of Bennett, and after the attention of the chairman of the meeting was called to the qualifications of each of the persons challenged in the presence of the person making the challenge, the said challenges were not pressed. That Oscar L. Steves and Edward Levine were nominated as trustee for one year and a ballot taken, which resulted in Steves receiving 107 votes and Levine 49.

The main grounds upon which this appeal is brought are, that Bennett and Steves are not, nor is either of them, eligible to the office of trustee, and that they were elected by the votes of persons not qualified voters of the district.

Section 24 of title 7 of the Consolidated School Laws of 1864, as amended, provides: "Every district and neighborhood officer must be a resident of his district or neighborhood and qualified to vote at its meetings." Section 12 of title 7 contains the qualifications necessary to qualify a person to vote at school district meetings. Section 13 of title 7 provides that if any person offering to vote at any school district meeting shall be challenged as unqualified by a legal

voter of the district, the chairman, presiding at such meeting, shall require the person so offering, to make the declaration stated in said section, and if the person makes the declaration, he or she shall be permitted to vote; but if he or she refuse to make the declaration, his or her vote shall be rejected.

The appellant alleges in his appeal that Bennett and Steves were ineligible to hold the office of trustee because they were not qualified voters in the district, and that they were elected as trustees by illegal votes.

The burden is upon the appellant to sustain his appeal by the preponderance of proof.

The respondents, Bennett and Steves, are not required to show affirmatively that they are eligible to the office of trustee, and that the persons who voted for them are qualified voters of the district; but the appellant must show by competent legal proof that the persons alleged by him not to be qualified voters, did not possess such qualifications in such terms as necessarily to exclude every presumption that such voters could not be qualified under section 12 of title 7 of the school law.

It appears that the appellant challenged but two persons, and it appears by the proofs that he did not insist upon such challenges. He alleges that many other persons who voted were not qualified voters; but it does not appear that he challenged any of them. A party knowing a person to be unqualified, and permitting him to vote without challenge, will not be allowed to object to the proceedings of the meeting because such unqualified person participated in them.

The appellant, in addition to establishing, as above stated, that the persons claimed by him were not qualified voters, must, in order to set aside the election of said Bennett and Steves as trustees, also show that said unqualified persons voted for said Bennett and Steves, and that had their votes been excluded said Bennett and Steves would not have been elected.

In my opinion the appellant has failed to sustain his appeal herein by a preponderance of proof, and the appeal should be dismissed.

Appeal dismissed.

NORMAL SCHOOLS

3994

In the matter of the appeal of Abraham M. Hasbrouck v. school district no. 1 of the town of New Paltz, in the county of Ulster.

The relations between district no. 1, New Paltz, Ulster county, and the New Paltz Normal School. The trustee directed as to his duty, under the provisions of chapter 54, Laws of 1891.

Decided September 7, 1891

Linson & Van Buren, attorneys for appellants

Draper, *Superintendent*

Chapter 54 of the Laws of 1891 provides for the admission of all children of school age in district no. 1, of the town of New Paltz, as pupils in the practice department of the New Paltz State Normal School, and for discharging the indebtedness and winding up the affairs of said district. It forbids any future alteration of the boundaries of the district, except by the Legislature, and directs that State school moneys apportioned to the district in 1891 and thereafter, shall be paid to the board of managers of the normal school. In section 5 the act provides that "the present district officers, shall continue in their respective offices and discharge their duties pertaining thereto until any and all present indebtedness of said district shall be liquidated, and thereafter no school district meeting shall be held nor school district officers chosen, and all school moneys remaining to the credit of said district after the liquidation of said indebtedness shall be paid over to the local board of managers of the State Normal School located at New Paltz."

The reason of this legislation is obvious. It was necessary in order to provide the needed practice department for a State normal school which has been located in a small country village. Without it a normal school at that point must apparently be discontinued. On the other hand, it would provide a better school for the children of the district than had previously been afforded, and that without any cost whatever to the people of the district. The arrangement was mutually advantageous. It is within the official knowledge of the Superintendent that the great majority — probably four-fifths or nine-tenths — of the substantial residents of the district so regarded it, petitioned for its enactment and earnestly desire its complete execution.

Indeed, several years prior to the passage of the act above referred to, the district at its annual school meeting authorized substantially the same arrangement as that provided in the act with the authorities of the normal school, and it had been consummated and was in satisfactory operation, when through the failure of any general attendance at the annual meeting in 1890, John Clingan, a man whose correspondence with this office shows him to be of very limited

intelligence and education, was chosen trustee and at once set about defying the wishes of the district and overturning the agreement referred to. Although the district school had been closed for several years he proceeded to employ teachers and reopen it. This rendered legislation necessary, and the will of the district was manifested so strongly in its favor that the Legislature acted promptly and emphatically in the matter.

The duty imposed upon the district officers and particularly upon the trustee, by this act, is plain. It was to forthwith wind up the affairs of the district, settle the debts accrued or binding upon the district at the time of its passage, March 10, 1891, and pay any moneys remaining on hand to the managers of the normal school. Their offices were continued only long enough to enable this to be done.

Instead of doing this the trustee has continually delayed and prevented the statute from having its intended effect. He has unreasonably delayed the collection of taxes necessary to the payment of the indebtedness of the district. Then pretending to move in the matter he has included in his tax list sums which he had no right to collect and which were no legal charge against the district, even attempting to raise money to pay himself for services. When given directions from this Department as to how he should proceed he has ignored them. While the statute hereinbefore referred to, contemplated that no more district meetings should be held unless in the possible contingency of a vacancy in the office of trustee before the affairs of the district should be closed up, Clingan and a few adherents assumed to hold an annual meeting August 4, 1891, at which he was reelected and other officers were chosen. It was also assumed at this meeting that the district school was to be continued. Taxes were pretended to be authorized to pay teachers' wages for the next year, and other things were done indicating a clear intention to ignore and overthrow the legislative act.

From the proceedings of this pretended school meeting this appeal is taken. The papers were served upon the trustee August 12th, and although the rules required him to answer within ten days, he has made no answer. In acting upon the matter I have felt justified in placing upon the record a somewhat full statement of the whole matter, as not only set forth in the appellant's papers but derived from my official knowledge of the circumstances as they have transpired.

There is no argumentative reasoning necessary in the premises. A mere statement of the case carries its own conclusion. The trustee was bound, at once upon the passage of the act, to proceed to determine the amount of the legal indebtedness of the district and to raise the money, by legal process, for discharging the same. He had no power to create any new indebtedness. No meetings were to be held and no new officers were to be chosen. His unlawful course has been tolerated longer than it would have been if there had not been uncertainty as to whether it was due to viciousness more than ignorance, and if there had not been a desire to guide and aid him if ignorance was the cause of his strange action. It can be tolerated no longer on any ground. He must forthwith proceed to execute the provisions of the statute or be removed from office, that one may be named who can and will.

The appeal is sustained. The proceedings of the pretended school meeting held in the district August 4, 1891, and all acts in pursuance thereof are declared to be unlawful, void and of no effect. The trustee is *ordered* to take no steps looking to the continued maintenance of a district school in the district and to enter into no agreement entailing any obligation upon the district. He will forthwith proceed to determine the amount of the indebtedness of the district due or incurred upon the 10th day of March 1891, and to apply any moneys now standing to the credit of the district to the payment of the same, so far as the same may be legally applicable thereto. If there are not sufficient moneys on hand for that purpose he will forthwith issue his tax list and warrant for the collection of the deficiency and as soon as collected he will fully and completely pay and discharge the indebtedness of the district. The said John Clingan, trustee, will also show before me at the Department of Public Instruction at the Capitol in the city of Albany, on Tuesday, September 29, 1891, at 10 o'clock in the forenoon of said day what proceedings he has taken in fulfillment of the terms of this order and if it shall then appear that he has not proceeded promptly, intelligently and in good faith to obey the same, he will show cause at said time and place why he should not be removed from the office of trustee. The appellant or his attorneys may also attend at said time.

3998

In the matter of the appeal of Abraham M. Hasbrouck v. John Clingan, trustee of school district no. 1, in the town of New Paltz, in the county of Ulster.

The relations of district no. 1, New Paltz, Ulster county, and the New Paltz normal school. Wages of teachers employed by trustee in disregard of agreement between district and normal school prior to passage of chapter 54, Laws of 1891. *Held,* to be a legal charge against the district.

Decided September 11, 1891

Draper, *Superintendent*

On the 19th day of December 1890, this appeal was taken for the purpose of testing the right of the respondent to employ teachers and continue the operation of a public school under his auspices in the district above named. The ground upon which the appellant proceeds is that at the annual school meeting held in the district, in August 1887, it was determined to pass the control of the district school over to the managers of the State normal and training school located in the district. This proposition was accepted by said managers who, with the approval of the State Superintendent of Public Instruction, agreed to assume charge of the school and furnish all needed instruction therein. The district was also to pay to the State normal school the sum of $800 annually, including in said sum the amount of State school moneys apportioned to said district. The arrangement here outlined was entered upon; the trustee relinquishing his authority and control over the school and the managers of the normal school assuming the same. The arrangement was considered mutually

advantageous, because it furnished a practice department for the normal school, without which it was impossible for the normal school to proceed, and it supplied local school facilities to the district better than it had previously enjoyed. At the annual school meetings in 1888, 1889 and 1890 the arrangement was ratified and continued by the district meetings. From the time the agreement was made in 1887 up to the close of the school year of 1889 and 1890, the managers of the normal school conducted a school in the schoolhouse in said district, pursuant to said agreement. The agreement referred to was ratified and continued by a unanimous vote at the school meeting held August 5, 1890. Upon the day following said school meeting the respondent, John Clingan, was elected trustee of the district. In disregard of the action of the several district meetings referred to, the appellant alleges that the said Clingan proceeded to employ teachers and incur other expenses for the maintenance of said school, and on or about the 28th day of November 1890, issued his tax list and warrant for the collection of said expenses.

From this tax list and warrant this appeal is taken. The respondent served his answer to said appeal on the 13th day of January 1891. He admits the statements of the appellant to be true in all essential particulars, but claims that the agreement made between the district and the managers of the normal school was not authorized by law and is therefore void; and that his contracts in the employment of teachers for said district are valid and binding thereon.

Chapter 54 of the Laws of 1891, has largely disposed of the matter. As has been stated by me in another appeal relating to the same subject and decided upon the 7th day of September 1891, said chapter 54 provides that all pupils of school age in said district shall be eligible to the privileges of the practice department of said State normal school, free of tuition; that the local board of managers of the normal school shall make a statistical report to the school commissioner in whose school commissioner district said school district is located; and that school moneys shall be apportioned to said school district upon the basis of said statistical report, and paid to the managers of said normal school; that the boundaries of said district shall not thereafter be altered except by act of the Legislature; that the present district officers of said district shall continue for the purpose of liquidating the indebtedness which existed or had been incurred at the time of the passage of said act, March 10, 1891; and that thereafter no district meetings should be held and no officers chosen in said district; and that all moneys remaining to the credit of the district after the liquidation of said indebtedness shall be paid over to the board of managers of said normal school. The effect of this act is to take the management and control of the affairs of the district, as well as the custody of the property of the district, from the trustee thereof and vest the same in the managers of the State normal school. The time has now passed within which the trustee of said district could, in any event, have properly been in possession of district property and could have properly continued to maintain a district school therein, because any agreement for the employment of teachers entered into prior to the passage of said act, would by operation of law have by this time expired and terminated.

The main question raised in this appeal, however, remains to be determined, and that is, whether the agreements between the district and the normal school prior to the passage of the statute above referred to, were valid and binding upon the district and its trustee; or in other words, whether the act of the trustee in employing teachers and in otherwise incurring expense for the maintenance of a district school, during the school year of 1890 and 1891 in disregard of said agreement, was binding upon the district.

The law of this State jealously guards the authority of trustees touching the employment of teachers. So careful is it in this particular, that a trustee may employ any duly licensed teacher, regardless of the wishes of his district, and he may also agree with said teacher as to the amount of compensation for his services, regardless of the wishes of the district. While it is apparent that the trustee in this case pursued a course which the district meeting in four successive years had determined he should not pursue; while in the employment of teachers and the opening of the school he overthrew an arrangement which was actually in operation and satisfactory to the people of the district, I am nevertheless of the opinion, that he had legal authority for so doing, and that his act must be upheld. It therefore follows that the district must pay for the services of the teachers employed by him, prior to the passage of chapter 54 of the Laws of 1891.

For the purpose of promoting the speedy settlement of the affairs of said district, it is determined:

First, that the authority to maintain a school in said district, or to make contracts relating thereto and the custody of the property thereof, has passed from the trustee and become vested in the managers of the normal school.

Second, that the only remaining duty of the trustee is to determine the indebtedness existing or incurred on the 10th day of March 1891, and to raise the money by tax and pay the same.

Third, that in said indebtedness the trustee may include the wages of teachers and necessary expenses incurred by him prior to March 10, 1891.

Fourth, that public moneys apportioned to the district and paid to the managers of the normal school under chapter 54, Laws of 1891, can not be used to pay any portion of the wages of teachers or other indebtedness of said district.

Without passing upon the several items included in the tax list appealed from, or considering the precise form thereof, it is manifest that the same can not include an amount sufficient to discharge all of the indebtedness of said district. If it was to be upheld, another would become necessary and at once. There should not be two outstanding tax lists at the same time.

The appeal is therefore dismissed so far as the validity of the employment of teachers or the payment of their wages may be concerned, but the trustee is directed to withdraw the tax list appealed from, restore any moneys collected thereunder to the persons from whom collected, cancel and destroy the same and issue a new tax list and warrant, as directed by my order of September 7, 1891, which order will, in all particulars, continue to have full force and effect.

OFFICERS

3958

In the matter of the appeal of David S. Kirkpatrick and others v. Melvin G. Russell as trustee of school district no. 20, town of Queensbury, county of Warren.

A district trustee assumed to appoint a district collector in place of the one legally elected, declaring the office vacant without requiring the elected officer to give bonds; *held,* illegal and of no effect as no vacancy existed.

Grounds of complaint stated in an indefinite manner will not be considered.

Decided February 6, 1891

Draper, *Superintendent*

The above-named appellant, David S. Kirkpatrick, was elected district collector at the annual school meeting held in district no. 20, town of Queensbury, county of Warren, August 5, 1890. Without requiring said collector to file a bond, the respondent, the trustee, has assumed to declare the office of collector vacant, and appointed one Archibald Tubbs to that position, thereupon issuing to said Tubbs a trustee's warrant and tax list, and said Tubbs has assumed to enforce the same. Grounds are also alleged by appellants relative to the illegal assessment of property by the respondent, as trustee, but in an indefinite manner, and it does not appear that appellants are in any manner affected or injured by such action.

The enforcement of the tax list and warrant has been enjoined pending the determination of this appeal.

No answer has been interposed, and upon the only allegation which is presented with clearness, I must find for the appellants. David S. Kirkpatrick is the legal collector of the district. The appointment of Archibald Tubbs was void, as no vacancy existed in the office at the time.

The trustee is hereby directed to withdraw the tax list and warrant which was placed in the hands of Archibald Tubbs, and after correcting all errors therein, to deliver the same to the district collector for enforcement.

The appeal is sustained as above indicated, and the stay granted on this appeal, revoked.

4024

In the matter of the appeal of Peter Weatherwax v. Royal Harmon, trustee of school district no. 9 of the town of Half Moon, county of Saratoga.

The trustee is the officer to pass upon the sufficiency of a bond of the collector, and if satisfied therewith, to approve the same. The district collector having neglected to furnish a satisfactory bond, his refusal was in effect a vacation of the office to which he was elected, and the trustee had authority thereafter to appoint a qualified elector to fill the vacancy.

Decided November 20, 1891

Draper, *Superintendent*

The above-named appellant was, at the annual school meeting held August 4, 1891, duly elected collector of said district. Subsequently, said collector was requested to execute a bond for the faithful performance of the duties of such collector; that soon thereafter a bond was executed by the collector with one Thomas Lattimer as surety. This bond the trustees refused to approve of, and returned the same to the collector with the request that he secure another person to sign as surety. This the collector declined to do, whereupon and on September 28, 1891, the trustee declared the office of collector vacant because of the failure of the collector to file a satisfactory bond, and appointed another person district collector, who has qualified and entered upon the performance of his duty. The appellant takes this appeal from the action of the trustee, and insists that the said Thomas Lattimer was a sufficient surety upon the bond. A number of affidavits are presented by the respective parties bearing upon the question of the sufficiency of the surety. The affidavit of the person offered as surety is very indefinite. He admits therein, as claimed by the respondent, that the farm which he owns and is assessed for only $400, is incumbered by a mortgage of $500 as appears by the county records, but he insists that a part of this, he does not state how much, has been paid. He also claims that he has money deposited in a bank with which to meet any obligation which became due on said mortgage the coming spring. In this instance he fails to state the amount. In support of the appeal a number of affidavits are presented, of residents of the district, who swear that, in their judgment, the surety offered was sufficient. By the law, the trustee is the officer to pass upon the sufficiency of a bond, and if satisfied therewith, to approve the same. From the evidence submitted I am unable to find that the trustee did not act with judgment and from proper motives.

The district collector having neglected to furnish a satisfactory bond, his refusal was in effect a vacation of the office to which he was elected, and the trustee had authority thereupon to appoint a qualified elector to fill the vacancy.

Finding the facts as above stated, I overrule the appeal.

Collectors are the proper custodians of district moneys, and they need not pay them over to trustees. They should pay only on the written order of one trustee, or a majority of the trustees, which order should state the purpose for which the money is to be paid.

Decided April 23, 1866

Rice, *Superintendent*

Collectors are now the proper custodians of all the district moneys collected by tax, and it is not their duty to pay over such moneys to the trustees. They are to pay it out only on the written order of the trustee, or of a majority of the trustees, which order must specify for what purpose the money is to be paid.

Under no circumstances is a collector authorized to sell real estate. If he can not levy on enough personal property at one time to satisfy the warrant which he holds, he can keep on levying till he *does* obtain property enough to pay the tax.

Where property in the possession of public officers has been stolen or destroyed by fire, without negligence on their part, they are not bound to make good the loss.
Decided April 17, 1855

Smith, *Acting Superintendent*

It has been settled by the Supreme Court, in the cases of Supervisors of Albany County v. Dorr (25 Wendell 440), and Browning v. Hanford, sheriff (5 Hill 558), that a public officer, in whose possession property has been destroyed by fire or for want of care, or from whom money has been stolen without negligence or any default on his part, is not bound to make good the loss.

BOND

Trustees must require a bond of collector for the faithful discharge of his duties etc., before collector receives first warrant for collection of district tax. If they neglect such requirement, said trustees are liable to district for any loss or damage resulting from their neglect.
Decided December 28, 1865

Rice, *Superintendent*

The law makes it the duty of the trustees to require the collector, before receiving the first warrant for the collection of a district tax, to give bonds for the faithful discharge of his duties, and accounting for the moneys received by him by virtue of such warrant. A failure to comply with this direct requirement of the law on the part of the trustees would, in my opinion, constitute such a case of nonfeasance as would render the trustees liable to the district for any loss or damage resulting from their neglect.

The acts of trustees, *de facto* holding office under color of an election, subsequently declared void and set aside, are valid and binding upon their successors.
Decided June 25, 1841

Spencer, *Superintendent*

Samuel S. Lord and John S. Panlow were elected trustees of district no. 6, Lincklaen, at a meeting which was, on appeal, decided to be illegal, and the proceedings thereat void.

Before the decision, however, the trustees had contracted to build a schoolhouse, in accordance with the proceedings of the meeting at which they were elected, and had hired a teacher for the winter school, and agreed to pay him $24 of the public money, and had levied and partly collected a tax of $50 voted by said meeting toward building the schoolhouse.

Their successors refused to fulfil their contracts, and they appealed.

Held, that, until the decision declaring void the proceedings of the meeting that elected them, they were to all intents and purposes the legal officers of the district, so far as the public and third persons were concerned. They acted in their official and not in their individual capacity, for the district and not for themselves. The collection of the tax assessed by them could not be resisted; all their contracts made within their official jurisdiction were legal and binding. They were competent to transact all the business of the district. Their successors, under the decision, succeeded, not merely to all their rights, but also to all their legal liabilities, and were bound to execute all their contracts entered into while acting under color of a legal election.

The trustees of school district no. 1 in the town of Middlefield v. the commissioners of common schools of said town.

The acts of an officer *de facto* are valid, so far as the public and third persons are concerned, Decided October 3, 1826

Flagg, *Superintendent*

This was an appeal from the trustees of school district no. 1 in the town of Middlefield, from the proceedings of the commissioners of common schools of said town in setting off certain inhabitants to other districts. The ground of objection taken by the appellants was that one of the two commissioners by whom the alteration was made, did not file his acceptance of the office of commissioner until after the expiration of fifteen days from his election and until after the performance of the official act from which the appeal was brought.

The principle involved in this application has been decided by the Supreme Court in the case of the People v. Collins, 7th Johnson's Reports, page 549. In that case the court say, "The allegation is not material that the commissioners had not caused their oath of office to be filed in the town clerk's office. If the commissioners of highways acted without taking the oath required by law, they were liable to a penalty; or the town upon their default, might have proceeded to a new choice of commissioners. But if the town did not, the subsequent acts of the commissioners as such, were valid as far as the rights of third persons and of the public were concerned in them."

The collector of a school district is answerable for moneys lost to the district by his neglect, though he may not have given a bond to the trustees.

If the term of service of the trustees and collector has expired, and a warrant for the collection of a school bill has run out in the hands of the latter, the successors of such trustees must renew the warrant and direct it to the successor of such collector.

Decided September 12, 1836

Dix, *Superintendent*

If by the neglect of a collector, moneys which might have been collected by him within the time limited, are lost to the district, he is liable for the amount, whether he has given a bond or not to the trustees. The bond is an additional security; but if it is not required of him, he is not released from any obligation which the law imposes on him. The trustees may require a bond of the collector or not, as they please. If they do, they may, in case of his delinquency, look to his sureties: If they do not, they must look to him for an indemnity against losses sustained by the district.

If the term of service of both trustees and collector has expired, and a warrant for the collection of a school bill has run out in the hands of the latter, the successors in office of such trustees must renew the warrant, and deliver it to the successor of the collector; but the collector in whose hands the warrant runs out is answerable if there is any loss through his neglect.

4455

In the matter of the appeal of Louis Potter v. John G. Pavek, Edward P. Clonan and Noah Brooks, trustees, school district no. 4, town of Highlands, Orange county.

Neither the trustees of a school district nor the qualified voters therein have the lawful authority to assume or to decide that a school district officer who has been elected by the form or color of an election is not eligible to hold the office to which he was elected. Where a person was elected collector of a school district and accepted the office a vacancy in such office can not arise except by an order of the State Superintendent declaring the person ineligible to hold the office or that he was not duly and legally elected, or where such person files a written resignation of such office. Any appointment by the trustees of a school district to supply a vacancy must be in writing and filed with the clerk of the district.

Decided June 8, 1896

Skinner, *Superintendent*

This is an appeal by the appellant in the above-entitled matter from the action of the respondents, Pavek and Clonan, two of the trustees of school district no. 4, town of Highlands, Orange county, in appointing one John Weyant as collector of said district, the appellant alleging in his appeal that he was elected collector of said district at the annual school meeting held therein, on August 6, 1895, and that he duly accepted the office and has been ready and willing to file his bond and perform the duties thereof, and has never resigned said office.

Trustees Pavek and Clonan have filed their answer to said appeal.

It appears from pleadings and proofs filed herein that at the annual school meeting, held in said district no. 4, on August 6, 1895, the appellant was nominated by the respondent, Clonan, for the office of collector, and the appellant being present at said meeting stated that he did not want the office, but being persuaded by said Clonan, the appellant consented to serve, and was thereupon elected at said meeting collector of said district; that a special meeting of said district was held on August 31, 1895, and after the business of the meeting had been transacted, one Laurence Gibney stated in substance that the district had no collector as the one elected at the annual meeting was ineligible, not being able to read and write, whereupon the appellant replied in substance that, at the annual meeting he stated he did not want the office, but the meeting put it on him and he accepted; that he did not want the office and to appoint their man, that he wanted to settle with the district; that on September 24, 1895, said Pavek and Clonan, without any notice to the appellant, appointed John Weyant collector of said district; that on or about March 4, 1896, said trustees delivered to said Weyant the tax list of the district, and on or about March 18, 1896, the appellant brought his appeal herein.

The principal contention in the affidavits filed are as to what was said by the appellant at the time of the special school meeting on August 31, 1895, after the statement made by Gibney. It is not material as to what the appellant did say. The meeting was a special meeting and no business could be legally done except that specified in the notice. The meeting had no legal authority to accept the resignation of the appellant or to elect his successor. The appellant was duly elected collector of the district at the annual school meeting on August 6, 1895, and accepted the office, and until he made and delivered his resignation in writing to the trustees of the district, and such resignation was accepted by them and filed with the district clerk, or he failed to make and deliver, when notified, his bond as collector, as required by the school law, or he was removed from office by the State Superintendent of Public Instruction, he continued to be collector of the district, no matter what he might have stated orally subsequent to the meeting at which he was elected about not desiring the office, or that he wished to resign, etc., etc.

It is not claimed that the appellant ever made and delivered to said trustees his resignation in writing, of the office of collector nor that he was ever requested by the trustees to file a bond as such collector, and neglected or refused to file said bond, or that he has been removed from office as collector by any order or decision of the State Superintendent of Public Instruction. Hence the appellant is still the collector of said district, and any action on the part of the trustees of said district, assuming or deciding that the appellant had resigned as collector, or that there was a vacancy in the office of collector in said district, or in filling such alleged vacancy in said office was, and were, without authority of law and void.

From the statements made by Gibney at the time of the special meeting of August 31, 1896, it would seem that it was claimed that the appellant could not read and write, and was, therefore, ineligible to hold any school district

office. Assuming for the purpose of argument that the appellant could not read and write, under the school law, the State Superintendent of Public Instruction is the only person who can determine the question of the eligibility of the appellant to hold said office. The question of such eligibility can be raised by an appeal from the election of appellant as such collector, and the appellant having been duly elected, can not be removed from such office except by an order of the State Superintendent. The voters of said district, or the trustees thereof, have no authority to decide or act upon that question.

It also appears that had there been a vacancy in the office of collector, and had the trustees lawful authority to fill it, no appointment to fill such vacancy has ever been filed in the office of the clerk of said district, as required by the school law.

Under the school law, the trustees of said school district composed a board, and every power committed to said trustees by the school law must be exercised by the board. The board must meet for the transaction of business in accordance with notice of time and place, and such notice should not be less than one of twenty-four hours. Said trustees should notify the district clerk of every meeting of the board, and the clerk should be present and keep a record of the proceedings of said meetings in a book provided for that purpose. It would seem that the trustees of said district have not complied with said provisions of law. Trustee Brooks alleges in his affidavit that he was not notified or advised of any meeting of said trustees to take action on the alleged resignation of the appellant as collector, or the appointment of Weyant as a successor to appellant as collector, or to transact any other business since August 6, 1895.

The appeal herein is sustained.

It is ordered, That the action and proceedings had and taken by the respondents herein, Messrs Pavek and Clonan, as trustees of said district no. 4, town of Highlands, Orange county, on September 24, 1895, in appointing one John Weyant as collector of said school district to fill an alleged vacancy in said office by the alleged or assumed resignation of the appellant herein, Louis Potter, as such collector, be, and the same hereby are, vacated and set aside as illegal and void.

It is further ordered, That said trustees of said school district forthwith demand of said John Weyant the tax list and warrant issued to him by them; and that the same be issued and delivered by them to the appellant, Louis Potter, as collector of said district.

3954

In the matter of the application for the removal of William A. Burnham from the office of the president of the board of education of union free school district no. 2, town of Greenburgh, county of Westchester.

A manufacturing corporation in which a member of a board of education was a stockholder and also an officer, entered into a contract with the district. The officer's removal from the office of trustee is sought because of the contract. *Held,* that it is doubtful

if the case at bar is one which comes within the provisions of section 473 of the Penal Code, which forbids any school officer from *becoming voluntarily interested in a* contract etc.

Appeals not promptly taken, except when the delay may for satisfactory reasons be excused, will not be entertained.

Decided January 23, 1891

Charles E. Davidson, attorney for applicant
L. T. Yale, attorney for respondent

Draper, *Superintendent*

William A. Burnham is president of the board of education in the district above named, and treasurer of, and a stockholder in a corporation known as "Lord's Horticultural Manufacturing Company." This being so, the board of education in the year 1889, entered into a contract with said corporation for heating apparatus in one of the schoolhouses under its charge, for the sum of $500. The apparatus was supplied and paid for. The petitioners now think that the relations of Mr Burnham to the board of education, and to the manufacturing company, were such as to make it unlawful for the one to enter into a contract with the other, and that having permitted this to be done, ask that he should be removed from office therefor.

By an amendment to section 473 of the Penal Code made in 1888, it was provided that any school officer "who is authorized to make any contract in his official capacity, who voluntarily becomes interested individually in such contract, directly or indirectly, is guilty of a misdemeanor."

Whether the act complained of comes within the scope of this statute is somewhat doubtful. It would be a very stringent rule which would prohibit a manufacturing corporation from entering into a contract with a board of education because one of its stockholders was a member of such board, and I think it may well be questioned whether in that event, such stockholder would be deemed to "become voluntarily interested indirectly" in such contract.

But whatever conclusion might be finally arrived at upon that question, I am free to say that there are circumstances surrounding the matter which I should take into consideration. It is now many months since the transactions complained of occurred. The time for bringing the matter before the Department has expired. The contract for heating apparatus was let only after an open competition therefor. Four bids were presented besides the one from Lord's Manufacturing Company. That was the lowest. It is in proof that the company derived little or no profit from the contract. There is no pretense that there was any unfair advantage given to the company in letting the contract, or that the work was not well and satisfactorily performed. It is developed that there is considerable ill-feeling in the district, and that it has extended to the members of the board, and it is very manifest that it is in consequence of this unfortunate ill will that the present application has been made.

For these considerations, I conclude that the application should be denied.

3951

In the matter of the appeal of William A. Douglass and others v. school district no. 2, town of Hunter, county of Greene.

Expenses of a district collector, incurred by him defending an action brought against him in his official capacity, should be allowed him, when a bill therefor itemized and verified is presented to a district meeting. A charge for the collector's personal services, however, can not be allowed.

A note given to the collector by the trustee for such expenses, without authority of a district meeting, is invalid as a district obligation.

Decided December 30, 1890

C. M. Cartwright, attorney for appellant

Draper, *Superintendent*

This is an appeal from the action of a special meeting held in the district above named on the 27th day of October 1890, allowing and appropriating the sum of $48.75, in payment of a claim of Luman M. Coles for services and expenses as collector of said district, in defending an action brought against him as such collector.

This district has unfortunately been involved in considerable controversy. The matter here in dispute has been the subject of contention for some time. It was passed over the annual meeting, when it should have been attended to. A special meeting was called for the purpose of acting upon it. Mr Coles presented a bill to the special meeting. This bill included an item of $45, being the amount of a note given to him by the trustees of the district, a year or two since, in settlement of his claim, together with interest on the amount of said note. The district voted to pay the claim by a vote of 28 to 15. The appellants raise all possible objections to this action. Many of their objections are frivolous. In one position, however, they are entirely correct. The note in question was never authorized by the district. Indeed, it had no authority to authorize such a note. It was invalid as a district obligation. The district was entitled to have a complete itemized statement of Mr Coles' claim presented to it for action. This was not done.

Mr Coles should be reimbursed for all expenses which he incurred in the litigation referred to. He can not be paid for any services rendered. He should make a bill plainly indicating what payments he has made, and if he has received moneys from any source in consequence of such litigation, he should credit the same upon his bill. The balance ought to be paid by the district. The matter may readily be presented at the next special or general meeting in the district, but the action of the special meeting in this connection, can not be upheld.

The appeal is therefore sustained.

3578

In the matter of the appeal of Henry H. Brazee v. John W. Hogeboom, trustee of school district no. 1, of the town of Blenheim, county of Schoharie.

A person elected trustee of a school district can not then be challenged as to his eligibility to hold the office and required to be sworn and show his qualifications. A challenge is proper only at the time a person offers his vote.

Decided March 25, 1887

Draper, *Superintendent*

This is an appeal by Henry H. Brazee, a resident of school district no. 1, of the town of Blenheim, Schoharie county, New York, against John W. Hogeboom, who has assumed the office of trustee of said district by reason of the action of the annual meeting held in said district August 31, 1886.

The alleged grounds of appeal are as follows:

That at the annual school meeting held in said district, the appellant was voted for for trustee; that he received a majority of all the votes cast for said office; that the chairman of the meeting declared said Brazee elected trustee; that subsequently, some electors at said school meeting objected to the election of Brazee and challenged his right to hold the office; that the chairman thereupon requested said Brazee to be sworn as to his qualifications to hold said office; that said Brazee declined to be sworn or make any statement at that time; that the chairman thereupon declared that said Brazee was not eligible and directed the meeting to proceed to elect a trustee and that thereupon a ballot was taken and John W. Hogeboom was declared elected trustee for the ensuing year and assumed the duties of the office.

The respondents deny that the appellant was elected; they deny that the vote was even counted upon the first formal ballot for trustee and allege that Brazee is not qualified to hold the office of trustee.

In order to arrive at the facts of the case, the matter was referred to School Commissioner Le Grand Van Tuyl for the purpose of taking the evidence of the witnesses for the respective parties. From the evidence so taken and returned to me, I find the facts are as follows:

1 That the appellant received a majority of all the votes cast at said annual meeting for the office of trustee.

2 That the chairman of said meeting duly declared appellant elected trustee.

3 That the right of said Brazee to hold the office of trustee was challenged by voters at that meeting and that said Brazee refused to be sworn and to state his qualifications.

4 That subsequently John W. Hogeboom, the respondent, was voted for and received a majority of the votes cast at said meeting for trustee.

The only question, then, which arises in this case, is whether Mr Brazee's refusal to be sworn as to his qualifications to hold the office of trustee after his election would disqualify him. It does not appear from the pleadings, or from the examinations of the witnesses before the commissioner, that the right

of the appellant to vote was questioned. It does not appear that any challenge was offered when he attempted to vote at said meeting. It does appear that he voted repeatedly without any objection being interposed. In fact, he voted after the chair had decided that he was not qualified to hold the office of trustee. It is provided by section 13, title 7 of the general school laws, that any person offering to vote at school meetings may be challenged as unqualified by any legal voter, and that the chairman presiding at such meeting, shall require such person offering to vote to make a declaration of his qualifications to vote and every person making such declaration shall be permitted to vote, and if he refuses, his vote shall be rejected. By the next section, it is provided that any person who shall make a false declaration of his right to vote shall be guilty of a misdemeanor, and that any person not qualified to vote, who votes at such meeting, shall forfeit five dollars, to be sued for by the supervisor of the town. There is no provision of law which authorizes a challenge of a person, except when he attempts to vote. It appears from the evidence in this case that the right of Mr Brazee to vote was not challenged at any time. The challenge, if any, was made as to his qualifications to hold the office of trustee, and then, after his election as trustee. The appellant refused to comply with the request of the chairman of the meeting to be sworn, and denied his right to require him to do so. I am of the opinion that the chairman of the meeting did not possess the right of inquiring into the qualifications of the appellant to hold the office of trustee in this manner. The appellant in claiming the office of trustee by this appeal must show, in addition to the fact that he was duly elected, that he was and is qualified to hold the office. It very clearly appears from the evidence taken before the commissioner that he possesses the necessary qualifications. It appears that he is over 21 years of age and a resident of the district in question and that he rents real estate in the district and did at the time of the annual meeting, and that he was and is a duly qualified voter in said district and therefore eligible to hold the office of trustee.

The appeal is sustained and the appellant declared to be the trustee of the district.

4340

In the matter of the appeal of Azariah J. Hathaway v. George N. Luther, trustee of school district no. 6, town of Otego, Otsego county.

Where an action is brought in the courts against a collector of a school district for his official acts in the levy and sale of property the school district has authority to vote a tax to pay such collector for the reasonable expenses incurred by him in defending said suit.

Decided March 15, 1895

F. D. Shumway, attorney for respondent

Crooker, *Superintendent*

The appellant herein appeals from the proceedings of a special meeting held in school district no. 6, town of Otego, Otsego county, on November 1,

1894, and from a tax list and assessment made and issued by George N. Luther as trustee of said district. The said trustee has answered said appeal.

From the papers presented it appears: That during the school year commencing August 1, 1893, one Lavelle Lent was the collector in school district no. 6, town of Otego, Otsego county; that on October 11, 1893, the then trustee of said district issued and delivered to said collector a tax list and warrant, in which tax list the appellant herein was taxed and assessed for the sum of $10.45; that said appellant refused to pay said tax and said collector levied upon two cows, the property of the appellant, and subsequently sold one of said cows for $15, which amount covered said tax of $10.45 and the fees and expenses of the collector and the other cow was returned to the appellant; that in the month of November 1893, the appellant commenced an action in justices' court against said Lent for the conversion of said cows, which action was defended by said Lent and in such defense said Lent employed counsel, and which action was decided in favor of said Lent; that on the same day of the decision of the aforesaid action the appellant commenced a second action before another justice against said Lent for the like cause of action, in which action said Lent employed counsel, and said action was decided in favor of said Lent; that on the same day that said second action was decided appellant brought a third action for like cause as the first two, in which action said Lent employed counsel and defended and was successful in such defense. That the aggregate sum expended by said Lent in defending said three actions was $47.80; that in November 1894, the respondent called a special meeting of said district to be held on November 16, 1894, for the purpose of considering the payment by the district of the legal and other expenses of said Lent in defending said three actions brought against him by the appellant herein; that every qualified voter in said district, including the appellant herein, was duly and legally notified of the time and place of said special meeting and the business to be transacted thereat; that at said special meeting a motion or resolution was duly adopted unanimously, said vote thereon being taken by ballot, to pay said Lent said sum of $47.80, and that the sum be levied by tax upon said district; that on December 18, 1894, the respondent duly issued his tax list and warrant for the collection of said sum of $47.80, which sum has been collected including the tax levied in said tax list against the appellant herein, and said tax list and warrant duly returned, and the amount so collected paid over to said Lent.

The appeal herein was brought on January 14, 1894. Under section 14, of article 1, title 7, of the Consolidated School Law, the qualified voters of any school district assembled at a meeting, duly called and held, have the authority to vote a tax to pay the reasonable expenses incurred by district officers in defending suits or appeals brought against them for their official acts.

It is clear that the aforesaid three actions brought by the appellant herein against said Lent were, and each of them was, brought against him for his official acts as collector of the district, and the district had authority to vote

the tax to pay Lent for reasonable expenses incurred by him in defending said suits.

The appellant herein, having failed to establish his appeal said appeal should be dismissed.

Appeal dismissed.

3793

In the matter of the appeal of James S. Howard and others v. union free school district no. 2, of the town of Westport, county of Essex.

In a union free school district having a board of education of nine members, five of whom resigned for the obvious purpose of defeating the expressed will of the voters in selecting a schoolhouse site, the remaining members of the board, four in number, fill the vacancies caused by such resignations, and the board so newly organized continue to exercise the functions of a legal board; *held,* not to be violative of the authority and the policy of the law for such four remaining members of the board to exercise the functions of such board, and that the four members of the board exercised a power which the statutes confer, and which it was to the interests of the district to have them exercise. They exercised it only so far as was necessary to maintain school administration in the district uninterruptedly. The persons appointed to fill vacancies in the board were, if not officers *de jure,* such *de facto.* They had color of title to their offices at least. Their acts, taken in conformity with the directions of a district meeting, are binding upon the district.

Decided July 29, 1889

Anthony B. Ross, attorney for appellant
Matthew Hale, attorney for respondent

Draper, *Superintendent*

A special meeting of the electors of the above-named district was held on the 16th day of February 1889, at which it was resolved to build a new house at a cost not to exceed $5000, and to purchase a new site therefor, which was designated. At an adjourned meeting held April 20th the vote designating a site was rescinded, and another site selected. At another adjourned meeting held May 4th it was voted that the title to the last site selected was unsatisfactory, and that the new building be erected upon the site heretofore in use by the district. At a meeting held May 18th it was voted not to build on the old site, and still another new site was designated. At an adjourned meeting held June 1st it was voted to rescind the action taken at the last preceding meeting, and build upon the same lot previously designated for a new site by the meeting held April 20th, and which is known as the "Pollard" lot. At the meeting held June 1st a communication was read, signed by five of the nine members of the board of education, resigning their places upon the board. At a meeting of the four remaining members of the board held June 3d, they first elected one new member to fill one of the vacancies, and after he had joined them, the five chose four more to fill the remaining vacancies. At the same

meeting and another held the following day, a deed was procured of the site last designated by the district meeting, and the members of the board thus constituted, gave their note for the purchase price, being the sum of $1200.

From the action of the district meeting designating the "Pollard" lot, and from the action of the board in purchasing the same, this appeal is taken.

I find no allegation that the proceedings of the several district meetings were not regularly taken, and in the manner prescribed by the statute. It is said that they were not all well attended by the people of the district. In view of the frequency with which they were held, this is not surprising, but it does not invalidate the lawful action of those who did attend.

It is said that the site last determined upon is not suitable for a school site. This is as strongly disputed. It seems more than likely that if it were on the other side of a creek which divides the village, the differing opinions as to its suitableness would be exactly reversed. There has evidently been enough of discussion and dispute over the matter. It seems to have been regularly designated as a new school site by a majority of the electors who chose to attend a meeting, competent to act upon the matter. This being so, there is no such preponderant proof of unsuitableness as to warrant me in interfering with that action on that account.

But the appellants say that the site last designated has not been purchased, by reason of the fact that the board, assuming to make the purchase, was not a board, and was powerless to bind the district. They contend that, after the resignations of five members, the remaining four, being less than a majority of the whole number, had no power to exercise any of the functions of the board, even that of filling the vacant places.

Acting upon the theory that the vacancies created by the resignations have not been legally filled, the appellants have heretofore applied to the school commissioner to fill the same, which he has undertaken to do, and for some reason which does not appear, has reappointed the five members who resigned.

In the meantime, it appears that the four original members of the board, with the others appointed by them, have exercised control over the new site which they have assumed to purchase; have made some changes thereupon, and have employed an architect, procured plans and taken other steps toward the erection of the new building.

The question raised by the appellants as to the right of less than a majority of the whole number of the board of trustees in a union free school district to fill vacancies occasioned by the resignations of the majority, is a new and grave one.

It is the policy of the school law to guard against any exigency which will cause a break or work a failure in the administration of the school system, and it is likewise its policy to provide officers for administering that system through the agency of the district itself, or of other district officers. Thus, in an ordinary school district, it provides that a vacancy in the office of trustee may be filled by appointment by the school commissioner. The district may act at any time

within the thirty days, and it is the policy of the law to have it act, if it will. In a union free school district, vacancies may be filled by the board. If not filled by the board for thirty days, then the school commissioner may appoint. The school commissioner can not act for thirty days. It is the policy of the law to have the board appoint, if it will. If the four members could not appoint to fill the vacancies in the present case, then they could exercise no other function of the board, and there could be no exercise of any of the powers of the board for the space of thirty days, except in the event of a special election being ordered by the State Superintendent. If this theory be sound, then there might be entire failure of school administration in the district for a time, and neither a district meeting nor any officer or representative of the district could cure the difficulty.

It is provided by the Consolidated School Act of 1864, in regard to the trustees of common schools, that while there is one vacancy in the office of trustee, the two trustees have all the powers and are subject to all the duties and liabilities of the three, and while there are two such vacancies, the trustee in office shall have all the powers and be subject to all the duties and liabilities of the three as though he were a sole trustee.

It is true that this clause relates to the trustees of an ordinary school district, but it is provided in title 9 of the act relating to union free schools, that the members of a board of education of a union free school shall "Possess all the powers and privileges and be subject to all the duties in respect to the schools, or the common school departments in any union free school in said districts, which the trustees of common schools now possess or are subject, not inconsistent with the provisions of this title."

The statute provides that a board of education in a union free school district shall consist of not less than three nor more than nine persons. It is therefore not violative of the authority and the policy of the law for four persons to exercise the functions of such a board. I conclude, accordingly, that the four trustees in the present case exercised a power which the statutes confer, and which it was to the interest of the district to have them exercise, and it would seem that they exercised it only so far as was necessary to maintain school administration in the district uninterruptedly.

If there were any doubt, as I think there is not, about persons named by the remaining members of the board being trustees *de jure,* there would seem to be none about their being such *de facto.* They have had color of title to their offices at least, and have acted as such, and been recognized. Their acts, taken in conformity with the directions of the district meeting, would be binding upon the district.

Arriving at this conclusion, it is unnecessary to consider other questions raised on the argument.

The appeal must be dismissed.

4192

In the matter of the petition of John E. Casey for the removal of Adelbert Case as clerk of school district no. 6, town of North Norwich, Chenango county.

Where, upon application to a district clerk by a qualified voter of the district for permission to examine the minutes of the annual school meeting of the district, the clerk refused to permit such voter to examine such minutes, using vulgar and profane language in expressing such refusal, held that the clerk was guilty of a wilful violation of duty and an order made for his removal.

Decided November 2, 1893

W. H. Sullivan, attorney for petitioner

Crooker, *Superintendent*

This is a proceeding in the nature of an appeal for the removal of one Adelbert Case as clerk of school district no. 6, town of North Norwich, Chenango county, for wilful violation and neglect of duty.

A petition of John E. Casey, a resident and taxpayer in said school district, duly verified on September 16, 1893, setting forth certain charges against said Case with specifications of the facts to establish such charges, and having annexed thereto the affidavits of said Casey, of one Perry Hunt in support thereof, and a notice addressed to said Case that said petition and affidavits would be presented to me at Albany and application thereupon be made to remove said Case from his said office of clerk of said district, and requiring said Case to transmit his answer to said application duly verified, to this Department within ten days after service of said notice, petition and application, or the charges contained therein would be deemed admitted, with proof of service of copies of said petition, affidavits and notice upon said Case on September 19, 1893, were filed in this Department on September 23, 1893. No answer to said petition etc., has been received or filed, and the allegations contained in said petition etc., are considered as admitted as true by the said Case. The allegations contained in said petition etc., so considered admitted as true, are as follows:

That the said Adelbert Case was, in August and September 1893, the duly elected and qualified clerk of school district no. 6, town of North Norwich, Chenango county; that on or about August 28, 1893, about 9 o'clock in the forenoon of that day, John E. Casey and Perry Hunt, each of whom was a resident, voter and taxpayer of said school district, went to the premises of said Adelbert Case, the clerk of said school district, and asked permission of said Case, to look at the minutes of the school meeting of said district, held on August 22, 1893, and the said Case, in wilful violation of his duty as such clerk, refused to permit said Casey and Hunt to look at and inspect such minutes, using vulgar and profane language in expressing such refusal. That on the eleventh day of September 1893, at about 9 o'clock in the forenoon, said Casey and Hunt went to the house of said Case and said Casey then and there requested said Case to allow him to inspect the minutes of said school meeting of said

district held on August 22, 1893, and also asked for a copy of said minutes; that said Case told said Casey that he would not let him see the minutes, and to get right off from his premises, or he would slash him right down with a corn knife, which said Case then held in his hand. Said Case further told said Casey to get right off from his premises and to keep off, and that he would not furnish him with a copy of said minutes.

The clerk of a school district is a school officer, and his principal duties are defined in section 37 of title 7 of the school law. His duty is to record the proceedings of his district in a book to be provided for that purpose by the district, etc., etc.; to keep and preserve all records, books and papers belonging to his office and to deliver the same to his successor, and a refusal or neglect so to do subjects him to the forfeit of fifty dollars for the benefit of the district, to be recovered by the trustees.

The proceedings, records, books and papers in possession of said clerk are the property of the district, and not the individual property of the clerk. It is the duty of the clerk to permit any voter to freely inspect the records at all reasonable times, and a wilful denial of this right by a clerk would subject him to the liability of removal from office. There can be no doubt as to the right of a voter of a school district to examine and copy the district records, under reasonable provisions.

Section 18, of title 2, of the school laws provides that whenever it shall be proved to his satisfaction that any school commissioner, or other school officer, has been guilty of any wilful violation or neglect of duty under the school act, the Superintendent of Public Instruction may, by an order under his hand and seal, which order shall be recorded in his office, remove said school commissioner or other school officer from his office.

From the facts established upon this appeal I am satisfied that the said Adelbert Case, as clerk of school district no. 6, town of North Norwich, Chenango county, was guilty of wilful violation and neglect of duty under the school laws, as such clerk, as alleged in said petition, etc.

The petition herein is sustained.

It having been proven to my satisfaction that Adelbert Case, clerk of school district no. 6, town of North Norwich, Chenango county, has been guilty of wilful violation and neglect of duty, under the school laws, as such clerk. I do therefore, by virtue of the power and authority in me vested, order:

That the said Adelbert Case be, and he hereby is, removed from the office of clerk of said school district no. 6, town of North Norwich, Chenango county.

5326

In the matter of the application of Melvin H. Pendleton et al. to remove John D. Jones from the office of school commissioner and John C. Hyde from the office of trustee.

Where the moving papers in a proceeding to remove a school officer are legally defective and do not even allege an offense for which such officer might be removed, the proceeding should be dismissed.

Decided August 20, 1907

Draper, *Commissioner*

The petitioners allege that respondents wilfully misrepresented the views expressed by them in an interview relating to the dissolution of a school district. The moving papers do not allege that respondents have been guilty of a wilful violation of law or official duty or of any other offense for which the statutes impose the penalty of removal from office. Respondents deny the charge of misrepresenting the views of the petitioners expressed at the conference in question and offer evidence in proof of such denial. The proceeding should be dismissed on the moving papers which are legally defective and which fail to even allege an offense for which respondents might be removed.

The petition herein is dismissed.

5184

In the matter of the petition of John Clark et al. for the removal of Charles A. Higley from the office of school commissioner of the first school commissioner district of Oneida county.

A school commissioner will not be removed from office for making an order which was fair, open and above board in every particular and in which he exercised his discretion wisely.

If a school commissioner exercises an unwise discretion in making an order, or if he makes an improper order, the relief of an aggrieved party is an appeal from the action of the commissioner in making such order and not a petition for his removal.

Decided April 21, 1905

James W. Watts, attorney for appellants

Draper, *Commissioner*

The petitioners are residents of school district no. 8, town of Marcy, and of the first school commissioner district of Oneida county. It appears that one William H. Kauth desired to have his real property transferred from district

no. 8, Marcy, to adjoining district no. 1, Marcy. At a special meeting of district no. 8, Marcy, to consider the advisability of consenting to the transfer of Mr Kauth's property the voters present decided not to consent to an alteration of the district boundaries making such transfer. The school commissioner then made an order altering the boundaries of district no. 8, Marcy, by transferring the property of Mr. Kauth to district no. 1, Marcy.

It is alleged by petitioners that in making this order the school commissioner "acted in bad faith and against the best interests of said district, and simply to accommodate said Kauth." The petitioners do not present any evidence whatever in support of this allegation. They do not assign one specific act or reason to sustain their contention. They do not even show that the action of the commissioner in making such order was unwise. The affidavits of the petitioners are to the effect that upon "information and belief" Commissioner Higley acted in bad faith. This is insufficient and in their moving papers petitioners have failed to make a case sufficient to have warranted them in filing this petition. The commissioner possessed legal authority under sections 3 and 4 of title 6 of the Consolidated School Law to make this order even if a majority of the voters of district no. 8, Marcy, were opposed to the changes which would be made thereby. The action of Commissioner Higley was regular, fair and open and above board in every particular. He accorded those opposed to the order two impartial hearings. He does not appear to have exercised his discretion unwisely in making this order. If such order was improper or unwise the remedy of any aggrieved party was an appeal from the action of the commissioner therein to this Department.

The petition herein is dismissed.

A copy of this decision must be served by the respondent upon the attorney for the petitioners.

In the matter of the removal of George Turner Miller from the office of school commissioner of the sole commissioner district of Chemung county.

The fact that a school commissioner applied for and received money from the State to settle an expense of the teachers institute and that he kept this money over thirteen months, during which he was in frequent contact with the officials to whom it was to be paid, is sufficient in itself to constitute a wilful violation and neglect of duty, requiring the exercise of the power of removal reposed by law in the Commissioner of Education.

Decided February 27, 1905

Draper, *Commissioner*

On February 3, 1905, the president of the board of education at Horseheads, N. Y., called to my attention the fact that a claim against the State on the part of said board, amounting to $24.20, for coal consumed and for janitor service in connection with a teachers institute held in their high school building during the week ending December 19, 1903, had never been settled.

Investigation showed that the amount had been paid to the school commissioner immediately after the institute was held, for the purpose of liquidating

the claim. A letter from the clerk of the school district stating the amount of the claim appeared among the papers, but no receipt on the part of the district was shown.

On February 4th I addressed a letter to the school commissioner, calling for an explanation. On February 7th the amount was paid, by post office money order, to the treasurer of the district. Nothing was heard from the school commissioner until February 17th, when he replied to my letter of the 4th, stating that "The amount was paid the Chemung Valley Bank, the treasurer of the district. The matter is now adjusted." In consequence of the delay in replying to my letter and because of the unsatisfactory look of the whole affair an order was made on February 13th for the school commissioner to appear here on February 23d to show cause why he should not be removed from office.

On the return of the order, the school commissioner appeared and claimed that the delay in answering my letter of the 4th of February was because he was away from home. He admitted going to his home post office for mail and for the post office money order on February 7th, but asserted that my letter was not received at that office prior to his leaving home for a ten days' journey on February 8th, although my letter was mailed at Albany on February 4th.

The home of the school commissioner is at Van Etten, some twenty miles from Horseheads. He stated that he paid the amount on February 7th, because when talking on the telephone with his father, who resides at Horseheads, it was suggested to him that there was some talk about the matter at Horseheads and that it ought to be settled.

The explanation given for the long delay in paying the bill was that he was not certain as to whom he should pay it, and that he was not willing to pay it except to one entitled to legally receive the money. He asserted that there was some ill feeling between himself and officers of the district over trifling matters. He insisted that he at all times expected to pay over the money and was only waiting to be satisfied as to whom he should pay it.

Mr Miller was, for some time prior to his election as school commissioner, principal of the school at Horseheads. He was wholly familiar with all the circumstances in that district and was well acquainted with its officials. He has an office at Horseheads which he announces will be open on Saturday afternoon. He admitted that during the thirteen months while he had been holding this money he had been in Horseheads more than twenty times; also that he well knew the officers of the district and that the Chemung Valley Bank was the treasurer.

The question as to the time when the school commissioner received my letter of February 4th, and as to what led him to pay the claim of the district three days after this letter was mailed from Albany, without having received this letter, is of slight importance except as it bears upon his credibility. The explanation offered for the delay in paying over the money is not sufficient. It was the business of the school commissioner to pay this money over immediately upon its receipt. An officer having any correct feeling about the matter or any proper

appreciation of the obligations and responsibility of a public office, would have been anxious and restless until the money had passed out of his hands and into the hands entitled to possess it. The difficulty about determining to whom it might properly and legally be paid seems mere pretense.

It is not necessary to indulge in speculations as to whether this money would ever have been paid over if the matter had not been stirred up by the parties in interest. The fact that this school commissioner applied for and received money from the State to settle an expense of the teachers institute, and that he kept this money over thirteen months, during which time he was in frequent contact with the officials to whom it was to be paid, is sufficient in itself to constitute a wilful violation and neglect of duty, requiring the exercise of the power of removal reposed by law in the Commissioner of Education. I should be glad to come to some other conclusion, but it is impossible. Failure to act as the law contemplates would be a delinquency on my part.

It is therefore ordered, That George Turner Miller be, and he hereby is, removed from the office of school commissioner of the sole school commissioner district of Chemung county.

5286

In the matter of the application to remove James H. Roe as trustee of common school district no. 6, town of Warwick, county of Orange.

Appearing in and answering a proceeding without reserving any rights, even if formal notice of proceeding is not given, brings the proceeding properly within the jurisdiction of the Commissioner of Education.

A trustee who fails to provide for his own children the instruction prescribed by the compulsory education law is guilty of wilful violation of law and neglect of official duty and should be removed from office.

The burden of proof as to the physical inability of children to attend school is upon the parent and not the school authorities.

Trustees may require parents to furnish a physician's certificate in the case of habitual or long-continued absence on the ground of physical inability and such certificate is conclusive.

Decided October 20, 1906

Lewis J. Stage, attorney for petitioners
Clifford S. Beattie, attorney for respondent

Draper, *Commissioner*

District no. 6, town of Warwick, county of Orange, is a common school district having three trustees. At the annual meeting of August 1905, James H. Roe was elected one of the trustees of this district and is still serving in that official capacity. This proceeding was commenced July 7, 1906, but the pleadings were not completed until October 22, 1906. At the time this proceeding was instituted John M. Marsh and George H. Davenport were the other trustees

of the district. These two trustees and Jacob F. Welch and other legal voters of the district are the petitioners who pray for the removal of Trustee Roe.

The specific charge against respondent is that he violated the provisions of the compulsory education law by not requiring his two children who are within the ages of that law to regularly attend upon instruction. The pleadings show that respondent Roe is the father of Arthur Roe, a boy 10 years of age, and of Elma Roe, a girl 9 years of age, and that they are residents of school district no. 12, town of Warwick. It also appears that between October 1, 1905, and April 30, 1906, the school in said district was in session 126 days and that Arthur Roe was in attendance thereat 63 days and absent 63 days, and that Elma Roe was in attendance upon such school 60½ days and absent 65½ days. It is further shown that between April 30 and June 1, 1906, neither of these pupils was in attendance at school. The absence of such children from school is not denied by respondent nor does he claim that such children were in attendance upon instruction elsewhere.

It is also shown that on April 17, 1906, Arthur Roe had some trouble in school with the teacher over a recitation in arithmetic and that the teacher took Arthur from the recitation to his seat by the collar of his coat and that at noon when the teacher was at his dinner respondent appeared at the schoolhouse and took Arthur and his daughter Elma home. These children did not attend school any portion of the year thereafter. It is also shown that in the early part of May respondent took the books of these two children from the schoolhouse.

The pleadings in this case further show that on April 30, 1906, on an information duly made by John L. Springer, an attendance officer of the town of Warwick, charging this respondent Roe with the crime of misdemeanor for violation of the compulsory education law, a warrant for the arrest of said Roe was duly issued by J. V. D. Benedict, a justice of the peace of the town of Warwick. It also appears that on similar informations warrants were issued for four other residents of this district and that such residents were found guilty and fined.

Respondent Roe was tried May 26, 1906, before a jury and such trial resulted in a disagreement of the jury. Before this trial, however, an application was made by respondent through his attorney to the special county judge of Orange county for an order directing that the case should be presented to the grand jury for indictment. This application was denied. It also appears that a second application was made to a justice of the Supreme Court and denied. The second trial of Roe took place June 16, 1906, and at the close of such trial the jury brought in a verdict of guilty without leaving the court room. Roe was thereupon fined $5 by the court the maximum penalty as this was the first time he had been prosecuted for a violation of this law. The respondent has taken an appeal from this judgment to the county courts. The foregoing outline of the history of the case is shown by the moving and answering papers in this proceeding.

In the moving papers of petitioners is an informal petition signed by thirty-five legal voters of the district praying for Roe's removal. Respondent objects to the acceptance of such petition on the ground that it is not verified. It is

immaterial whether this petition is accepted or not as the petition of Trustees Marsh and Davenport and Jacob F. Welch, a legal voter of the district, is sufficient to bring the case properly before me for determination. Attorney for respondent further objects to the consideration of this proceeding on the ground that the offenses charged as being a violation of law took place more than thirty days previous to the date on which this proceeding was instituted and that notice of a hearing on the alleged charges has not been given as required by section 13, title 1 of the Consolidated School Law. This is not an appeal which must be brought within thirty days from the date on which an official act constituting a grievance occurred but it is an appealing termed an appeal brought by petition for the removal of a school officer for a wilful violation of law and official duty. This Department does not hold nor do the rules require that a petition for this purpose shall be presented within thirty days from the date on which the alleged violation of law or official duty occurred or that a satisfactory reason shall be given for such delay. If the rules did require this the fact as shown upon the pleadings that respondent was being prosecuted in the courts for the alleged violation of law would in itself, without specifically pleading the same as such excuse, be regarded as good reason for delay in bringing the proceeding. It appears that no formal notice of application to me for hearing the charges alleged was attached to the moving papers. This notice is merely a matter of form. It is not required by section 13, title 1 of the Consolidated School Law or by any other provision of law. The moving papers contained all the essential facts as required by page 15 of the rules regulating such proceedings. The service of the moving papers was ample notice of what respondent was required to answer. However, respondent has appeared and answered without notice and without waiving any rights, and such appearance and answer even if notice were required is sufficient to bring the proceeding properly within my jurisdiction.

After this proceeding was inaugurated before me, I applied to Justice of the Peace Benedict for a certified return of the evidence taken by him upon the trial at which Roe was found guilty. He returns what purports to be a record of such evidence but his certificate shows that by agreement at the trial between the complainant and the defendant he did not keep a complete record of the evidence and that the return made is a record written by him from memory since my application for a return has been made. Attorney for respondent properly objects to my receiving such return and I shall sustain this objection.

Trustees of school districts are charged with the enforcement of the compulsory Education Law and a trustee who not only fails but refuses to provide for his own children who are subject to the provisions of that law the instruction which the law declares they shall receive is guilty not only of a wilful violation of law but of a wilful refusal to perform his official duty and should be removed from office.

It is proper to inquire what the official record of district no. 6, Warwick, with this Department has been in the enforcement of the compulsory education law. Our official reports and files show that it has been almost impossible to compel

the officers of this district to enforce such law. On December 5, 1905, the Chief of the Attendance Division wrote Trustee Marsh calling his attention to the unsatisfactory attendance in his district and specifically naming the two children of respondent Roe as pupils who were not attending school as required by law. The trustee's attention is called to the "long record of unsatisfactory attendance" and is advised that if the law is not properly enforced the public money of the district will be withheld. Again on March 1, 1906 the Chief of the Attendance Division wrote Trustee Marsh of the continued unsatisfactory attendance and again named the daughter of respondent Roe as one of the pupils who did not attend school as legally required and also stated that satisfactory excuse for her absence was not given. Again on April 18, 1906 a communication was addressed to all three of the trustees calling attention to the failure to enforce this law. The Chief of the Attendance Division reports that in the enforcement of the compulsory education law district no. 6, Warwick, has one of the worst records of any district in this State. In this connection it is pertinent to refer to the fact that the data of the last United States census will show that Orange county stands number 44 in the list of counties of the State arranged in the order of the number of illiterates above the age of 10 years. This county has 4090 illiterates above that age or 49 out of every 1000. It also stands number 46 in the list of counties of the State arranged according to the number of illiterates in the voting population. It has 1894 illiterate voters or 62 out of every 1000. These figures show the importance of the strict enforcement of the compulsory education law and a trustee who does not manfully perform his duty in this respect is unfit to continue to assume the responsibilities of such office.

The respondent's answer does not deny the charges of absence from school on the part of his children nor does he claim in his answer that proper excuses were furnished for their absence. Therefore the charges of petitioners, namely, that the children did not attend school as required by law and that proper and legal excuses were not furnished for their nonattendance, stand admitted. In his answer he justifies his violation of the plain provisions of the law on the ground that the children were physically incapacitated to attend. If his children were physically unable to attend school it was his duty to satisfy the school authorities upon that point. The statement of a parent to the effect that a child is ill and unable to attend school need not necessarily be accepted by school authorities as a proper excuse. School authorities might know that such children were running the streets or were illegally detained at home to aid their parents. If school authorities were required to accept such excuses, a parent might keep his children out of school at any time for any purpose and simply send an excuse to the school authorities stating that the children were ill. Such construction of the statutes would render the compulsory education law a dead letter and the fundamental purposes of this law would be absolutely defeated.

The affidavit of respondent's attorney shows that the principal ground upon which he has taken an appeal to the county court from the judgment of the court which tried and convicted him is that the justice improperly charged the jury

that the burden of proof as to the physical inability to attend school was upon the parent and not the school authorities. If the contention of respondent's attorney in this respect is true it would be an absolute impossibility to enforce the law. Such interpretation of the law would put many obstacles in the way of its enforcement which school officers would be unable to overcome. How are school officers to ascertain the physical conditions of children? The law provides no method. If a physician should be sent by school authorities to examine a child detained on the ground of illness and the parent refuses to permit the child to be examined by such physician how can such examination be made? Must in such event application be made to the courts for an order to make such examination and the important legal questions raised which such procedure involves? It can not be held that it was the intention of the Legislature to place such burdens upon the school system. The rational interpretation of this law consonant with the general policy of school administration is that the burden of proof in such cases is upon the parent. It violates no legal right of the parent.

Section 10 of the compulsory education law places the general responsibility of the supervision of the enforcement of this law throughout the State upon the Commissioner of Education. Pursuant to this authority I have promulgated certain regulations for the enforcement of such law. In every school register of the State, a copy of which is furnished every school district and a copy of which was supplied school district no. 12, Warwick, for the year beginning August 1, 1905, was the following printed regulation:

No pupil subject to the provisions of the compulsory education law, shall be absent or tardy without bringing a written excuse from his parent or guardian, which excuse should state the specific reasons for absence or tardiness. Sickness of the child, severe sickness in the family requiring the service of the child temporarily till other help may be had, or some unusual condition beyond the control of either child or parent, should be deemed the only legal excuse for absence. If any question as to the sufficiency of an excuse shall arise between the parent or guardian and teacher, it shall be referred to the superintendent of schools or to the school authorities for decision.

This rule places it within the power of trustees to determine what are sufficient excuses. This Department has always ruled that in the case of habitual or long-continued absence on the ground of physical inability to attend, trustees are within their lawful rights in requiring parents to furnish a physician's certificate and that such certificate is conclusive.

The Court of Appeals has held that the Commissioner of Education has authority to prescribe reasonable rules in the management of the public school system (181 N. Y. 421).

Respondent also claims that the reason for making application to have the case presented to the grand jury was to have the case tried in a court of record so that a commission could be appointed to take the testimony of two physicians who reside out of the State. He sets up that it was impossible to secure their attendance in this State at a trial and that a justice of the peace had not authority to take their testimony through a commission. If respondent believed the testi-

mony of physicians residing out of the State admissible why did he not offer their testimony by affidavit in this proceeding? No evidence of this character has been offered and no application or request has been made to me to obtain such evidence. It is proper to state, however, that evidence of this character is admissible now as it was also upon the trial of Roe. The strained effort of respondent to make it appear now that he is desirous of presenting a certificate or testimony from a physician does not relieve him from the penalty due for failing to furnish the trustees such certificate at the proper time.

It appears clear from the pleadings in this case that respondent was guilty of failing to require his children to attend school as provided by law and of failing to conform to a regulation of this Department in the enforcement of the compulsory education law and that the facts show that his conduct therein was wilful and for a wrongful purpose and that he thereby as trustee became guilty of a wilful violation of law, of a regulation of this Department and of official duty. He should be removed from office.

The petition herein is sustained.

It is ordered, That James H. Roe be, and hereby is, removed from the office of trustee of school district no. 12, town of Warwick, county of Orange.

5170

In the matter of the petition and proceedings of school district no. 6, town of North Salem, Westchester county, for the removal of Charles S. Oakley and Frank C. Parkus, trustees of said district.

Funds received by a school district as an award under condemnation proceedings in which the site of the district is taken for public purposes must be used for the purchase of a new site and in removing and erecting thereon a schoolhouse, and improving and furnishing such site and house and their appendages and to purchase school apparatus and for the support of the school. Such funds must be used for these purposes as the legal voters of the district shall direct. Such funds are not at the disposal of the trustees to be used for such purposes as they shall direct.

When the trustees of a common school district are directed to expend $2000 in the erection of a building and such officers expend $4000 for that purpose they are guilty of a violation of law and of official duty. If it is necessary to expend any considerable amount in excess of an appropriation for the erection of a building it is the duty of the trustees to call a special meeting of the district and permit the legal voters thereof to direct what action shall be taken.

It is not within the power of trustees to decide to make improvements which are not necessary for the comfort or convenience of the children but which add to the general attractiveness of the building, such as installing electric light, putting in metal ceilings, papering walls, etc. The legal voters of the district in district meeting assembled is the proper authority to decide on making such improvements.

Section 473 of the Penal Code prohibits trustees from becoming interested personally, directly or indirectly, in any contract which they are authorized to make for the district.

School districts are entitled to protection in their rights and when trustees are determined to ignore such rights this Department is bound on appeal in due form to afford districts

such protection as the law provides. When the conduct of trustees shows clearly that they have wilfully violated the law and wilfully neglected their duty the penalty of removal must be imposed.

Decided January 31, 1905

Wilson Brown, jr, attorney for petitioners
Frank L. Parkus & Charles S. Oakley, attorneys for respondents

Draper, *Commissioner*

During the school year ending July 31, 1904, the board of trustees erected a school building in this district. The report of the trustees to the annual meeting in 1904 included expenditures for the erection of such building. Such report was referred to an auditing committee of three with instructions to report at an adjourned meeting to be held August 16th. At such adjourned meeting the committee submitted a written report charging the trustees with having made unnecessary and illegal expenditures, with being interested in district contracts, and recommending that such trustees be requested to resign on or before August 22d. The report also contained a recommendation to the effect that a committee be appointed with power to employ counsel and to take such action as might be deemed necessary. The meeting adopted this report and authorized the appointment of the committee recommended therein. Isaac Purdy, G. Preston Brown and Uel T. Bailey were named as members of such committee. The meeting adjourned until August 23d. The trustees did not resign as requested before August 22d. At the meeting of the district on August 23d the above-named committee was instructed to petition the Commissioner of Education for the removal of these trustees. This petition is, therefore, presented by direction of the district. The members of the committee join in the petition as individuals and as taxpayers of the district.

The petitioners allege twenty-two specific violations of law or of official duty on which they ask for the removal of Trustees Oakley and Parkus. It is unnecessary to go into a detailed consideration of each of these twenty-two counts against such trustees. The substance of the principal charges is that they made expenditures from the funds of the district in excess of appropriations and without legal authority therefor; and that they were personally interested in contracts which they made for the district and that they rendered services in various forms for the district, determined their compensation therefor and then audited and paid their own bills.

The pleadings which contain several hundred pages of typewritten matter show, among other things, that during the school year ending July 31, 1903, the site of this school district with other adjoining land was taken by the authorities of New York City under condemnation proceedings for the purpose of obtaining a pure and wholesome supply of water for that city. An award was made to the district by proper authority about June 19, 1903. This award amounted to $6518.90.

The school law does not directly provide what use shall be made of a fund derived from this source. It will be shown hereinafter that under the provisions

of the Consolidated School Law so much of such fund as may be necessary shall be used in procuring a "new site and in removing or erecting thereon a schoolhouse, and improving and furnishing such site and house and their appendages," and also to purchase school apparatus and for the support of the school. But such fund must be used for these purposes as the inhabitants of the district shall direct at a district meeting. Such fund is not at the disposal of the trustees to be used by them for any of such purposes as they shall direct.

These alleged illegal expenditures were made during the school year beginning August 1, 1903, and ending July 31, 1904. The board of trustees for that year was composed of E. L. Quick, Frank L. Parkus and C. S. Oakley. Mr Quick's term of office expired at the annual meeting in 1904, and he was not reelected. This petition was not filed at this Department until October 3, 1904, and after Mr Quick's term of office had expired. The petitioners, therefore, ask for the removal of Mr Parkus and Mr Oakley who were members of the board of trustees at the time these alleged illegal expenditures were made and who are still serving as members of such board.

It appears that during the school year ending July 31, 1903, a new site had been purchased for the sum of $500 and that improvements thereon had been made in the sum of $397.93. At the annual meeting of 1903 the trustees reported a balance of $5620.97 in the fund received by award from New York City.

The authorities representing New York City gave the district the building on the old site. At a district meeting the sum of $800 was voted for the purpose of removing the building from the old site to the new site. The sum of $1200 was voted for repairs to the building. The trustees were authorized to grade the grounds in a suitable condition, but a specific amount was not voted for that purpose. These are the only expenditures expressly authorized by the district. It is not claimed by the respondents that other expenditures were authorized by the district.

Trustees are authorized by subdivision 5, section 47, article 6, title 7 of the Consolidated School Law to expend $50 for repairs to the schoolhouse, furniture etc. in any one year without a vote of the district. They may also, on the order of the school commissioner, expend under subdivision 3, section 13, title 5 of the same act, the sum of $200 for repairs to the schoolhouse and $100 for repairs to or for the purchase of furniture. They are also authorized by section 50 of title 7 to expend $50 for the erection of outbuildings when the district is wholly unprovided with such buildings and when such expenditure is directed by the school commissioner or by the Commissioner of Education. It is not claimed by the respondents that the school commissioner or the Commissioner of Education directed expenditures for these purposes. The trustees could, therefore, expend only $50 in addition to that voted by the district.

As the district meeting authorized an expenditure of $800 for removing the building and $1200 for repairs to the building, and the trustees could expend $50 without a vote of the district, such trustees could legally expend $2050 and whatever might be necessary to grade the grounds in a suitable condition. They did

not possess legal authority to expend more. Any expenditure in excess of such amount for the erection and equipment of buildings and the grading and improvement of the site was an unauthorized and illegal expenditure. In making such expenditures the trustees were guilty of a violation of law and of official duty. If it were necessary to expend any considerable amount in excess of the appropriation to place the grounds and buildings in proper condition, it was the duty of the trustees to call a special meeting of the district and permit the legal voters thereof to direct what action should be taken. To pursue any other course would be an unwarranted and illegal procedure. It appears that many of the taxpayers believed improper and illegal expenditures were being made and petitioned the trustees to call a special meeting to consider the question. The school commissioner suggested to the trustees that they call such special meeting. These trustees refused to call such meeting. It was a serious mistake on the part of these trustees under the circumstances to refuse to honor such petition and to fail to comply with the suggestion of the school commissioner. They should have called a special meeting of the district.

The report of this board of trustees to the annual meeting of the district in 1904 shows the following expenditures:

Expenses of grading, cellar, ditch, well etc.		
Grading	$422 55	
Well	150 17	
Cellar and chimneys	650 30	
Cement, lime and brick	94 15	
Tile	130 96	
Labor	231 88	
Posts for fence	30 00	
Use of pump	1 00	
Replacing tree	2 00	
Total	$1 713 01	
Less amount expended by former board	382 93	$1330 08
Architectural work	61 67	
Heating plant	450 00	
Desks and furniture	246 50	
Moving and settling building	875 00	
Registry of deed and lot	1 40	
Electric lights	47 90	
Extra work on closets and clearing lot	17 43	$1699 90
Expense of building		
Bells, batteries etc	$4 30	
Carpenter labor	546 88	
Cartage and car fare	1 94	
Metal ceiling	55 08	
Express and freight	2 56	
Glass	10 32	
Hardware	103 25	
Labels and cards for desk	1 25	
Lavatory	10 00	

Expense of building — *Continued*		
Lumber	$682 72	
Mason work, chimneys and walls	117 20	
Paint, paste, varnish etc	65 10	
Painters' labor	133 55	
Paper for ceilings	16 00	
Pipes, tin etc	57 09	
Registers	5 40	
Sink	1 75	
Slate boards	63 52	$1877 91
Total expenditures	.....	$4907 89

The report made by these trustees therefore shows that they expended $4907.89 for the purposes for which they were legally authorized to expend $2050 plus what might be necessary for grading the grounds in a suitable condition. The respondents do not attempt to state just how much they did expend in grading the grounds. They should be able to give the exact amount expended for that purpose. It is clear that at least $700 in addition to that expended by the former board was expended for this purpose. Accepting this as a fair, reasonable amount to have paid for grading the grounds, the board was authorized to expend not more than $2750. By this liberal estimate their expenditures still exceed the amount legally authorized by nearly $2200. All of these expenditures were made from the fund derived from the award paid by New York City.

These respondents attempt to justify their conduct in making these excessive and illegal expenditures, on the theory that section 21 of article 2, title 7 of the Consolidated School Law, conferred on them that power. Sections 19 and 20 of this article and title of the school law provides for the sale of a district site. Section 21 provides for the use that shall be made of a fund derived from the sale of a site. This fund, as previously stated, was obtained as an award in condemnation proceedings. The school law makes no provision for the use of a fund obtained in this manner. The school law does provide for the use that shall be made of money derived from a sale of the site of a district. A fund derived from an award made as the result of taking a site under condemnation proceedings is the equivalent of a fund derived from the sale of a site. In the absence of a provision of law to the contrary such fund must be so regarded and must be used as the law directs a fund derived from the sale of a site to be used.

The section of law above cited must, therefore, govern the use of this fund in question. The law reads that this fund "shall be applied to the expenses incurred in procuring a new site and in removing or erecting thereon a schoolhouse and improving and furnishing such site and house, and their appendages, so far as such application shall be necessary; and the surplus, if any, shall be devoted to the purchase of school apparatus and the support of the school as the inhabitants at any annual meeting shall direct." This section of law does not provide that *all* of such moneys shall be expended on a new site and buildings but only so much thereof as may be necessary. This section of law does not

confer on trustees the power to select or purchase sites or to erect or repair buildings or to appropriate funds of the district derived from any source for these purposes. It simply provides that this fund shall be used for certain purposes. To be used for such purposes it must be appropriated by the authority which the law directs, namely, a duly assembled school meeting.

There is no provision of the school law conferring on trustees the power to appropriate money for a site or to determine what amount shall be paid for a site. There is no provision of the school law conferring on trustees the power to appropriate money for the erection of buildings or for the improvement of, or additions to, school buildings except to the amount of $50, nor are trustees empowered to determine what amount shall be used for such purposes. The law does not confer on trustees the power to appropriate money beyond the sum of $50 for the purchase of school furniture. The law does, however, confer on a district meeting the power to appropriate money for these purposes and to determine the amount to be expended therefor (*see* subdivisions 7 and 8 of section 14 and sections 17 and 18 of title 7 of the Consolidated School Law). Before any portion of the $6518.90 could be legally used by the trustees in purchasing a site or removing or erecting a building, it was necessary that a district meeting authorize an appropriation therefrom and to specify the amount to be used. The trustees could legally expend the amount thus voted but no more.

The respondents claim that the action of the district in voting $800 for removing the old building and $1200 for repairs was illegal and not binding upon them, on the ground that the vote was not taken at a proper meeting and not taken by the method which the law directs. In this they are in error. Such action was binding upon the trustees until declared illegal by proper authority. If these respondents were correct in this contention they had no right to make any expenditure from this fund except the $50 which the law permits trustees to expend without a vote of the district. By this contention the trustees evidently recognized the limitations placed on their powers by the Consolidated School Law in relation to expenditures for the purposes under consideration. If these expenditures were made by the respondents knowing that they were exceeding their rightful powers, their conduct was wilful and they must stand guilty of a wilful violation of law and neglect of duty.

The trustees were authorized by the annual meeting of 1903 to inquire into the best mode of heating the schoolhouse. They never reported to the district on that question, but decided on a heating system and installed it at a cost of $450, without direction from the district to do so. It also appears from the report of the trustees to the annual meeting of 1904 that such trustees installed a system of electric lights in the building, put in metal ceilings, papered the walls, expended nearly $250 for furniture and made expenditures for several other purposes which had not been authorized. Many of these expenditures were not necessary for the comfort or convenience of the children but added to the general attractiveness of the building. It was not within the power of these trustees to decide to make such improvements no matter how desirable they may have been. It

was the right of the district, under the law, to pass upon the necessity and the desirability of making such expenditures.

It is also alleged in the petition that these trustees personally supplied material, performed labor and services for the district and were thereby personally interested in contracts which they, as trustees, made for the district. One of the purposes for which it is alleged excessive and illegal expenditures were made was grading the grounds. The official records of the board show that Trustee Quick was employed on the grading a large portion of the time between October 5, 1903, and February 6, 1904. He received $5 per day for the services of himself and team. These records also show that he supplied material used in the improvements made. He received for such labor, services and material at least $346.60. The official records of the board also show that Trustee Parkus, who is a painter and decorator, supplied material at various times, that he was employed much of the time between November 20, 1903 and February 20, 1904, receiving $3.50 per day. He received for such labor, services and material at least $303.87. The bills of Trustee Quick and Trustee Parkus for such labor, services and material were presented to the board of trustees, audited by such body and paid under the order of that body. Mr Parkus and Mr Quick constituted a majority of the board. They could have controlled the action of the board. Mr Oakley offered no objection to this procedure, but on the contrary readily concurred in it. It was an illegal and wrongful proceeding and Mr Oakley in acquiescing in it became equally censurable with the other two members. In fact he appears to have been the controlling power in the board. It is charged by petitioners and admitted by respondents that all members of the board rendered services or performed labor for which they presented bills which were audited officially by the board.

This board of trustees made a division of certain work among its members. These members performed such work. As trustees they passed upon the character and quality of the work which they as individuals performed for the district. Again as trustees they determined the value of the services which they as individuals rendered the district. It is this very practice which the law prohibits. It is a violation of section 473 of the Penal Code for trustees to become interested personally, directly or indirectly, in any contract which they are authorized to make for the district. The petitioners have shown that those respondents did not make proper effort to get this work done for the district at the lowest price consistent with substantial service. The appellants have also shown by evidence of competent witnesses that the cost of the building and improvements is largely in excess of their real value. Four men competent to testify on the value of the school property in question as it now stands, swear that the cost of erecting the buildings and making the improvements to the grounds etc. should not have exceeded $2500, provided such sum was properly expended. The respondents have failed to present competent evidence to controvert this charge. The testimony of men who have made repairs in the locality of this school district showing that such repairs have cost more than was anticipated is

not sufficient nor is it competent. Testimony on this point should be from men familiar with grading and building and who know the cost of performing such labor and of the materials to be used etc. Such testimony the resondents have not offered and the allegation that the funds of the district were wastefully and wrongfully expended is established.

Section 17 of article 2 of the Consolidated School Law rovides that no schoolhouse shall be built in any school district until the plan of ventilating, heating and lighting have been approved, in writing, by the school commissioner. The plans of this building, showing these features were never submitted to the school commissioner for approval and the trustees erected this building in violation of a law generally understood by the people and with which they must have been familiar. The conduct of these trustees has been reprehensible in many ways. They seem to have had no regard for the wishes of the people of the district as clearly expressed in district meetings. They have shown no respect for the law regulating their duties and limiting their powers. They decided to make certain improvements and expenditures without regard to their legal powers or the rights of the district and they put into effect their decision thereon. School districts are entitled to protection in their rights and when trustees are determined to ignore such rights this Department is bound on appeal in due form to afford districts such protection as the law provides. The severe penalty of removal from office will not be imposed for slight reasons or for trivial offenses committed through a misunderstanding of the law; but when the conduct of trustees shows clearly that they have wilfully violated the law and wilfully neglected their duty this penalty must be imposed. When a district, acting within its legal powers, directs its trustees to do certain things and such trustees fail to do as directed or deliberately exceed their powers in such matter they are guilty of a wilful violation of law and of neglect of official duty.

School officers are to be commended for manifesting a desire to erect suitable buildings, to properly equip them, and improve and beautify the grounds. In all proper and legal efforts to achieve such results they will be fully sustained by this Department. When the voters of a district refuse to properly cooperate with trustees in such matters this Department will extend all assistance and relief which the circumstances will warrant and the law will permit. School officers who disregard the plainly written statutes and violate the rights of a district to reach these ends, of course, can not be sustained.

I decide, that Frank L. Parkus and Charles S. Oakley, members of the board of trustees of school district no. 6, town of North Salem, Westchester county, were, and each of them was, guilty of wilful violation of law and wilful neglect and violation of duty:

By expending illegally, excessively, exorbitantly and wrongfully the funds of the district; by knowingly permitting members of the board of trustees of such district to become personally interested in contracts of the district and by auditing and paying the bills of members of the board for services performed and material furnished; by failing to comply with the directions of the district

in many ways as charged in the moving papers; and by failing to protect the rights, property and funds of the district as required by virtue of the offices which they held and as the law provides.

The petition herein is sustained.

It is ordered, That Frank L. Parkus and Charles S. Oakley, and each of them, be, and they are, and each of them is, hereby removed from office as members of the board of trustees of school district no. 6, town of North Salem, Westchester county, for wilful violation of law and wilful neglect and violation of duty as members of such board of trustees.

It is further ordered, That Uel T. Bailey, the member of the board of trustees of said district, elected at the annual meeting held in such district August 2, 1904, without unnecessary delay, call a special meeting of the legal voters of said district no. 6, town of North Salem, in accordance with the provisions of section 6, title 7 of the Consolidated School Law, for the purpose of electing a trustee whose term of office shall expire on the first Tuesday of August 1905, in place of Frank L. Parkus, removed; also, for the election of a trustee whose term of office will expire on the first Tuesday in August 1906, in the place of Charles S. Oakley, removed.

3727

In the matter of the application for the removal of Isaiah M. Merrill as trustee of school district no. 8, town of Northfield, county of Richmond.

A trustee who reported a claim against the district as paid, when in fact it was not paid, and who received district moneys into his own hands to pay the same, and then liquidated the debt by giving his personal promissory note, is guilty of a procedure which can not be upheld.

Trustee's removal from office decreed.

Decided November 15, 1888

Draper, *Superintendent*

Isaiah M. Merrill is one of three trustees in the district above named. He was elected to such office at the annual school meeting in 1886, and his term will expire in 1889.

The petitioners allege that he has been guilty of making false reports to district meetings. It was shown that the annual report of the trustees made in 1887, showed that a bill for lumber in favor of J. H. Van Clief & Son had been paid, when in fact such bill had not been paid. It seems that a brother of Merrill was the collector of the district and that between them they received the money which should have paid this bill. On the other hand, the trustee claims that the report was not intended to show that such bill had been in fact paid, but that an order had been drawn upon the collector in favor of Van Clief & Son for the payment thereof. It is also shown that Merrill settled this bill with Van Clief & Son on the 4th of February 1888, by giving to said firm his promissory

note for the amount, and that said firm received such note in settlement of the claim.

There are some other matters set forth in the petition for the removal of Merrill, but I do not deem it necessary to consider them.

Sufficient appears to show that the trustee has been derelict in the duties of his office. He does not deny that he had full knowledge of all the circumstances and was responsible for the report to the district meeting in 1887 being made in the form in which it was presented. If the claim of Van Clief & Son had not actually been paid, the report should not have indicated that it had been. But while it might be possible to overlook a misstatement of that nature upon the ground that it was unintentional and that there was no deliberate purpose to deceive the district meeting, it is not possible to overlook the fact that this trustee received the money of the district into his own hands and that instead of paying the same over to the claimant he converted the same to his own use for a long time, and then finally settled the claim by giving his personal promissory note therefor.

A school trustee has no right to take into his hands moneys belonging to the district. It is his business to draw orders upon the proper officer in settlement of legitimate claims and deliver the order to the claimant, who must get his money from the collector. It is quite possible that there has been no deliberate purpose to defraud the district, but the conclusion is irresistible that the trustee in this case has been guilty of a procedure which can not be upheld as a predecent, and can not be tolerated with safety to the public interests.

Mr Merrill, the trustee, also comes before the Department with a petition asking that the records of a certain district meeting be expunged from the official records of the district, on the ground that such meeting was not regularly and lawfully called. It is alleged by the respondents that the meeting referred to was not intended to be a regular district meeting, that it was only a voluntary assemblage of residents of the district looking to action which should be advantageous to the interests of the district. It is admitted that if the records of such a meeting have been incorporated into the records which the law requires the clerk to keep, that the same should be expunged therefrom.

It is, therefore, ordered that Isaiah M. Merrill be, and he is hereby removed from the office of trustee in school district no. 8 of the town of Northfield, Richmond county, and that the remaining members of the board call a speedy meeting of the district for the purpose of filling such vacancy.

5441

In the matter of the petition of Charles J. Quinby and Robert F. Smith for the removal of William A. Cromwell from the board of education in union free school district no. 1, town of White Plains, Westchester county.

Removal of member of board of education; authorizing expenditures in excess of appropriation. Where a board of education directs certain specified repairs to be made to the several school buildings in a union free school district and one of the members

of the board acts as a committee in making such repairs, the fact that such member in contracting for repairs exceeded the amount which had been appropriated for such repairs, is not a sufficient cause for his removal where it appears that there was no evidence of bad faith and that the board itself examined the accounts for the repairs and ordered them to be paid.

Failure to obey rules requiring bids. A board of education adopted a rule requiring that bids should be received on all contracts exceeding the sum of $100. A wilful violation of such a rule to the detriment of the district for the purpose of favoring any person or persons in transactions respecting the district property or affairs is sufficient ground for removal. Where the evidence shows that the violation of such rule is technical and not wilful he should not be removed. A petitioner who seeks the removal of a member of the board of education because of a violation of such a rule must show by preponderance of proof that such violation was wilful and resulted in injury to the district.

Decided March 10, 1910

Charles J. Quinby, attorney for appellant
William A. Cromwell, attorney for respondent

Draper, *Commissioner*

The petitioners, Charles J. Quinby and Robert F. Smith, are taxpayers and qualified electors in union free school district no. 1, town of White Plains, Westchester county, and they ask for the removal of William A. Cromwell from his office as member of the board of education of such district. The petition was filed in this Department November 17, 1909; an answer was filed by the respondent November 24, 1909, but the subsequent pleadings and affidavits submitted by both parties delayed the closing of the case until January 24, 1910. The case has assumed voluminous proportions; a large number of affidavits have been submitted on both sides and a considerable amount of documentary evidence has been adduced. It has been necessary to carefully examine all these pleadings, affidavits and documents to reach a decision.

The proceeding is brought under section 228 of the Education Law which provides that "For cause shown, and after giving notice of the charge and opportunity of defense, the Commissioner of Education may remove any member of a board of education. Wilful disobedience of any lawful requirement of the Commissioner of Education, or a want of due diligence in obeying such requirement, or wilful violation or neglect of duty, is cause for removal." The respondent has been served with a copy of all the charges, and has replied thereto in detail. He has been notified of his opportunity to present oral testimony in his defense. The petitioners and the respondent have expressly consented to a decision upon the papers presented, without oral argument.

It is admitted that the respondent was a member of the board of education of union free school district no. 1, town of White Plains, which consists of the village of White Plains, in the year 1908, and that during that year he was a member of the committee on buildings and repairs; that at the annual meeting held in August 1908, an item of $4500 was voted to be expended during the ensuing school years for repairs to school buildings; that the respondent, as a member of the committee on buildings and repairs, presented a detailed report to

the board, at a meeting held July 14, 1908, specifying the character and extent of the repairs to be made on the several school buildings in the district, and thereupon the making of such repairs was referred to the said committee, with power; that on July 30, 1908 the respondent, as sole acting member of such committee, sent notices to certain persons, with specifications attached, directing them to make the repairs in accordance with such specifications; that the repairs were accordingly made under the direction of the respondent during the months of July, August and September 1908, and that the total amount of indebtedness thereby incurred amounted to over $7300; that such repairs were made without competitive bids being asked for or received.

The petitioners contend that the respondent wilfully violated the law in incurring an indebtedness for repairs in excess of the sum of $4500, voted at the annual school meeting held August 4, 1908, for repairs to school buildings. But it appears from the allegations contained in the petitioners' reply that the board directed that certain specified repairs be made to the several school buildings, without regard to the probable cost thereof, at a meeting held prior to the annual meeting of the district when the appropriation was made. It is the duty of a board of education to keep the schoolhouses of the district, and the furniture and apparatus therein in repair (Education Law, § 226, subd. 6), and such duty is not limited or enlarged by an appropriation which may be made therefor by a district meeting. If the amount appropriated for such purpose by the annual meeting in accordance with estimates submitted to such meeting by the board is insufficient to pay the cost of necessary repairs, and there is no other fund available for such purpose, it is the duty of the board to present a supplementary estimate to a special meeting duly called by such board (Education Law, § 242). If the school buildings are in such condition as to make the repairs necessary for the use of such buildings for school purposes, the board may take the necessary action to secure a tax levy to raise the amount required to pay for such repairs, as in the case of contingent expenses (Education Law, § 244). While it is true that under the provisions of section 232 of the Education Law, the amount appropriated for a specific purpose measures the liability to be incurred, such section must not be construed as arbitrarily limiting the amount to be expended in making repairs which must be made to preserve the district's property and to render its buildings fit for use.

All of the bills submitted by the persons whom the respondent employed to make the repairs, amounting to more than $7300, were carefully examined by the board, and they were ordered paid without a dissenting vote. If there was any unlawful act committed in paying out money in excess of the appropriation made by the district meeting, it was the act of the board, for which it would be unjust to hold this respondent responsible. There is no proof that all or a part of the repairs were unnecessary, or that there was no fund available to pay the cost thereof, and it must therefore be held that neither the respondent nor the board of education violated the law in exceeding the amount appropriated for such repairs at the annual school meeting.

A more serious question is involved in the declaration that the respondent is guilty of a wilful violation or neglect of duty in failing to ask for and receive bids for the performance of the work which he was directed to do, and in omitting to refer the matter of making certain repairs to the board of education, as required by the rules and regulations of the board. The rules which it is insisted the respondent has violated are as follows:

Buildings and repairs: this committee shall exercise general supervision over all buildings and grounds. It shall order all needful repairs on all school buildings and grounds, when the sum to be expended does not exceed $100, otherwise it shall first obtain the approval of the board.

Proposals and bids: bids shall be received on all contracts and purchases exceeding the sum of $100, the board reserving the right to accept or reject any and all bids.

These rules were probably in force when the respondent directed the reports to be made according to the specifications which had been submitted to the board, although this is denied by the respondent. It may be that the board had not continuously observed such rules. It may be that the board had not adopted rules and regulations for the years 1907, 1908 and 1909. But it does not appear that such rules and regulations have been abrogated, and the rules cited should have guided the respondent in the performance of his duty.

It appears from the evidence that all the repairs of certain kinds on all the schoolhouses were given to the same person or firm. For instance, the work of renewing, repairing and cleaning heaters, repairing roofs, skylights etc. was given to Klein & Carter. This work was done on three schoolhouses. The expense incurred for such work on two of the schoolhouses exceed $100. The total amount of this claim was $973.32. The work of papering, painting and kalsomining was given to one firm, and was done by the day without contract, except as to a portion thereof on two of the school buildings. The total amount of such work was $1288.91. The carpentry work on all these school buildings was done by one man, and the amount charged therefor was $656. The masonry work required in and around all these buildings, consisting of plastering, cement work and brick work, was done by daywork and without competitive bids or contracts. The amount charged for such work was $1776.03. The amount expended for new plumbing and repairing old plumbing in the several school buildings was $1723.52, and it was all done under an arrangement made with one man on a daywork basis, separate charges being made for materials. In many instances the amount expended on each school building for the several kinds of repairs which were ordered by the respondent, in his capacity as sole member of the committee on buildings and repairs, exceeded the sum of $100, and the expenditures thereof should have been subject to approval by the board and in accordance with competitive bids. There was an apparent disregard of the two regulations of the board to which reference is made above.

The respondent should have known that he was exceeding his authority in ordering these repairs to be made without asking for competitive bids and sub-

mitting the same to the board so that contracts therefor might be awarded. The Department approves of such a method of expenditure of the district's money, and will insist that such method be followed where the law or the rules of the board require it. If in any case it is shown by sufficient and competent evidence that a board of education or member or committee thereof has wilfully violated any such law or rule, to the detriment of the district, with the purpose of favoring any person or persons in transactions respecting the district's property or affairs, such board, member or committee will be removed from office.

The respondent is guilty of a technical violation of the rules of the board in ordering the repairs made without receiving competitive bids. But unless such violation is shown to be wilful there is not sufficient proof to justify his removal. The statute conferring the power on the Commissioner of Education to remove a member of a board of education recognizes "wilful violation or neglect of duty" as cause for removal. There is no proof in this case that the respondent wilfully violated such rules or wilfully neglected his duty. The minutes of the board show that each member thereof voted in favor of a motion referring the matter of repairs to the various schools to the "building committee *with power*." The respondent insists that he thought he was thereby given power to proceed as he saw fit in making the repairs specified. The motion was broad in its terms and on its face would appear to confer ample authority upon the respondent to proceed with the repairs. He might have misjudged his limitations, but he was not wilful in his transgression; there is no evidence that he wilfully refused to obey the directions of the board in respect to such repairs.

The petitioners have alleged that the bills presented to the board were exorbitant and that the repairs ordered by the respondent were not reasonably necessary. These allegations are denied by the respondent. The petitioners should have shown in what respect the repairs ordered were unnecessary and how the prices charged were exorbitant. Both of these statements, if true, could have been substantiated by affirmative proof. There being no proof of unnecessary work done upon the order of the respondent, for prices which are excessive, it must be held that the respondent is not guilty of fraud or collusion. Whatever proof is produced by either party upon this question leads to the conclusion that the district was not seriously injured by these transactions. The money paid for such repairs was not misappropriated. The petitioners must bear the burden of their allegation of misfeasance in office based upon the charges that favored tradesmen and contractors were permitted to charge exorbitant prices for work that was not needed. They have not assumed this burden, and it must be held that these charges are not proven.

Mr Edward B. Long and Mr Robert C. Bromm are members of the board of education and present affidavits in support of the petition for removal. It appears from Mr Long's affidavit that he and Mr Bromm were appointed a committee to examine the bills for repairs which were claimed to have been incurred by the respondent without authority. It is apparent that these two gentlemen were not friendly to the respondent. If they had discovered any fraud or collu-

sion in these transactions they would have probably reported that fact to the board. This committee kept these accounts in their possession for several weeks and presumably made a careful examination of each piece of work done. The minutes of the board show that this committee reported nearly all the bills in controversy and advised that they be paid. Mr Long and Mr Bromm both say that they advised the board to pay the bills, since they believed that they were legal claims against the district. If the respondent exceeded his lawful authority in incurring an indebtedness in excess of an appropriation, or if he wilfully violated a provision of law in failing to advertise for and receive bids for the work done, the claims therefor were not enforceable against the district. When the board directed the payment of these claims, it recognized their validity, and in effect approved the acts of the respondent. The acts of the respondent thereby became the acts of the board, and if the respondent is guilty of improper conduct in incurring indebtedness in excess of the appropriation made for repairs, the board is equally guilty, and if the respondent should be removed on this account the members of the board who voted to pay such claims should also be removed.

After a careful examination of all the material matters involved in this proceeding it must be held that the respondent has not been shown to be guilty of any intentional or wilful violation or neglect of duty. The petition is therefore dismissed.

5338

In the matter of the appeal of A. L. Cleaveland and E. N. Christopher from the action of the board of education of union free school district no. 1, town of Union, Broome county.

A proceeding to impeach the official action of a board of education without showing definite knowledge of wrongdoing on the part of such board and without supplying sufficient proof to sustain alleged charges, will be dismissed.

Decided September 24, 1907

Thomas A. Macclary, attorney for respondents

Draper, *Commissioner*

The moving papers in this proceeding are very defective. The verification, the service, the insufficiency of proof of wrongful conduct on the part of the board of education and the failure of appellants to show that the action complained of operates as a grievance to them, are sufficient grounds for dismissing this appeal. It further appears that appellants were at the annual meeting of district no. 1, town of Union, on the evening of August 6, 1907, and raised no objection to the acts complained of. Appellants are thereby estopped from raising objection to such proceedings now.

It appears that the notice of the annual meeting was published but three weeks preceding the date of such meeting. If no notice at all had been given of such meeting the proceedings of such meeting would not be void. The law

fixes the date of an annual meeting and the voters of a district may convene on that date at the proper hour and place and transact the business of the meeting if no notice at all is given. The provision of law requiring notice of such meeting is simply directory and not essential to the validity of the meeting.

There is no ground for appellants' contention that the board improperly paid an attorney $10 for services rendered the board. The services were proper and the charge therefor was not excessive. The board had full authority to employ an attorney for the work which he performed and the expense of the same was a district liability.

The principal contention of appellants is that the published account of the receipts and disbursements of the board are not sufficiently itemized. On the contrary, the report which was printed appears to be very complete in details and very clear. It may be that there are two clerical or typographical errors but there is nothing in these suggestive of irregularity on the part of the board.

A person should not initiate a proceeding to impeach the official action of a board of education without having definite knowledge of wrongdoing on the part of such board and without supplying sufficient proof to sustain his charges.

The appeal herein is dismissed.

3907

In the matter of the appeal of Alfred T. Bortle and Jacob P. Lansing v. the trustees of school district no. 11, town of Schodack, Rensselaer county.

A trustee having placed himself in an equivocal position as between the district whose interests he should protect, and a contractor engaged in building for the district, by accepting employment from the contractor upon such work, removed from office.

Decided September 10, 1890

Draper, *Superintendent*

Appeal to restrain trustees of district no. 11, town of Schodack, Rensselaer county, from the further prosecution of the work of building a schoolhouse in said district, and for the removal of James Benner, one of the trustees, from office.

The ground upon which an order to restrain is asked for, is that the work is not being carried on as required by the plans and specifications adopted.

The trustee's removal is sought upon the ground that he has been employed by the contractor, and is doing work for him as a laborer or carpenter upon the school building, thereby placing himself in an equivocal position as between the district whose interests he should guard, and the contractor by whom he is employed.

Having carefully considered the pleadings filed, and after hearing the appellant and counsel for the respondent, I have concluded to defer a final determina-

tion of all the issues raised until the completion of the building in question. I make, however, the following preliminary determination and order:

1 I deny the application for an order to enjoin the prosecution of the work.

2 I hereby remove the trustee, James Benner, from office, it having been conceded that he is engaged at work upon the schoolhouse, under employment from the contractor. I do this among other reasons, in order that a trustee may be selected by the legal voters of the district if they will, who is in no manner associated with the contractor in the performance of his contract, and who will guard and protect the interests of the people.

I do hereby enjoin the trustees of said district from issuing any further order to the contractor or his assignees for work done or to be done upon the contract, for building said schoolhouse, and the collector of said district from disbursing any district money upon orders to the contractor or his assignees upon said contract, until ten days after the completion of said contract, and the acceptance of the building by the trustees, in order that any legal voter of the district, believing that the contract has not been complied with, may have a reasonable opportunity to call the attention of the Department thereto.

4773

In the matter of the petition of G. M. Sweet and others, for the removal of Frank K. Avery from office as a trustee of Phoenix school district, Schroeppel, Oswego county.

In a petition for the removal of a school officer for wilful violation of duty, under the provisions of section 13, title 1, of the Consolidated School Law of 1894, the petitioners must establish, by a preponderance of proof, that such officer has acted *intentionally, with a wrongful purpose,* or such petition will be dismissed.

Decided June 23, 1899

O. M. Reilly, attorney for petitioners
Addison D. Merry, attorney for respondent

Skinner, *Superintendent*

This is a petition by certain residents of the Phoenix school district, in the village of Phoenix, county of Oswego, praying for the removal of Frank K. Avery from office as a member of the board of education of said school district, for wilful violation and neglect of duty.

The petitioners, upon information and belief, as the main grounds for the removal of said Avery, allege that on February 22, 1898, the said Avery, then being one of the trustees of such school district, entered into a contract with the board of trustees of said district, by which he sold and delivered to said district 40,625 pounds of coal at the agreed price of $5.25 per ton, amounting in the aggregate to the sum of $106.64, and on or about April 5, 1898, received said sum from such district; that on or about January 28, 1899, still being one of

the trustees of said district, Avery entered into a contract with the board of trustees of the district by which he sold and delivered to said district 40,280 pounds of coal at the agreed price of $4.75 per ton, amounting in the aggregate to the sum of $95.67, and on or about February 20, 1899, received said sum from said district; that on or about October 26, 1898, said Avery then being one of the trustees as aforesaid, and a member of the firm of Merry & Avery, which firm was engaged, in the village of Phoenix, in conducting the business of fire insurance for divers fire insurance companies, entered into a contract with said board of trustees by which he procured to be written and delivered to the clerk thereof a policy of insurance upon the school building of the district, the premium thereon being the sum of $48, and which premium was paid by the board of trustees to said Avery on or about December 1, 1898.

Said petitioners further allege, upon information and belief, that at the times he furnished said coal and received pay therefor, and delivered said policy of insurance, and was paid the premium thereon, "said Avery knew that he had no right to be directly or indirectly interested in any contracts with said school district while being a member of the board of trustees of the district."

The respondent, Avery, has answered the petition in which he admits that he was elected a member of the board of education as stated in the petition, and is still acting in such capacity, and for the purposes of the proceedings herein, he admits the sale and delivery by him to said school district, in February 1898 and January 1899, of the coal and at the purchase price as stated in the petition, and that he received from the district such purchase price; that he denies the allegations in the petition that the bills for said coal were never audited by said board, and alleges that said bills were duly audited; that he denies the allegations in the petition, that at the times he furnished such coal and received pay therefor, he knew that he had no right to be directly or indirectly interested in any contracts made by him with said school district, or by its board of education; but on the contrary alleges that at none of said times had he any knowledge of the existence of any law forbidding such acts or contracts, or that he had any knowledge that his said acts or contracts were in violation of any law of this state.

Respondent Avery further admits that he was a member of the firm of Merry & Avery as alleged in the petition, but alleges that before the formation of said firm it was agreed that he (Avery) was to have an interest only in such business as he should solicit and bring to said firm, and that he did not bring, solicit or procure the issuing of the policy of insurance upon said school building, and never had any interest whatever in the premium paid thereon, or any commission thereon; that the business of procuring such insurance had been solicited by, and promised to, Merry prior to the formation of the firm of Merry & Avery in January 1897.

To said answer the petitioners have filed a reply.

In section 18, article 4, title 8 of the Consolidated School Law of 1894 it is provided, among other things, that no member of a board of education shall be personally interested in any contract made by said board.

Section 13 title 1 of the Consolidated School Law of 1894 provides that whenever it shall be proved to the satisfaction of the State Superintendent of Public Instruction that any school commissioner or other school officer has been guilty of any wilful violation or neglect of duty under said act, or any other act pertaining to common schools, or wilfully disobeying any decision, order or regulation of such Superintendent, the said Superintendent may, by an order under his hand and seal, remove such school commissioner or other school officer from his office.

In the people ex rel. Clingen v. Draper, State Supt. etc., 63 Hun 389, the general term for the third department held that "*wilful*" in said section 13 means "*intentional.*" In the people ex rel. Light v. Skinner, Supt. etc., 37 Appellate Division Reports 44, the court called attention to the established doctrine that where the power to remove an officer is conferred by authority of a statute, it must be strictly construed, and its provisions accurately followed. That it would not be doubted, as claimed by counsel, that a power to remove officers who have been elected by the citizens of the town in which they live, to an honorable office for a term of years, should not be exercised except in a reasonably clear case, and with great caution. The court held that " The words ' wilful violation of duty,' as used in section 13, title 1 of the Consolidated School Act, as applicable to acts for which members of a board of education may be removed by the State Superintendent, must be construed to mean acts intentionally done with a wrongful purpose."

The petitioners allege, *upon information and belief,* that Trustee Avery knew at the time he entered into each of the two contracts with the board of which he was a member, to furnish coal for the district, that the law forbade him to be personally interested in either of such contracts. The respondent, Avery, expressly denies that he had any such knowledge.

I decide:

That the petitioners have failed in establishing by a preponderance of proof that the respondent, in entering into such contracts, acted intentionally with a wrongful purpose.

I further decide:

That the preponderance of proof filed herein, establishes the fact that the respondent herein had no personal interest in the matter of insuring the school building by an insurance company of which the firm in which the respondent was a member, acted as the agents.

The petitioners allege in their petition that on the evening of April 5, 1899, at a meeting of the board of education of said school district, the respondent, Avery, used abusive and insulting language toward certain other members of such board, and was guilty of official misconduct.

Assuming, for the purpose of argument only, that such misconduct is established by the proofs herein, I have no legal authority to remove the respondent from office as a member of said board of education for official misconduct.

Subdivision 13 of section 15, article 4, title 8 of the Consolidated School Law of 1894, provides that the boards of education of every union free school dis-

trict shall severally have the power, and it shall be their duty "To remove any member of their board for official misconduct." Said subdivision requires a written copy of all charges made of such misconduct shall be served upon him at least ten days before the time appointed for the hearing of the same; and he shall be allowed a full and fair opportunity to refute such charges before removal.

The petitioners having failed to establish the allegations contained in their petition by a preponderance of proof, such petition is dismissed, and the prayer of the petitioners is denied.

4576

In the matter of the petition of Julien T. Williams for the removal of Frederick D. Light, Daniel Scannell, Charles J. Flahaven, Charles C. Parker and Henry F. Van Devort from office as members of the board of education of the town of Dunkirk, Chautauqua county.

When a meeting of a board of education is duly adjourned to a day and hour, and upon such day and hour two members thereof are present and after waiting for seven minutes for their associate members to arrive, adjourn such meeting without day and leave the building and notify their associates that the meeting is adjourned without day and such associate members, notwithstanding such notice, proceed to organize a meeting of such board, claiming such meeting to be the regular adjourned meeting, and proceed to transact business, such members of said board, so acting, are guilty of a wilful violation of duty and upon petition will be removed from office.[1]

Decided September 4, 1897

Skinner, *Superintendent*

Julien T. Williams, the petitioner in the above-entitled matter, has filed his petition, alleging that he is the president of the board of education of the town of Dunkirk, Chautauqua county, and asking for the removal of Messrs Light, Scannell, Flahaven, Parker and VanDevort as members of said board of education for wilful violation and neglect of duty in holding illegal meetings of said board, and assuming to transact business thereat, and attempting to carry into effect the motions and resolutions of such illegal meetings; and for disregarding and refusing to obey an injunction order of the State Superintendent of Public Instruction.

Messrs Light, Scannell, Flahaven, Parker and Van Devort have answered the petition.

The material facts alleged in the petition of the holding by the respondent herein, of an illegal meeting on June 14, 1897, are not controverted.

It appears that by chapter 54 of the Laws of 1888, the Dunkirk union free school district was established; that said chapter 54 has been, at different times, amended; that said district is under the direction of a board of education which

[1] The State Superintendent was reversed by the Court of Appeals upon this case. The opinion is given here for the purpose of making the record of the case complete.

board, for the school year of 1896–97, consisted of eight members, namely, the petitioner and respondents herein, and Thomas C. Jones and Richard Mulholland, of which the petitioner was president and the respondent, Light, secretary; that said board is a body corporate, a majority of whom shall constitute a quorum for the transaction of business; that such board has power to fill vacancies occurring in said body; that a regular meeting of said board is required to be held once in each month, and may be adjourned from time to time; that special meetings may be called by the president of the board, or, in his absence or inability to act, by the secretary or any other member of the board, as often as necessary, by giving personal notice to each member of the board, or causing a written or printed notice to be left at his place of residence, at least twenty-four hours before the hour of meeting; that said board shall, at the first meeting after the annual election in each year appoint one of their number president of the board, who shall preside at the meetings of such board when present, and when absent a president pro tempore shall act in his stead.

It further appears that a regular meeting of the board of education of the town of Dunkirk, was held at its office in Dunkirk, on June 14, 1897, at 7.30 p. m., and was duly adjourned to June 16, 1897, at 7.30 p. m., and on June 16, 1897, was again adjourned to June 18, 1897, at 7.30 p. m.; that on June 18, 1897, a written notice was sent by the respondent, Light, as secretary, to each of the members of such board that there would be an adjourned regular meeting of such board of education on Saturday evening, June 19, 1897, at 7.30 o'clock; that on June 19, 1897, at 7.30 o'clock in the evening the petitioner herein, the president of said board, and Mr Mulholland, a member thereof, met in the office of said board of education, pursuant to the aforesaid notice of Secretary Light and remained until 7.37 o'clock when, no other members of said board appearing, on motion of Mr Mulholland the meeting was adjourned; that the petitioner and Mulholland in passing out of the building met certain other members of the board and informed them that the meeting of the board was adjourned without day, and the petitioner and Messrs Mulholland and Jones, two other members of the board, left the building.

It further appears that the respondents herein organized a meeting, the respondent Parker acting as chairman, and the respondent Light acting as secretary, at which said meeting one Clarence F. Morton was elected superintendent of the Dunkirk school for the school year of 1897–98, and other proceedings taken relative to the school of Dunkirk, after which the meeting was adjourned without day.

The respondents claim that the meeting held by them on June 13, 1897, was legal and valid and held pursuant to the adjournment made on June 16, 1897; the petitioner claims that such meeting was illegal, and that the respondents, in holding such meeting, are guilty of a wilful violation of their duty as members of such board of education.

I am of the opinion that the contention of the petitioner is well taken.

On June 16, 1897, the regular meeting of the board of education was adjourned to June 19, 1897, at 7.30 o'clock p. m., and each member thereof was

notified in writing of the fact by the secretary. It was the duty of each member of such board to be present at the hour fixed for the meeting. The members who were present at the hour to which such meeting was adjourned were not legally or otherwise required to wait for their associates or send the janitor to hunt them up, and the action of the petitioner and Mulholland in adjourning the meeting was legal and valid.

The meeting held by the respondents herein on June 19, 1897, was neither an adjourned meeting of the board of education, nor a special meeting of such board. The adjourned regular meeting of the board was to June 19, 1897, at 7.30 o'clock p. m. At 7.37 p. m. only the petitioner and Mulholland were present and such adjourned meeting was then and there adjourned without day. A special meeting of the board could not be held without a notice to each member of such board, and it is not claimed that any such notice for a special meeting to be held on June 19, 1897, was given. It follows that the meeting held on June 19, 1897, at which the respondents were present, and the respondent Parker acted as chairman, was not a legal meeting of the board of education of Dunkirk, but simply a meeting of the five persons who were present, as individuals. The proceedings had and taken thereat have no legal force or effect, and are not binding upon the school district, or upon the board of education thereof.

It appears that the petitioner here in July 1897, brought an appeal from certain acts and resolutions of certain members of said board of education, and that on July 9, 1897, an order was made by me restraining said board from taking any action whatever in regard to the election of a new superintendent of schools in Dunkirk, or dismissing the present superintendent, J. W. Babcock, until the decision of such appeal or a further order should be made by me therein; that on July 30, 1897, the respondents herein addressed a letter to said J. W. Babcock, notifying him that they considered his services as superintendent of schools definitely ended on July 31, 1897. The petitioner herein contends that such action on the part of the respondents was a disobedience of my order of July 9, 1897. The contention is not well taken. The letter was not written in pursuance of any legal action taken by such board of education, but is simply a letter of the five persons who signed it, and has no legal force or effect, and a mere harmless thunderbolt on their part.

By section 13, title 1, of the Consolidated School Law of 1894, it is enacted that whenever it shall be proved to my satisfaction that any school commissioner or other school officer has been guilty of any wilful violation or neglect of duty under said act, or any other act pertaining to common schools, I may, by an order under my hand and seal, remove such school commissioner or other school officer from his office.

I find and decide, That upon the facts presented herein, it has been proved to my satisfaction that said Frederick D. Light, Daniel Scannell, Charles J. Flahaven, Charles C. Parker and Henry F. Van Devort have, and each of them has, as members of the board of education of the town of Dunkirk, been guilty of a wilful violation of duty.

The petition herein is sustained.

It is ordered, That Frederick D. Light, Daniel Scannell, Charles J. Flahaven, Charles C. Parker and Henry F. Van Devort be, and they are and each of them is, hereby removed from office as members of the board of education of the town of Dunkirk, Chautauqua county.

Removal of trustee by Superintendent can not be predicated upon moral grounds, but only upon wilful violation or neglect of legal duty.
Decided November 26, 1869

Weaver, *Superintendent*

Appeal asking for the removal of a trustee upon the alleged ground that he is an habitual drunkard.

I am far from desiring to excuse the degrading habit of intoxication in any one, and certainly not in an officer intrusted with the educational interests of a school district. The fact may be that the *testimony* has failed to show that the respondent is at this time an habitual drunkard, but its manifest tendency is to prove that he has, like many others who have reformed from the vice of drunkenness, relapsed into what it is to be hoped was but a temporary forgetfulness of his better resolutions.

But the appellants have failed to make out any case for my action in the premises. They do not accuse the respondent of any *violation* or even *neglect* of official duty. I have no censorship over his morals. If the voters of a district choose immoral persons for school officers, responsibility as to the damage of such action will remain with themselves as long as such officers are not guilty of any wilful violation or neglect of legal duty in regard to their functions.

Petition for the removal of a trustee for not agreeing with his associates, and for using rude and uncourteous language toward them, denied.
Decided March 2, 1859

Van Dyck, *Superintendent*

On the petition of two of the trustees asking for the removal from office of the third trustee, it appears that the third trustee refuses to cooperate with his associates in matters relating to the administration of school affairs, and that his language toward them is rude and uncourteous.

Concerning the disagreement of Mr Simpson with his associates, they are the majority and can control, and it was never intended that this Department should have power to make men agree, nor to punish them for disagreeing.

In regard to the incivility of the third trustee toward his associates, the district is supposed to know whether or not those whom they elect to office have sufficient culture and refinement, sufficient dignity and purity of character, prop-

erly to adorn the office to which they are elected; and if they see fit to elect one who is rude, vulgar and coarse in his language, this Department will not and can not interfere.

For wilful violation of duty in refusing to accept the lowest bid of a responsible bidder with responsible surety.
Decided August 3, 1868

Weaver, *Superintendent*

A responsible man with a perfectly responsible surety offered to take the contract for repairing the schoolhouse of a district for $101. Other responsible bids were offered under $175; one as low as $104. But the bid for $101 was the lowest.

The trustee refused to accept the surety, and let the contract to his nephew for $175. The Superintendent says: "In view of the facts, I am of the opinion that the trustee has been guilty of wilful violation of duty. He should have used his best endeavors to protect the interests of his district. Instead of doing this, by his own admission, he refused to accept responsible surety for reasons purely frivolous. By this action, the district was put to an additional expense of nearly $75. When district officers appear to have forgotten or to have wilfully disregarded their duties, the Department is bound to interfere for the protection of the district. Order entered removing the said trustee from office."

The State Superintendent will, on proper application, remove a trustee for unwarrantable neglect of official duty.
Decided July 1851

Morgan, *Superintendent*

Elisha Bedell, one of the trustees of school district no. 1 in the town of Hempstead, is charged with a wilful disturbance and interruption of the school taught by Mary Augusta Brown, in said district. Mr Van Cott, another of the trustees, is charged with a refusal to unite with one of his colleagues in prosecuting for such offense, in accordance with the statute.

It is in evidence that Mr Bedell went to the schoolroom, and in the presence of the scholars used angry and abusive language to the teacher, openly countermanded her orders in conducting the school, and caused the school to be thrown into disorder, and that both teacher and pupils were much frightened by his language and threatening manner, and for some time after she was unable to proceed with the school.

The evidence is confirmed by the report of a committee of ten appointed by the inhabitants of the district at the annual meeting, to visit and examine the school, who, in concluding their statement, observe that they "were compelled to

the opinion that Mr Bedell has thereby disqualified himself for the office of trustee, and that it is evidently for the welfare of the school that he should forthwith resign his office."

This array of evidence is met only by a general and unsatisfactory denial by Mr Bedell.

There can be no doubt, in the opinion of the Superintendent, from evidence, that Mr Bedell has been guilty of a gross and unjustifiable violation of law and neglect of official duty. The same conduct in an individual not officially connected with the school would unquestionably have incurred the penalty prescribed by law; and it certainly does not mitigate the offense, nor change its nature, that it was committed by an officer specially charged with the preservation of quiet and order in the school, and with the protection and guardianship of its interests.

The act of 1845, to prevent disturbances in schools, above referred to, makes it the special duty of the trustees of any school district in which any such offense shall be committed, to prosecute such offender, before any officer having cognizance of such offense. Mr Van Cott, one of the two remaining trustees, having been called upon for the performance of this duty, positively refused to comply with said request, and still refuses so to do. This is clearly an unwarrantable neglect of official duty, for which no defense is interposed; and the said Elisha Bedell and Nicholas Van Cott are hereby removed from office as trustees of said district.

4297

In the matter of the appeal of John M. Pendleton v. John Seaton, John Travers and John J. Santry, as trustees; Charles Crowley, as collector; and George Sheridan, jr, as clerk of school district no. 3, town of Castleton, Richmond county.

Where in a petition or appeal for the removal of school officers for a wilful violation or neglect of duty, the petitioner must establish to the satisfaction of the Superintendent that such violations of duty were intentional and not the result of ignorance, neglect, omission, misapprehension or inadvertence.

Decided December 3, 1894

Edward C. Delavan, jr, attorney for appellant

John J. Kenney, attorney for respondents, Seaton, Travers, Santry and Crowley

Crooker, *Superintendent*

The appellant in the above-entitled matter, by proceedings in the nature of an appeal and by petition, asks for the dismissal of the respondents, Seaton, Travers and Santry, as trustees, and the respondent, Sheridan, as clerk of school district no. 3, town of Castleton, Richmond county, for wilful violation and neglect of duty as such school officers, under the provisions of section 13, title 1 of the Consolidated School Law of 1894, and for the removal of the respondent,

Crowley, from the office of collector of said district on the ground, as alleged, of his not being able to read and write, and, therefore, ineligible to hold said office under the provisions of section 23, article 3, title 7 of the Consolidated School Law of 1894.

The appeal and petition of the appellant was received September 26, 1894; a demurrer on the part of Crowley was received October 5, 1894, and also the answers of the respondents Seaton, Travers, Santry and Sheridan. A reply to said answers was received October 12, 1894, and rejoinder to said reply was received October 29, 1894.

The appeal was submitted on the part of the appellant on November 16th and on the part of the respondents November 23, 1894. The appellant alleges as grounds for the removal of trustees Seaton, Travers and Santry, first, that as such trustees they filed the bond of one Crowley as collector without the approval thereof in writing upon said bond; second, that said trustees have failed to file with the clerk of the village of New Brighton the tax lists and warrants of said district for the years 1891 and 1892; third, that said trustees have failed to transmit to the county treasurer of Richmond county the collector's account of unpaid taxes for the years 1892 and 1893; fourth, that said trustees have drawn orders upon the collector for the payment of teachers' wages when no sufficient money was in the hands of said collector to pay such orders; fifth, that said trustees have failed to procure a blank book on which to keep their accounts of all moneys received and disbursed by them as such trustees; sixth, that said trustees have failed to render at the annual school meetings, held in 1893 and 1894, their annual reports as required by the school law; seventh, that said Trustee Seaton has availed himself of his official position to make a profit from the school district.

The appellant alleges that Charles Crowley, who was elected collector of said district at the annual school meeting in 1894, is not eligible to hold the office as said Crowley can not read and write.

The appellant alleges that George Sheridan, jr, as district clerk, has failed to keep open for the inspection of any qualified voter of said district the records, books and papers of said district, and has refused to permit the attorney of the appellant to have access to said records etc.

The appellant also alleges that said Crowley, as collector of said district, has failed in the performance of the duties of his office, and that one Driscoll, a surety upon the bond of said Crowley, is insolvent and that no action has been taken by said trustees to protect said bond.

The appellant appeals from the action of the annual school meeting in said district in 1894, in the adoption of a resolution, by a viva voce vote, to procure an architect to draw plans for a proposed enlargement of the school building, such resolution involving the expenditure of money.

The appellant asks in this one appeal to have said trustees and district clerk removed from office for wilful violation and neglect of duty; to have the collector elected declared to be ineligible to hold his office; and to set aside so much of the

proceedings of the annual school meeting held in 1894, as authorized the trustees to employ an architect.

It appears, since this appeal or proceedings herein was commenced, that Charles Crowley has resigned the office of collector of said district, and being no longer collector of the district I have no jurisdiction.

It appears from the proofs presented in this appeal that one of the sureties upon the bond of Collector Crowley was Cornelius J. Driscoll, and that said Crowley delivered moneys collected by him under the tax list and warrant issued to him to said Driscoll, and that said Driscoll failed on the demand of said Crowley to pay said moneys; that Trustee Seaton and others, upon being informed by said Crowley, of said matters, under the advice of counsel, entered into negotiations with said Driscoll, and had received from said Driscoll some $1400, and that said negotiations were pending when the appeal herein was brought, and that an action has been instituted by said trustees upon the bond of said collector.

It also appears that when the bond of said collector was presented to said trustees for approval they informed said collector that they would approve the bond provided another surety was added, and that one Patrick M. Dailey became such additional surety; that by an inadvertence the notary public who took the acknowledgment of the last surety filed the bond in the office of the town clerk, instead of returning it to said trustees, and that the omission of the written approval of said trustees upon said bond was through inadvertence.

It also appears that the tax lists and warrants for the years 1891 and 1892 were in frequent use after the close of the school year in the negotiations entered into for settlement with the collector and his sureties, and for examination by the counsel for the trustees, and so continued until the commencement of this proceeding that said tax lists and warrants are on file with said town clerk.

It also appears that said trustees did transmit to the county treasurer the account of the collector of unpaid taxes, and the same was retained by said treasurer for some time; that on January 16, 1894, said treasurer wrote to the collector, stating that he had rejected such account as it did not contain map, lot or block numbers, and returned the account to said collector; that although said account contained a description of the lands upon which taxes were unpaid precisely as the same were placed upon the tax list, said trustees corrected such descriptions with the aid of the clerk of the village of New Brighton inserting map, lot and block numbers as far as the same could be identified and sent the same to said county treasurer; that on April 10, 1894, said treasurer returned said accounts on the ground that the taxes for 1893 had been levied; that the next levy of taxes will be in 1895.

It further appears that said trustees had kept books in which are entered their accounts of all moneys received or drawn for or paid by them, with separate accounts of each appropriation and the payments made therefrom, and full minutes of their official proceedings; that said trustees at the annual meetings in said district held in 1893 and 1894, rendered just and true accounts in writing of all moneys received by them respectively for the use of the said district, or raised

or collected by taxes the preceding year, and the manner in which the same were expended, and of all drafts or orders made by them upon the supervisor or collector or other custodian of the moneys of the district, and of every special matter touching the condition of the district, and which reports are entered in the minute book of the district.

It is not established that said trustees have drawn drafts upon the collector for the payment of teachers' wages at times when there were no funds in the hands of the collector for the payment thereof. There is no proof that trustee Seaton has availed himself of his said office to receive any profit or advantage to himself for any official act performed by him nor by reason of any contract of employment of any person for work done for said district.

The respondent Sheridan, the district clerk, for answer to the allegations of the appellant, shows that the first knowledge that he had that the appellant or his attorney desired to examine the records of said district was on September 14, 1894; that at the annual school meeting held in August 1894, a committee was appointed to examine the papers and records of said district, and said meeting adjourned to October 3, 1894, for the purpose of receiving the report of said committee; that records and papers being under examination by said committee, said Sheridan believed that other parties should not have possession thereof until such examination by said committee was concluded; that examination of said committee having been finished on September 28, 1894, he informed the attorney for appellant that said records, etc., were open to his inspection at any reasonable time; that the appellant and his attorney have had free access to said records etc., and made copies thereof on October 2, 1894.

That as to the allegations with reference to the action of the annual meeting in August 1894, upon the resolution presented authorizing the trustees to employ an architect to draw plans for an enlargement of the school building, it appears that the board of health of the village of New Brighton had notified the trustees of said school district that by reason of insufficient air space for the number of pupils, it would be necessary to make an addition to the schoolhouse; that thereupon a resolution was offered at the annual meeting empowering the trustees to procure an architect to draft plans, which resolution was put to a viva voce vote; but the chairman being in doubt as to the result there was a division of the house and upon the division the resolution was declared adopted; that said trustees thereupon entered into an arrangement with an architect to furnish plans upon his stipulating that said district was not to be liable to pay him anything for such services unless such plans should be accepted by the school meeting and at which meeting the sum to be paid should be fixed by the vote of such meeting.

Under section 13, title 1 of the Consolidated School Law of 1894, it is enacted that "whenever it shall be proved to his satisfaction that any school commissioner or other school officer has been guilty of any wilful violation or neglect of duty under this act, or any other act pertaining to common schools or wilfully disobeying any decision, order or regulation of the Superintendent, the

Superintendent may, by an order under his hand and seal, which order shall be recorded in his office, remove such school commissioner or other school officer from his office."

This Department has uniformly held that "wilful" in said section 13, above quoted, means "intentionally" or "designedly" and not ignorance, neglect, omissions, misapprehension or inadvertence, but knowing his duty, absolutely refusing to perform it. The courts of this State have so held. (See People ex rel. Clingen v. Draper, Supt., 63 Hun 389.)

In appeals and petitions to this Department under the school law the burthen is upon the appellant or petitioner to establish his appeal or petition by a preponderance of proof. In this he has failed.

The papers presented upon this appeal and petition have not proven to my satisfaction that said trustees, John Seaton, John Travers and John J. Santry, have, or either of them has, nor that said George Sheridan, jr, district clerk, has been guilty of any wilful, that is, intentional, violation or neglect of duty under the school laws.

The appeal and petition herein are dismissed.

4173

In the matter of the application of Bertha L. Emerson for the removal of George H. Edgerton as trustee of joint school district no. 5, towns of Sidney and Franklin, Delaware county.

Wilful violation or neglect of duty on the part of a school officer, as stated in section 18 of title 1 of the Consolidated School Act, does not mean mere omission, misapprehension or inadvertence on the part of such officer, but an intentional violation or neglect of duty and an absolute refusal to perform a duty and an announcement of doing directly the reverse of what is his duty to do.

Decided May 31, 1893

Crooker, *Superintendent*

This is an application by Bertha L. Emerson for the removal of George H. Edgerton as trustee of joint school district no. 5, towns of Sidney and Franklin, Delaware county.

A verified petition, with an affidavit of Leroy Emerson annexed and notice of their presentation to me, were served on the trustee on March 4, 1893, and filed in this Department on March 8, 1893. An answer was filed by the trustee to which Miss Emerson filed an affidavit in reply.

It appears from the papers presented that on or about August 10, 1892, the petitioner and respondent entered into a verbal contract by the terms of which the petitioner was employed to teach the school in said district for sixteen weeks, commencing on September 26, 1892, at the compensation of $5.50 per week. That about the time of the commencement of the school the petitioner filled out a memorandum of hiring on a form contained in the school register

and left the same at the residence of the trustee, with the wife of the trustee, with a request that the trustee should sign the same and return it to the petitioner; that the trustee was absent from home and before his return the register was returned to the possession of the petitioner. The petitioner states that the trustee had said register in his possession upon two different occasions, but neglected to sign said memorandum, although requested by her to sign the same, she does not definitely state when and where she requested the trustee, in person, to sign said memorandum, and the trustee alleges that it was not signed by him through inadvertence.

The petitioner fulfilled her contract, but the trustee did not pay her wages at the end of each calendar month, but after she had taught for about three months he paid her for two months' services. After the completion of the petitioner's term of employment she applied to the trustee for the balance of wages due her, and the trustee requested further time, which the petitioner declined to accede to. At the interview it would appear that both parties were somewhat excited and irritated. Within a few days the trustee paid the petitioner the balance of the wages due her.

By section 18 of title 1 of the Consolidated School Law of 1864, it is provided that, whenever it shall be proved to the satisfaction of the Superintendent of Public Instruction that any school commissioner, or other school officer, has been guilty of any wilful violation or neglect of duty under said act, or any other act pertaining to common schools, the said Superintendent may, by an order under his hand and seal, which order shall be recorded in his office, remove such school commissioner, or other school officer, from his office.

By chapter 335 of the Laws of 1887 it is provided that all officers who shall employ any teacher to teach in any of the public schools of the State shall, at the time of such employment, make and deliver to said teacher, or cause to be made and delivered, a memorandum in writing signed by said officer, in which the details of the agreement between the parties, and particularly the length of the term of employment, the amount of compensation, and the time or times such compensation shall be due and payable, shall be clearly and definitely set forth; but nothing in said act contained shall be deemed to abridge or otherwise affect the term of employment of any teacher then or thereafter employed in the public schools, etc.

The object of said act was to avoid controversies and prevent misunderstanding between trustees and teachers relative to the terms of contracts as to employments when made orally.

There seems to have been no controversy between the petitioner and the trustee in this matter as to the terms of the contract.

The trustee neglected to sign the memorandum of hiring of the petitioner. The question is, is the trustee guilty of a wilful violation and neglect of duty?

The courts of this State have held that "wilful" in the statute means "intentional," not omissions, misapprehension or inadvertence, but an absolute refusal to perform a duty, and an announcement of doing directly the reverse

of what it was his duty to do. (People ex rel. Clingen v. Draper, State Superintendent, 18 N. Y. Supplement, 232, and cases cited.)

The papers presented upon this application have not proved to my satisfaction that the trustee, George D. Edgerton, has been guilty of any wilful (that is, intentional) violation or neglect of duty under the school laws.

The application is denied and the petition dismissed.

4380

In the matter of the petition of Charles W. Burton, Joseph L. Hover and William A. Choate for the removal from office of Jeremiah I. Best, B. J. Walker and William A. Alsdorf, members of the board of education of union free school district no. 12, town of Schodack, Rensselaer county.

In a petition for the removal of school district officers for wilful violation and neglect of duty, the burden is upon the petitioners to establish such violation or neglect of duty by a preponderance of proof. The courts of this State have decided that "wilful" means "intentional"; that is, a school officer, knowing what the law and his duty are, intentionally does that which is directly contrary to the law and his duty, or so knowing his duty, intentionally neglects to perform it.

Decided September 28, 1895

Alden Chester, attorney for petitioners
T. Almern Griffin, attorney for respondents
Robert G. Scherer, of counsel for respondents

Skinner, *Superintendent*

The petitioners named in the above-entitled matter, on June 19, 1895, filed their petition in which they allege that they are qualified voters of said district no. 12, town of Schodack, and that said district is a union free school district; that said Best, Walker and Alsdorf are the trustees of said district and as such have been guilty of a wilful violation and neglect of duty, as alleged specifically in said petition; that the petitioners ask for the removal of said trustees from office. Annexed to said petition are certain affidavits and papers in support of the charges contained in the petition. An answer by the respondents to said petition was filed on July 5, 1895, denying that said school district is a union free school district, and that they have been guilty of any wilful violation of their duties as trustees as required and imposed under the school law. To said answer are annexed certain affidavits in support of the matters stated in said answer. A reply to the answer has been filed and to the reply a rejoinder. Briefs have been filed by the attorneys of the respective parties, and an exhaustive oral argument made by said attorneys and counsel.

In the charges set out in the petition some five or six allege that the respondents have neglected to do and perform certain duties which, under the school law, are required to be done and performed by boards of education or union

free school districts, and are not specially required to be done by trustees of common school districts. If district no. 12 of Schodack is not a union free school district the respondents do not constitute, nor are they members of, a board of education of a union free school district and hence such charges fall.

I am of the opinion that said school district no. 12 is not a union free school district. The establishment of a union free school in a common school district, since chapter 555 of the Laws of 1864 became operative, is a statutory proceeding, and the provisions of the statute in relation thereto must be complied with. No proof is produced that any action or proceedings under the Consolidated School Act of 1864 and the amendments thereto, or under the Consolidated School Law of 1894, relative to the establishment of union free schools, was or were ever had or taken in said school district. Conceding that at the annual school meeting, held in said district in 1864, a resolution was adopted, in effect, that said district should be changed to a union free school, such action did not establish a union free school under the school law. The fact that the trustees of the district in their annual report for the commissioner for several years called said district a union free school district, and the school commissioner in making his annual report to this Department, from the statements contained in said report of said trustees, called the district a union free school district or that upon an application of the trustees of said district to this Department for an apportionment of library money it was stated therein that the district was a union free school district, and that statement was accepted by the Superintendent as true, did not make said district a union free school district, nor was it a recognition by this Department that it was such district. This Department has no power or authority to recognize any school district as a union free school district, unless there is produced and filed a certified copy of proceedings had and taken under and pursuant to the provisions of the school law relating to the establishment of union free schools establishing said union free school district, or an act of the Legislature of the State creating such union free school district. It is conceded that after a careful search in this Department for a copy of proceedings in the establishment of a union free school in said district no such record can be found.

By the provisions of the Consolidated School Law of 1894, which went into operation on June 30, 1894, the trustee or trustees of every school district whether there is one or three trustees, shall constitute a board for each of said districts respectively, and each of said boards are severally created bodies corporate; that every power committed to said trustees by said act must be exercised as a board; that such board must meet for the transaction of business. A trustee or the trustees of a common school district can not lawfully be interested in any contract made by said board; nor can any trustee lawfully perform labor for the district and fix his compensation for such services; nor can he purchase property for the district from himself and fix the price of said property. As such trustees are required to meet as a board, books should be kept in which the records of all their proceedings should be kept by the clerk of the

district; such clerk should be notified by the trustees of the time and place of such meetings; that such records are the property of the district and should be open for inspection by any qualified voter at all reasonable hours.

By section 13 of title 1 of the Consolidated School Law of 1894, it is enacted that whenever it shall be proved to his satisfaction that any school commissioner or other school officer has been guilty of any wilful violation or neglect of duty under said act, or any other act pertaining to common schools, the Superintendent may, by an order under his hand and seal, remove such school commissioner or other school officer from his office.

The courts of the State have decided that "wilful" means "intentional," that is, a school officer knowing what the law and his duty are, intentionally does that which is directly contrary to the law and his duty, or so knowing his duty intentionally neglects to perform his duty.

The respondents herein, as trustees of said school district during the school year of 1894–95, appear not to have performed their duty strictly in accordance with the provisions of law, especially in meeting as a board and transacting the business as a board; in having a record kept by the district clerk, etc., etc., in the auditing of accounts against the district and drawing orders for their payment, etc., etc., but the proofs herein do not show that such violation or neglect of duty was "wilful," that is, "intentional."

The proofs herein fail to show that the respondent, Best, was pecuniarily interested in the action of the board in employing Best's children to perform janitor work in the schoolhouse.

The charges relative to the failure of the respondents to insure the schoolhouse and furniture for a period of five months, and to the condition of the water closets were not pressed by the petitioners upon the argument before me.

The petition charges that the respondents wilfully and unlawfully removed one Emma Wygant, a teacher in said district, during her term of employment without sufficient cause. I find this charge is not sustained by the proofs. The proofs show Miss Wygant was not removed by them, but resigned, contrary to the wishes of the respondents, and that her resignation was accepted. But if said respondents had demurred or removed her without sufficient cause, I have no power, under the school law, to remove the respondents from office as trustees of said district for such dismissal.

I find and decide, That it has not been proved to my satisfaction that the respondents herein, as such trustees of school district no. 12, town of Schodack, Rensselaer county have, or either of them has, been guilty of any wilful violation or neglect of duty under the Consolidated School Law of 1894, or any other act pertaining to common schools.

The petition herein is dismissed and the application of the petitioners therein denied.

4325

In the matter of the petition of Orin Swift and others for the removal of Daniel E. Butler as sole trustee of school district no. 6, town of Milford, Otsego county.

So long as a school district is in existence, it is the duty of the trustee or trustees thereof to maintain a school therein if there is a sufficient number of pupils to warrant it, and where he or they neglect or refuse to maintain such school, are not excused from performing such duty for the reason that the annual school meeting had voted that no school should be taught in the district for that school year. A trustee who fails to maintain a school will be deemed guilty of a wilful violation and neglect of duty.

Decided February 14, 1895

R. M. Townsend, attorney for petitioners

Crooker, *Superintendent*

This is a petition by certain qualified voters of school district no. 6, town of Milford, Otsego county, for the removal from office of Daniel E. Butler, sole trustee of said district. The principal grounds upon which such removal is asked are, that said Butler did not maintain any school in said district during the school year of 1892–93; that during the school year of 1893–94 a school was maintained in said district for only twelve weeks; and that by the neglect of said Butler the sum of $66.18 of the public moneys apportioned to said district in the custody of the supervisor was lost to the district.

On account of sickness in the family of said Butler his time to answer the petition herein was extended by me, and said answer was not received by me until August 20, 1894. A reply to said answer was received by me on November 13, 1894, and a brief on the part of the petitioners was received by me on February 6, 1895.

It appears from the papers presented that said Butler, at the annual school meeting held in said district in August 1892, was elected sole trustee of said district; that said annual meeting voted that no school should be taught in said district during said school year; that no school was taught or maintained in said district during said school year; that at the annual school meeting, held in said district in August 1893, said Butler was elected sole trustee of said district; that in the autumn of 1893, said Butler employed one Helen Windsor, who taught said school for six weeks and was paid $36 therefor by an order of said Butler upon the supervisor of the town of Milford; that the school remained closed until about February 1, 1894, when said Butler employed one Daniel Thorn, who taught the school for six weeks; that said Butler gave said Thorn an order upon the supervisor who declined to pay the same; that for the balance of said school year no school was maintained in said district; that at the annual meeting of said district, held in August 1894, a successor to said Butler as trustee was elected. In his answer to the petition herein said Butler alleges as an excuse for not maintaining a school in said district in the school year of 1892–93 the aforesaid action of the annual meeting resolving that no school be

taught for said school year, and that during the school year of 1893–94 he was unable to hire teachers except for said twelve weeks during which a school was taught.

The petitioners aver that said Butler could have employed a competent teacher if he had been willing to pay a reasonable sum as wages, but refused to employ any one unless at a compensation less than $5 per week; that one Minnie W. Bishop, a duly qualified teacher, made application in September 1893, to teach the school for the sum of $5 per week and board herself; but said Butler declined to employ her, stating that he would not pay $5 per week for a teacher.

While a school district is in existence it is a duty of a trustee or trustees to maintain a school in said district, and where he or they neglect or refuse to maintain such school, he or they are not excused from performing such duty for the reason that the annual school meeting has voted that no school be taught in the district for that school year. From the proofs herein I am satisfied that said Butler could have employed a competent qualified teacher to teach the school in said district in the school year of 1893–94 had he been willing to pay a reasonable compensation for such services.

I am of the opinion that said Butler was guilty, during said school years of 1892–93 and 1893–94, of a wilful violation and neglect of duty as said trustee of said district, in not maintaining a school therein for at least thirty-two weeks in 1892–93, and for at least 160 days, inclusive of legal holidays that might occur during the term of said school and exclusive of Saturdays during 1893–94. Said Butler having ceased to be the trustee of said district since the annual school meeting held therein in August 1894, I have no power to make any order to remove him for such wilful violation and neglect of duty.

The petitioners ask me to make an order directing the said Butler to pay to the district the sum of $66.18 which, it is alleged, said district lost by reason of the wilful neglect of official duty on the part of said Butler. It appears that in the autumn of the year 1893 there was in the custody of the supervisor of the town of Milford the sum of $102.18 for the payment of teachers' wages, belonging to said school district and that said Butler drew $36 thereof to pay Miss Windsor; that some time in March 1894, he drew an order upon said supervisor to pay Thorn for services as teacher, which order was not paid. Under the school law, on the first Tuesday of March in each year, each supervisor is required to make a report in writing to the county treasurer for the use of the school commissioners, showing the amounts of school moneys in his hands not paid on orders of trustees for teachers' wages, and the districts to which they stand accredited, and thereafter he shall not pay out any of said moneys until he shall have received the certificate of the next apportionment; and the moneys so returned by him shall be reapportioned. It would seem that on March 1, 1894, the supervisor made his report to the county treasurer showing the sum of $66.18 accredited to the district, and he was forbidden by law to then pay out any of said moneys until after he received the certificate of the next appor-

tionment, upon which new apportionment said district would receive a proportion of said sum of $66.18. I am of the opinion that I have no power to decide whether or not said district has lost or forfeited any money by the acts, misconduct or negligence of said Butler, nor to make any order in the premises.

By section 1, article 1, title 15, of the Consolidated School Law of 1894 it is enacted, that whenever the share of school moneys or any portion thereof, apportioned to any town or school district, etc., shall be lost in consequence of any wilful neglect of official duty by school commissioner, town clerk, trustee, etc., the officer or officers guilty of such neglect shall forfeit to the town or school district so losing the same, the full amount of such loss with interest thereon. I have no jurisdiction of proceedings under the foregoing section, but such proceedings must be taken in the courts. The forfeiture in this matter, if any, being declared for the benefit of said school district, it is the duty of the trustee to sue for and enforce its collection.

The petition herein is dismissed.

3695

In the matter of the appeal of Erastus B. Mason v. George A. Butler, as trustee of school district no. 8, town of New Hartford, Oneida county.

A trustee who has not been charged with dishonesty or immoral conduct will not be removed from office because he has neglected to repair schoolhouse and improve its surroundings, unless it should be made to appear that he has refused or neglected to carry out the proper directions of a district meeting or of a school commissioner to do so.

A citizen who occupies real estate and pays rent therefor, is a legal voter and eligible to the office of trustee.

Decided June 12, 1888

Draper, *Superintendent*

The appellant asks for the removal of the respondent from the office of trustee in district no. 8, town of New Hartford, Oneida county.

The grounds alleged are that the respondent is not a qualified voter at school meetings, and is, therefore, ineligible to hold the office, and that he has been negligent in the discharge of his duties and has allowed the building to remain out of repair and has suffered accumulations of stagnant water to remain so near the schoolhouse as to endanger the health of the pupils.

While the charges appear somewhat serious, yet they do not affect the moral standing of the respondent. No charge of dishonesty is made. At the most, it is only said that he has neglected to repair and keep in good condition the school building and its surroundings. It does not appear that the school commissioner nor any meeting of the inhabitants has directed repairs which the trustee has refused to make, and it is not made to appear that he could have made the repairs referred to upon his own motion and kept the expense within the limit the law allows.

The charge that the respondent is not a qualified voter has not been regularly met by an answer properly served, but for the information of the Department, the respondent has filed a verified statement to the effect that for three years last past, he has occupied real estate in the district and paid rent therefor.

I have concluded, in view of all the circumstances and the fact that the annual election of trustees is to occur so soon, to overrule the appeal and let the voters then determine as to the choice of a trustee.

3674

In the matter of the application of Martin V. Clark and others, for the removal of Lewis H. Lockwood, as trustee of school district no. 5, towns of Wheeler and Urbana, Steuben county.

A trustee will not be removed from his office unless it is shown by a clear preponderance of proof that he has been guilty of acts which are sufficiently grave to justify such a penalty.

The reelection of a trustee after a neglect to carry out the directions of a prior district meeting is good reason for refusing to remove him for such neglect.

Decided March 24, 1888

Draper, *Superintendent*

Lewis H. Lockwood was elected trustee of school district no. 5, towns of Wheeler and Urbana, Steuben county, on the 31st day of May 1887, at a special meeting, and was reelected to the same office at the annual meeting held on the 31st day of August 1887.

This is an application to remove him from office. The applicants allege, as the grounds of the complaint, that the trustee has refused or neglected to carry out the directions of the district meeting, relative to repairs to the schoolhouse and that he discharged a teacher from employment, which resulted in litigation and in the district being involved in trouble and expense on account thereof.

It appears that the district meeting directed certain repairs to be made to the schoolhouse, and appointed a special committee to superintend such repairs. The trustee refused to permit the special committee to do this and insisted upon attending to the matter himself. He was clearly justified in doing so. The trustee is the officer created by law for the purpose of attending to such matters, among his other duties. The complaint that the trustee refused to carry out the directions of the district meeting, loses its weight when taken in view of the fact that the directions were made at the meeting held in March 1887, at the same time the trustee was elected, and that he was reelected at the annual meeting at the end of August 1887. It would seem strange that he should have been reelected if his course was so displeasing to the majority of electors in the district as is claimed. The same observation may be made relative to the discontinuance of the employment of the teacher. Such employment discontinued

immediately after Lockwood became trustee, and yet he was reelected to the office, several months subsequently. It is true that a litigation has followed the discharge of the teacher, which seems to me to establish the fact that the teacher was discharged in violation of the contract or agreement; but notwithstanding this fact, if a majority of the electors of the district approved the action of the trustee in the discharge of the teacher, then such action ought not to be permitted to be the groundwork for removing the trustee from office.

Before a trustee can be removed from office, the persons moving in that direction must show by a clear preponderance of proof, that he is guilty of acts which are sufficiently grave to justify such a penalty. The proofs offered in this case are not sufficient, in my judgment, to justify me in granting the application of the petitioners, particularly in view of the fact that the whole trouble seems to be a controversy relative to the transaction of the business affairs of the district about which men have a right to differ in opinion and in view of the fact that the school year is so far advanced that the district will soon have an opportunity to elect a trustee.

The application is denied.

4192

In the matter of the petition of John E. Casey for the removal of Adelbert Case as clerk of school district no. 6, town of North Norwich, Chenango county.

Where, upon application to a district clerk by a qualified voter of the district for permission to examine the minutes of the annual school meeting of the district, the clerk refused to permit such voter to examine such minutes, using vulgar and profane language in expressing such refusal, held that the clerk was guilty of a wilful violation of duty and an order made for his removal.

Decided November 2, 1893

W. H. Sullivan, attorney for petitioner

Crooker, *Superintendent*

This is a proceeding in the nature of an appeal for the removal of one Adelbert Case as clerk of school district no. 6, town of North Norwich, Chenango county, for wilful violation and neglect of duty.

A petition of John E. Casey, a resident and taxpayer in said school district, duly verified on September 16, 1893, setting forth certain charges against said Case with specifications of the facts to establish such charges, and having annexed thereto the affidavits of said Casey, of one Perry Hunt in support thereof, and a notice addressed to said Case that said petition and affidavits would be presented to me at Albany and application thereupon be made to remove said Case from his said office of clerk of said district, and requiring said Case to transmit his answer to said application duly verified, to this Department within ten days after service of said notice, petition and application, or the charges contained

therein would be deemed admitted, with proof of service of copies of said petition, affidavits and notice upon said Case on September 19, 1893, were filed in this Department on September 23, 1893. No answer to said petition etc., has been received or filed, and the allegations contained in said petition etc., are considered as admitted as true by the said Case. The allegations contained in said petition etc., so considered admitted as true, are as follows:

That the said Adelbert Case was, in August and September 1893, the duly elected and qualified clerk of school district no. 6, town of North Norwich, Chenango county; that on or about August 28, 1893, about 9 o'clock in the forenoon of that day, John E. Casey and Perry Hunt, each of whom was a resident, voter and taxpayer of said school district, went to the premises of said Adelbert Case, the clerk of said school district, and asked permission of said Case, to look at the minutes of the school meeting of said district, held on August 22, 1893, and the said Case, in wilful violation of his duty as such clerk, refused to permit said Casey and Hunt to look at and inspect such minutes, using vulgar and profane language in expressing such refusal. That on the 11th day of September 1893, at about 9 o'clock in the forenoon, said Casey and Hunt went to the house of said Case and said Casey then and there requested said Case to allow him to inspect the minutes of said school meeting of said district held on August 22, 1893, and also asked for a copy of said minutes; that said Case told said Casey that he would not let him see the minutes, and to get right off from his premises, or he would slash him right down with a corn knife, which said Case then held in his hand. Said Case further told said Casey to get right off from his premises and to keep off, and that he would not furnish him with a copy of said minutes.

The clerk of a school district is a school officer, and his principal duties are defined in section 37 of title 7 of the school law. His duty is to record the proceedings of his district in a book to be provided for that purpose by the district, etc., etc.; to keep and preserve all records, books and papers belonging to his office and to deliver the same to his successor, and a refusal or neglect so to do subjects him to the forfeit of fifty dollars for the benefit of the district, to be recovered by the trustees.

The proceedings, records, books and papers in possession of said clerk are the property of the district, and not the individual property of the clerk. It is the duty of the clerk to permit any voter to freely inspect the records at all reasonable times, and a wilful denial of this right by a clerk would subject him to the liability of removal from office. There can be no doubt as to the right of a voter of a school district to examine and copy the district records, under reasonable provisions.

Section 18 of title 2 of the school laws provides that whenever it shall be proved to his satisfaction that any school commissioner, or other school officer, has been guilty of any wilful violation or neglect of duty under the school act, the Superintendent of Public Instruction may, by an order under his hand and seal, which order shall be recorded in his office, remove said school commissioner or other school officer from his office.

From the facts established upon this appeal I am satisfied that the said Adelbert Case, as clerk of school district no. 6, town of North Norwich, Chenango county, was guilty of wilful violation and neglect of duty under the school laws, as such clerk, as alleged in said petition etc.

The petition herein is sustained.

It having been proven to my satisfaction that Adelbert Case, clerk of school district no. 6, town of North Norwich, Chenango county, has been guilty of wilful violation and neglect of duty, under the school laws, as such clerk, I do therefore, by virtue of the power and authority in me vested, order:

That the said Adelbert Case be, and he hereby is, removed from the office of clerk of said school district no. 6, town of North Norwich, Chenango county.

OUTBUILDINGS

3979

In the matter of the appeal of Fannie A. Karker v. school district no. 4, town of Westerlo, in the county of Albany.

A school district maintains outhouses or privies within the bounds of a public highway. *Held,* the obstruction must be removed.

Decided May 9, 1891

Eugene Burlingame, Esq., attorney for appellant
Van Alstyne & Hevenor, attorneys for respondent

Draper, *Superintendent*

This appeal is against the action of the district in erecting and maintaining outhouses or privies, within the bounds of the public highway, and adjacent to the lands of the appellant. She claims that, thus located, they constitute a public nuisance, and interfere with the beneficial enjoyment of her adjacent property. The allegations of the appellant as to the location of the outhouses, are not denied by the respondent. But it is claimed that the school site is so limited that they can not be placed in the rear of the school building and are in no way offensive to appellant, or an infringement upon her rights. It is also claimed by the district that the legal right to maintain outbuildings at the place where they now stand, has been acquired under the deed by which the site was conveyed to the district, and by reason of long usage.

It hardly seems necessary to discuss complicated law questions. A school outhouse within a public highway can not be justified upon any ground. It is an offensive obstruction which no school district should insist upon. A proper regard for the interests of the school, as well as for the comfort of the public, require that such buildings should be placed where they will not be conspicuous, and may be properly screened and secluded from public view. If a district lacks a school site large enough for the accommodation of outbuildings it should take steps to procure such a site.

The appeal is sustained, and the district is directed forthwith to remove the outhouses from the highway, and to construct such outbuildings as are suitable for the use of the school, in a more secluded place. If the present school site does not permit of this, the district will take steps to procure more land, either by adding to the present site, or by changing to a more commodious one.

3773

In the matter of the appeal of George B. Lampman v. William H. Smith, as trustee of school district no. 13, New Baltimore, Greene county.

The expense for erecting outbuildings pursuant to chapter 538 of the Laws of 1887, can not be lawfully levied without the vote of a district meeting, except the same shall have been approved by a school commissioner.

A trustee of a school district can not legally be a party to a contract with the district except in his official capacity.

A tax list which contains no heading specifying the objects for which the tax is to be levied; *held,* fatally defective.

Decided March 27, 1889

E. C. Hallenbeck, attorney for appellant

Draper, *Superintendent*

This is an appeal by a resident taxpayer and elector of school district no. 13, of the town of New Baltimore, county of Greene, from the acts of William H. Smith, trustee of said district. The grounds alleged are as follows:

1 That the trustee has performed work for the district in building a certain outhouse, privy or water-closet, performing labor himself, and that, not being a carpenter or builder, he has performed the work in an unworkmanlike manner.

2 That he has prepared a tax list and warrant, and delivered the same to the collector of the district, presumably to raise a sufficient amount to pay his charge for the work thus performed as aforesaid; that the tax list contains no heading specifying the object for which the tax is to be collected. It is also alleged by the appellant that the expense of constructing the outbuilding has never been approved by the school commissioner of the district within which the school district is located. The warrant bears date, December 12, 1888, and was placed in the hands of the collector on or about the 11th day of January 1889.

A copy of the tax list and warrant appears among the appellant's exhibits. No answer has been interposed by the trustee. I am therefore compelled to assume, in passing upon the questions raised by this appeal, that the allegations of the appellant are true. A trustee of a school district can not legally be a party to a contract with the district except as the representative of the district. The expense for erecting outbuildings pursuant to chapter 538 of the Laws of 1887, can not be levied without a vote of the district meeting, except the same shall have been approved by the school commissioner. The tax list is fatally defective, for the reason that it contains no heading specifying the objects for which the tax is to be levied.

I must, therefore, sustain the appeal, and the tax list dated December 12, 1888, issued by the respondent, and which was delivered to the collector of the district on the 11th day of January 1889, is hereby vacated and set aside.

3749

In the matter of the appeal of Aaron Silvernail v. Jacob H. Mann, school commissioner of the second commissioner district of Schoharie county, and Egbert Baker, trustee of school district no. 17, towns of Summit, Schoharie county, and Worcester, Otsego county.

Where a trustee, in good faith, constructed additional outbuildings, intending to comply with the provisions of the health and decency act, and the charge for the work is reasonable, the trustee will be sustained, although the school commissioner refuses to approve the bill.

Decided January 14, 1889

Draper, *Superintendent*

The appellant was trustee in the above-named district during the school year ending August 20, 1888. There having been two privies or water-closets in the woodshed adjacent to the schoolhouse, the appellant, while serving as trustee, erected two others farther removed from the schoolhouse, and presented to the school commissioner a bill, amounting to about $28, for his approval, under the provisions of chapter 538 of the Laws of 1887. The school commissioner refused to approve such bill, and from such refusal this appeal is taken. The grounds of refusal alleged by the school commissioner are that the old privies were sufficient and complied with the act of 1887, in relation to health and decency, and also that the bill was exorbitant. It seems that the trustee had included in the bill a charge for his own services in connection with the matter, but that he has since withdrawn such charge and presented a bill amounting to $18.93; but the school commissioner likewise refuses to approve this bill on the ground that the expense was unnecessary and unwarranted.

The papers are nearly as voluminous as would be advisable if the matter in issue was an indictment for murder in the first degree, but I have read them with as much care as possible. I find that the respective parties each allege bad faith and false swearing against the other. I do not see any ground for this on either side. That there was need for improved water-closet accommodations, is manifest. A number of teachers who have taught in the school during recent years, swear that much trouble was experienced from the close proximity of the water-closets.

The Department has repeatedly notified trustees that they must carry out the provisions of the act in relation to health and decency, and I see nothing to indicate that the appellant was not acting in entire good faith in taking the steps which he did to erect new water-closets. On the other hand, I see nothing to indicate that the commissioner was disposed to do anything concerning the matter which he did not believe it his official duty to do. I have no doubt there was a misunderstanding between the commissioner and the trustee in reference to the matter. Although the communications from the commissioner to the trustee do not, in terms, direct him to take the steps which he did take, he did enjoin upon him the importance and necessity of his complying with the statute,

and it is not strange for the trustee to reason that the way for him to comply with the statute was to put up two additional water-closets. It seems that the commissioner has since directed the water-closets erected by the trustee to be torn down, and that the others have been cleansed and put in condition, and, as the commissioner thinks, they are sufficient. With that conclusion, I have nothing to do. Even though his judgment may be right in that connection, I think he errs in withholding approval of the appellant's bill, as now presented.

It would not be right to put a responsibility upon a school trustee, and permit him to proceed in good faith and with fair intelligence to discharge that responsibility, and thereby involve himself in expense without indemnifying him against personal liability or loss. If the appellant had refused to take any steps, and if the determination had been reached that the old water-closets were insufficient, he would have been liable to the district for the entire amount of public moneys which the district might have suffered in consequence of his refusal. If, then, he acted in good faith and with ordinary intelligence, the expense which he incurred should be borne by the district.

I can not consider the sum of $18.93 as an unreasonable amount for the work performed.

The appeal is therefore sustained, and the trustee of the district will forthwith proceed to the settlement of the bill of the appellant at the amount indicated.

PUPILS

4252

In the matter of the petition of George Fish to annul certificate or diploma to teach granted to Loren S. Minckley.

Where in a school the teacher stated to the board of education that certain of the scholars showed a disposition to disturb the school and asked what course he should take, and was instructed by said board that he was expected to keep order in the schoolroom and, if necessary, to punish the scholars, and one Fish, a pupil, a disturbing element in the school, was punished by the teacher, and that such punishment was not cruel, unreasonable or excessive; *held,* that a petition asking that the certificate to the teacher be annulled on the ground of such punishment be denied and the petition dismissed. Also *held,* if to maintain good order and discipline in the schools all other reasonable methods fail, then a resort to corporal punishment will be proper. When such punishment is administered the teacher should be careful not to lose his temper, that the punishment be not cruel, unreasonable, excessive or improper, but of a character suitable as a correction for the offense committed and of such nature and to such extent as a parent would administer for the correction of his child.

Decided June 6, 1894

J. O. Sebring, attorney for petitioner
A. J. Wright, attorney for respondent

Crooker, *Superintendent*

This is an application by petition to have the certificate granted to one Loren S. Minckley to teach, annulled, upon the ground that in inflicting punishment upon the pupils in the school taught by him for violations of the rules for the discipline and government of said school he has resorted to cruel, unreasonable, excessive and improper methods of discipline and punishment.

The petitioner, George Fish, is a resident and qualified voter in union free school district no. 2, towns of Bradford and Orange, Steuben county, and is one of the members of the board of trustees of said school district, such board consisting of five members. The respondent, Loren S. Minckley, is the principal in the school in said district, about 30 years of age, a graduate in the academic department of the State normal school, Brockport, N. Y., and holds a first grade certificate of the school commissioner of Orleans county, indorsed by C. W. Halliday, who, at the time of such indorsement, was a school commissioner of the first commissioner district of Steuben county, within which commissioner district said school district is situated. The respondent was employed by the board of education of said school district to teach a term of eight weeks of school in the spring of the year 1893, being the unexpired portion of the school year ending on July 31, 1893, and was then employed to teach in said school for the school year commencing on August 1, 1893, and is still teaching in said school.

The petition herein is verified by the petitioner, and in support of the allegations contained therein are annexed the affidavits of Jesse Morgan, Fred D. Morgan, Anson Tobias, Richard D. Fish, Ernest L. Smith and Harry Morgan. A verified answer to the petition has been interposed by the respondent, Minckley, and in support of the allegations therein are annexed his affidavit and those of upwards of thirty other persons, including four of the five members of the board of education of said district, with a certificate as to the satisfactory management of the school under the charge of respondent signed by forty-nine residents and taxpayers of said school district.

The petitioner has filed a verified reply to the answer of the respondent and annexed to his reply are some seventeen affidavits. To such reply the respondent has filed a verified rejoinder, to which is annexed some thirteen affidavits, quite a number of which were made by persons whose affidavits are annexed to the reply of the petitioner.

The papers in this proceeding are very voluminous and contain a large amount of matter not relevant to the question at issue. All the papers, however, have been carefully read and fully considered.

The burden is upon the petitioner to establish the allegations contained in his petition by a preponderance of proof. I am clearly of the opinion, after a careful examination of the proofs presented herein, that the petitioner has failed to so sustain such allegations. The only pupils in said school who complain that they were punished by the respondent in a cruel, unreasonable, excessive and improper manner are Jesse Morgan, Anson Tobias, Richard D. Fish and Ernest L. Smith, each of whom has made an affidavit relative to the punishment received by him respectively. It appears from the proofs that the respondent punished the pupil, Morgan, three times, twice with a ruler and once with a small piece of pine siding, by three or four blows upon his person. Morgan states in his affidavit that at one of these punishments he fainted; but that is denied by the respondent, and it appears in proof that Morgan admitted to divers persons that he did not faint upon such occasion. It appears that Morgan was punished for running away from school, for getting angry and refusing to be shown in relation to a lesson, and refusing to obey his teacher, and for conspiring with two or three of the larger boys in the school to resist the respondent in the performance of his duties. That the pupil, Tobias, was punished for making an obscene mark or picture upon his desk. Tobias denied having made it, although one Ackerman saw him make it; but Tobias subsequently admitted that he made it. The punishment was administered by means of a rubber tubing about three-eighths of an inch in diameter, applied upon his person. That the pupil, Smith, by means of a rubber syringe, threw water upon other pupils in the school during school hours; that he was kept after school hours and respondent gave him the choice of being punished or have his offense reported to the board of education, and that Smith replied he preferred to be punished, and thereupon the respondent punished him with a ruler applied to the person of said Smith. That the pupil, Fish, who is a son of the petitioner herein, was punished several times;

once, on being kept after school hours for disorderly conduct in school, while the respondent was talking with him he became angry and struck the respondent with his fist, and the respondent slapped him upon his face with his hand and whipped him with a ruler; on another occasion, on said Fish being kept after school hours and refusing to get his lessons and talking in an impudent and saucy manner to the respondent, he was struck two or three times by respondent with a ruler; that the last punishment received by Fish from respondent was on February 8, 1894, when he told an untruth to the respondent, was disobedient, became angry with, and saucy and impudent to the respondent, and caused the other pupils in the school to laugh by making faces behind the back of the respondent. The nature and extent of the punishment received by said Fish is set out in a number of affidavits by pupils present, and both by Fish and the respondent.

Upon all the proofs presented as to the character of the punishment administered to the pupils, Morgan, Tobias, Smith and Fish, by the respondent, I am of the opinion that such punishment was not cruel, unreasonable or excessive. It is not shown that any of said pupils sustained any serious injury thereby; that it does appear that the pupil, Fish, was a disturbing element in the school.

Under subdivision 2 of section 13, title 9 of the Consolidated School Act of 1864, and the amendments thereof, power is given to the board of education of every union free school district "to establish such rules and regulations concerning the order and discipline of the school or schools in the several departments thereof, as they may deem necessary to secure the best educational results."

Boards of education and boards of trustees of the school districts of the State establish the rules for the discipline and government of the schools, and the teachers in the schools are charged with their execution.

In the establishment of rules of order and discipline for such schools boards of education must use reasonable discretion, as their action in that regard may be the subject of appeal to the Superintendent of Public Instruction.

It appears in proof that the respondent stated to said board of education that certain of the scholars in the school under their charge showed a disposition to disturb the school, and asked what course he should take; that he was instructed by said board that he was expected to keep order in the schoolroom and, if necessary, to punish the scholars in order to do so. That such board has made careful inquiry and from reliable sources relative to the punishment inflicted by the respondent and the conduct and character of the scholars punished, and from such inquiry such board believes that such punishment was merited and necessary, and not disproportionate to the offenses committed. That no complaints or charges against the respondent have been made to such board other than by the petitioner herein.

The school laws are silent in regard to corporal punishment; they neither permit nor forbid its use. It was said by Secretary of State Dix, that the practice of inflicting corporal punishment upon scholars had no sanction but usage. It is of the highest importance that order and discipline should be maintained in

all schools if the best educational results are to be obtained. If to maintain good order and discipline in the schools, all other reasonable methods fail, then a resort to corporal punishment will be proper. When such punishment is administered the teacher should be careful not to lose his temper; that the punishment be not cruel, unreasonable, excessive or improper, but of a character suitable as a correction for the offense committed, and of such a nature and to such an extent as a parent would administer for the correction of his child.

The allegations contained in the petition herein, that the respondent, while teaching said school, became engaged in a public and newspaper quarrel with a Rev. Mr Mulford, in which a majority of the board of education sided with the respondent, and that a desire to spite said Mulford and his friends, was the reason that said board continued the employment of the respondent for the present school year, are not, nor is either of them, sustained by the proofs. Had such allegations been sustained they would not have constituted any valid or legal grounds for annulling the certificate of the respondent.

The application of the petitioner, Fish, is denied and his petition dismissed.

4936

In the matter of the appeal of Henry S. Mott and Samuel Robbins v. board of education of union free school district 4, Huntington, Suffolk county.

The school law is silent on the subject of corporal punishment, but such punishment has been recognized by this Department for many years, and it has uniformly ruled that the force or violence used must be reasonable in manner and moderate in degree. Subdivision 4 of section 223 of the Penal Code permits teachers to use force or violence upon or toward a scholar, and if the force or violence used is reasonable in manner and moderate in degree it is not unlawful. When the trustees of school districts authorize or direct corporal punishment, it is the teacher, not the trustees, that administer the punishment, and the trustees have no authority to direct the kind of instrument to be used, nor the extent of the punishment. A teacher who uses force or violence upon or toward a scholar, not reasonable in manner or moderate in degree, thereby renders himself or herself liable to be proceeded against in the courts, and to have his or her license annulled.

Decided April 24, 1901

Skinner, *Superintendent*

This is an appeal from the following resolutions adopted at a meeting of the board of education of union free school district 4, Huntington, Suffolk county, held January 12, 1901:

Resolved, That Harry Robbins and Fred Ketcham be, and they hereby are, suspended from the Northport union school for the balance of the school year; or, in the alternative, that they be permitted to return to school at once and submit to such punishment as the principal may see fit to inflict, and resistance to such punishment shall constitute cause for their immediate and final expulsion from the school.

Resolved, That this board does most heartily recommend to the principal that the punishment inflicted be a good sound thrashing, administered with some flexible substance that will hurt but not permanently injure.

Resolved, That in consequence of the fact that this is the first time that any insubordination on the part of Harry Mott has been brought to our attention, that he be permitted to return to school at once upon condition that he submits to such punishment as the principal may see fit to administer, and that any resistance on the part of said Mott to such punishment shall constitute cause for his immediate and final expulsion from the school.

The grounds alleged by the appellants for bringing their appeal are, that such resolutions are illegal, unjust and improper and that the principal of the school is not a proper person to administer punishment because of his ungovernable temper and of unreasonable punishments which he is in the habit of administering.

The board of education filed an answer to the appeal, and to such answer the appellants have replied.

From the papers filed in this appeal it appears that the appellants are residents of union free school district 4, Huntington, Suffolk county; that the appellant, Henry S. Mott, is the father of Harry T. Mott, a boy of the age of 16 years who, prior to January 10, 1901, has attended the school in such district; that the appellant, Samuel Robbins, is also a resident of such school district and has a son named Harry Robbins, of the age of 16 years who, prior to January 10, 1901, attended such school; that one Benjamin J. Wightman now is, and for the past five years has been, the principal teacher in such school; that the respondents, Rowland Miles, John W. Olmstead, Elbert Hartt, Frank B. Smith, Henry G. Simpson, Charles E. Robertson and Charles B. Partridge constitute the board of trustees of such district for the present school year.

It also appears from the records of this Department that on or about December 18, 1895, under the provisions of title 8 of the Consolidated School Law of 1894, chapter 556 of the Laws of 1894, common school districts 4 and 8 were consolidated by the establishment of a union free school therefor and therein, said union free school district to be designated and known as district 4, Huntington, Suffolk county.

It is in proof that at a recess of said school on the afternoon of January 9, 1901, a dispute arose between Harry T. Mott and one James Fitzgerald, also a pupil in the school, in which Harry Robbins, and one Sweeney another pupil, a cousin of Fitzgerald, became parties in which blows were exchanged and stones thrown; that the boys Fitzgerald and Sweeney went home instead of returning to the school, but during the session of the school returned with a note from Mrs Fitzgerald, whereupon the principal requested the four boys to remain after the school was dismissed; that the four boys remained after the school was dismissed; and the principal called Fitzgerald and Sweeney to his desk and after talking with them relative to the matters that occurred during the recess punished each of them for leaving the school grounds without permission, and dismissed them; that thereupon the principal requested Mott to come forward, but

as he did not comply the principal seized him by the coat collar, tearing the coat, and struck Mott with a ruler or rulers; that then Robbins arose from his seat and was struck by the principal with his fist, and thereupon the boy, Ketcham, who was in the yard below, hearing the disturbance entered the schoolroom and was ordered by the principal to leave the room, and Ketcham took several steps backward, whereupon the principal struck him with his fist and Ketcham left the room; that the principal then told Mott and Robbins to report to the president of the board of trustees, and not to return to the school until authorized by said board to do so; that Mott and Robbins left the school building and forthwith reported the matter to the president of the board and to their respective parents.

It further appears that on the evening of January 12, 1901, pursuant to a call by the president, a meeting of the board of trustees was held at which all the members were present, and also Henry S. Mott and his wife and sons, Henry T. and Charles Mott, Samuel Robbins and his wife and son Harry Robbins, Ellsworth Ketcham and son Frederick, John Fitzgerald and his son James and his nephew John Sweeney, and William H. Bartow and Daniel A. Arthur, clerk of the board. That the president of the board of education questioned the boys in relation to the matters that occurred at the afternoon recess, and after the school closed on January 9, 1901, and the statements made were substantially as hereinbefore stated; that the appellants herein addressed the board, the boys having left the meeting, admitting a breach of discipline on the part of their sons; that thereupon the board of trustees adopted the resolutions hereinbefore stated; copies of which were served upon the appellants January 14, 1901.

The appellants admit that their sons should be reprimanded or punished in a reasonable manner for their acts on January 9, 1901.

The board of education of union free school district 4, Huntington, under subdivision 2, of section 15, article 4, title 8 of the Consolidated School Law of 1894, has the power to establish such rules and regulations concerning the order and discipline of the school or schools under its charge, in the several departments thereof as it may deem necessary to secure the best educational results.

The teachers in such school have no power to make such rules, but only to enforce the rules made by the board.

Such board has power to suspend or expel pupils for violation of such rules, and under the provisions of the compulsory education law, to send pupils between the ages of 8 and 16 years who are habitual truants from instruction or who are insubordinate or disorderly during their attendance, or irregular in their attendance to a truant school. Such board may direct that corporal punishment be administered. An order to suspend or expel a pupil should designate the time of such suspension or expulsion, and can not be longer time than to the close of the school year, nor can any pupil be confined or maintained in any truant school exceeding the remainder of the school year.

The school law is silent on the subject of corporal punishment, but such punishment has been recognized by this Department for many years, but it has uniformly ruled that the force or violence used must be reasonable in manner

and moderate in degree. Such punishment is permitted by a teacher to a scholar under section 223 of the Penal Code of this State:

Section 223 Use of force or violence, declared not unlawful, etc. To use or attempt, or offer to use, force or violence upon or toward the person of another is not unlawful in the following cases:

4 When committed by a parent or the authorized agent of any parent, or by any guardian, master or teacher, in the exercise of a lawful authority to restrain or correct his child, ward, apprentice or scholar, and the force or violence used is reasonable in manner and moderate in degree.

When the trustees of any school districts authorize or direct corporal punishment to be administered to any scholar in the school under their charge it is the teacher, not the trustees, that administers the punishment, and the trustees have no authority to direct the kind of instrument to be used or the extent of the punishment to be administered. Such trustees have no authority to require scholars to submit to such punishment as the teacher may see fit to inflict, or to finally expel a scholar from the schools who shall resist any such punishment.

Under section 223 of the Penal Code, in such punishment, the force or violence used must be *reasonable in manner and moderate in degree* and hence if excessive force is used, or the instrument used would do great bodily harm, the act of the teacher becomes an assault which the scholar, to prevent bodily harm, may lawfully resist.

A teacher who uses force or violence not reasonable in manner or moderate in degree will render himself or herself liable to be proceeded against in the courts both civilly and criminally, and to have his or her license to teach revoked.

Admitting, for the purposes of argument only, that Principal Wightman correctly stated what occurred in the schoolroom after the school was dismissed on the afternoon of January 9, 1901, on the part of the principal, and the boys Mott and Robbins and Ketcham, such action on the part of the boys was not sufficient to authorize the decision and action of the board of education in the adoption of the resolutions appealed from.

I decide that the board of education of union free school district 4, Huntington, Suffolk county, in the adoption January 12, 1901, of the three resolutions appealed from by the appellants herein, exceeded the authority given to such board under the provisions of the Consolidated School Law of 1894, and the amendments thereof; that such action of such board should be vacated and set aside.

The appeal herein is sustained.

It is ordered that the three resolutions adopted by the board of education of union free school district 4, Huntington, Suffolk county, January 12, 1901, be, and each of them is, hereby vacated and set aside.

It is further ordered that said board of education admit into the school of such district, without any condition or conditions precedent, Harry T. Mott, Harry Robbins and Frederick Ketcham, each of whom is of school age, and each of whom resides with his respective parents within such district.

PUPILS — EXPULSION OF

5253

In the matter of the appeal of Frank McAvoy from the action of Averill Cole as trustee of school district no. 12, town of Greece, county of Monroe.

When a pupil is a constant menace to the good order and discipline of the school and the progress of other pupils in their school work and when his conduct is mean and vicious, it is the duty of the trustee to expel such pupil.

The trustee should then proceed against such pupil under section 4 of the compulsory education law so that he may be committed to a proper institution where suitable and lawful instruction will be provided.

Decided April 10, 1906

Henry R. Glynn, attorney for appellant

G., S. C. & A. E. Truesdale, attorneys for respondent

Draper, *Commissioner*

On or about February 7, 1906, Averill Cole, trustee of school district no. 12, town of Greece, expelled William McAvoy, the son of appellant, from further attendance at the public school maintained in said district. This appeal is brought to obtain an order directing the trustee to reinstate the said William McAvoy to full school privileges.

The evidence submitted in this case consists of the affidavits of appellant, appellant's wife and the boy, William, upon one side, and the affidavits of Respondent Cole, who is trustee of the district, Nettie Ireland, who is the teacher, and six pupils of the school whose ages are from 11 to 16 years, upon the other side.

The pleadings show that Nettie Ireland has been teaching in this district since September 1905, and that William McAvoy, the boy who has been expelled, was a registered pupil in said school from the opening of the school in September until the time of his expulsion. It is also shown that his attendance was irregular and that he refused or neglected to bring proper excuses from his parents for absence from school. William was 13 years of age and therefore subject to the provisions of the compulsory education law.

The evidence of the teacher which is corroborated by several pupils clearly establishes that this boy was a constant source of annoyance to the teacher and the school from the time he entered school in September until his expulsion and that his conduct grew worse as the term of school progressed. From the evidence submitted the boy appears to have been guilty, among other things, of the following conduct: he refused to do the things which his teacher directed him to do and he did those things which his teacher told him not to do and which he knew would disturb the school and interrupt and hinder the progress of other pupils; he fought his teacher when she undertook to discipline him and he fought other pupils in the schoolroom when school was in session; he threw a brick across the schoolroom when school was in session; he would remain

on the school grounds after school had been regularly convened and then call to the pupils in the schoolroom and otherwise attract their attention; he smoked on the school grounds and in the building; he persistently and wilfully annoyed other pupils in many ways; he was disobedient, insolent and vulgar; he used low, vile, profane and indecent language in the presence of his teacher and the other pupils; he was guilty of low and indecent actions; he swore at his teacher, called her vile, coarse names, and frequently made insulting remarks to her in the presence of the other pupils and even before the school when it was in session. His presence was a constant menace to the good order and discipline of the school and the progress of other pupils in their school work. His conduct appears to have been such that the parents of other pupils consulted the trustee in relation to the matter. He was suspended in December but permitted to return on a promise of good behavior.

It can not readily be understood how his teacher endured such conduct as long as she did. During this period of wilful misbehavior his parents tried to believe that he was not properly treated. It is quite probable that if his parents had not supported him in his mean and vicious conduct and had upheld the efforts of his teacher to properly discipline him the result would be quite different. It appears that the teacher and the trustee endeavored to enlist the cooperation of his parents in their efforts to keep his conduct within proper limitations, without success or encouragement.

This Department has held that incorrigible pupils and those whose moral senses have become so depraved that their association with other pupils would contaminate such pupils is proper ground for expulsion. The trustee was justified in expelling this boy. More than that it was his duty to expel him. It appears to have been necessary as a means of proper protection to the well-being of other pupils.

The boy is between the compulsory school ages and is required to be under instruction as the compulsory education law directs. The trustee is charged by law with the duty of seeing that the boy attends upon instruction as required by the statutes. It appears that since his expulsion from this school he has been attending school in the city of Rochester. When a trustee expels a pupil within the compulsory school ages and the parents of such child fail to provide proper instruction elsewhere it becomes the duty of such trustee to proceed against such parents under section 4 of the compulsory education law and such pupil may then be committed to a proper institution where suitable and lawful instruction will be provided.

The trustee must be sustained in the action he took. It was clearly in the interest of the school and all parties affected. For the present I must leave to his discretion the question of reinstating the pupil and the conditions on which such action shall be taken.

If this boy is causing no particular trouble in the school which he has been attending since his expulsion it appears wise to continue him in attendance upon that school.

The appeal herein is dismissed.

PUPILS—SCHOOL PRIVILEGES OF

5238

In the matter of the appeal of Arthur Mills from the action of a special meeting held in school district no. 13, in the town of Hume, Allegany county.

A man who is not a taxpayer but who is the father of children of school age has a right founded upon reason and law to be heard upon the question of proper school facilities in his district equal to that of a man who may be a large taxpayer but who is not the father of children of school age.

Whoever may reside upon farms whether owners or tenants are entitled to proper school facilities.

Decided February 1, 1906

Smith & Dickson, attorneys for appellant
G. W. Harding, attorney for respondent

Draper, *Commissioner*

On August 31, 1904, School Commissioner D'Autremont of the first school commissioner district of Allegany county, and School Commissioner McCall of the second school commissioner district of Wyoming county, made an order dissolving joint school district no. 5 of the town of Hume, Allegany county, and the town of Genesee Falls, Wyoming county, and annexing its territory to school district no. 13, Hume. The schoolhouse of district no. 13 is located in the village of Wiscoy and previous to the annexation of district no. 5 was located near the central part of the district. All the children residing in former district no. 13 were within a reasonable distance of the schoolhouse. At the extreme eastern point of former district no. 13 and about 1 mile distant from the village of Wiscoy is the village of Rossburg. Appellant claims that Rossburg is within the boundaries of former district no. 13, but it appears from the map submitted in appellant's pleadings that Rossburg is partly in former district no. 13 and partly in former district no. 5. The two districts join each other in or near this village. Former district no. 13 contained about 33 children of school age and had an assessed valuation of $49,597.

Former district no. 5 embraces a section of the Genesee valley of about 3 miles in length. It is an agricultural region and contains many fine farms for which this valley is noted. The Pennsylvania Railroad extends through the whole length of the district. The public highway extending through the valley is a good hard road and in excellent condition. The schoolhouse was located so that it was easily accessible to all the children in the district. Many of the farms in this district are occupied by tenants. At the time of the dissolution of this district the number of children of school age residing therein was nine and the assessed valuation of the district was $90,392. As compared with district

no. 13 its assessed valuation was twice that of no. 13, but the number of children of school age was less than one third of those of no. 13. The number of legal voters in district no. 13 exceeds those in district no. 5. The assessed valuation of former district no. 5 was sufficient to maintain a good school without imposing undue burdens upon the taxpayers.

The consolidated district has an assessed valuation of $139,989 and 42 children of school age. The financial and numerical strength of the district is such as to render it possible for this district to maintain an ideal rural school. The schoolhouse of the consolidated district is the one owned by former district no. 13. It is not centrally located but is in the extreme western portion of the present district. The distance from many of the homes in former district no. 5 to the schoolhouse is so great as to make attendance upon school by small children prohibitive unless transportation is provided.

On August 9, 1905, 26 residents and voters of the district petitioned the trustee to call a special meeting for the purpose of voting upon the proposition to change the site of the district from the village of Wiscoy to the village of Rossburg. On August 14, 1905, Trustee Pratt issued a call for such meeting to be held at 7.30 p. m. on August 29th. Such meeting regularly convened at the proper time and place and after electing a chairman adjourned to meet October 28th. The minutes of the meeting show that 50 voters were present at the time the meeting adjourned. These 50 voters were mostly residents of the Wiscoy section of the district. Many of the voters from former district no. 5 had not reached the meeting although it appears they were on their way to such meeting. It does not appear that those present acted with undue haste in opening the meeting. It does appear that they were prompt in opening the meeting but that some little time elapsed before the meeting was adjourned. The action of the meeting appears to have been regular and legal and if residents of the district were prohibited from participating in the proceedings of the meeting it is chargeable to their failure to be present at the time set for its opening.

It is claimed by appellant that it was the intention of the voters residing in the Wiscoy end of the district and who appear to be a majority of those in the district, to continue to adjourn such meeting without taking definite action on the question which it was called to consider. The pleadings do not show whether or not the meeting was held on the adjourned date of October 28th. It appears from an official inspection ordered by this Department that no action has been taken on the proposition to change the site. It was the duty of the clerk to have given notice of this adjourned meeting in accordance with the provisions of subdivision 3, section 34, title 7 of the Consolidated School Law.

It is claimed by appellant that when district no. 5 consented to the proposition of consolidation with no. 13 it was upon the understanding that the site of the district should be changed and the schoolhouse centrally located. This claim is supported by the testimony of School Commissioner D'Autremont and Doctor Soule, who was trustee of school district no. 13 during the school year ending July 31, 1904, and during the year when the consolidation of these districts was

agitated and which agitation resulted in the order made by the school commissioner on August 31, 1904. Respondent denies that district no. 13 ever became a party to such understanding. Respondent shows that at the annual meeting of district no. 13, in 1904, a resolution was voted down which proposed the appointment of a committee of three to take into consideration the question of consolidation of these districts and the change of the site. It does appear that there had been some representations to the inhabitants of district no. 13 by leading citizens residing in district no. 5, to the effect that if they would consent to the consolidation plan the site of the district would be changed so as to bring all residents of the enlarged district within a reasonable distance of the schoolhouse.

However, it is immaterial as to what the understanding between the inhabitants of these two districts may have been on this question. The inhabitants of district no. 13 could not expect to annex territory to their district representing twice the assessed valuation of their district without extending in return adequate school facilities to the inhabitants of such territory. Many of the inhabitants of former district no. 5 live from 2½ miles to 3½ miles from the schoolhouse of the present district. Children are therefore required to travel from 5 to 7 miles daily in order to attend school. This distance renders attendance by such children upon school prohibitive. If the district boundaries are to be maintained as they now exist the district must change the site to some suitable location at or near Rossburg. If the site is not changed former district no. 5 must be restored. This controversy must be determined by one of these two methods. If district no. 5 is restored it will be necessary for that district to erect a new schoolhouse.

In determining the change of site the inhabitants of former district no. 13 should take into consideration the condition of the present schoolhouse. If the districts should be separated it will be necessary for district no. 13 to enlarge its site, make extended repairs to its schoolhouse, and erect outbuildings that shall be sanitary and conform to law. The appeal from the order of the school commissioner in condemning this schoolhouse will not be decided until the question of changing the site is settled.

I believe either of these districts will be able to maintain a satisfactory school. A better school can probably be maintained by the consolidated district at less expense to the taxpayers of the district. The conditions in this community are such that I believe the voters of the district should be given an opportunity to pass upon the question and I shall therefore direct the trustee to call a special meeting of the district to decide upon the wisdom of changing its site. After such meeting has been held and the action taken by the district is known such further orders may be made herein as shall appear necessary.

The respondent has not satisfactorily answered the charge that adequate and proper school facilities can not be afforded by continuing the schoolhouse where it now stands. This charge is not answered by showing the physical condition of the schoolhouse, its seating capacity, etc. Neither is the question answered by showing that many of the farms are occupied by tenants who may

remove from the district at the end of the year. These valuable farms will continue to be occupied by some one. If not by their owners or the present tenants by other tenants. Whoever may reside on these farms, whether owners or tenants, are entitled to proper school facilities. The value of the farms depends to a certain extent upon the school facilities afforded by the district.

Respondent has devoted much effort to show that many of the petitioners praying for a special meeting to vote upon the proposition to change the site of the schoolhouse are not taxpayers. It is not claimed that these petitioners are not legal voters of the district. It is shown that many of them have children whose education depends upon their ability to travel to and from the schoolhouse daily. A man who is so unfortunate as not to be a taxpayer but who is so fortunate as to be the father of children of school age has a right founded upon reason and law to be heard upon the question of proper school facilities in his district equal to that of a man who may be a large taxpayer but who is not the father of children of school age.

It is ordered, That Fred E. Pratt, sole trustee of school district no. 13, of the towns of Hume and Genesee Falls, of the county of Allegany and Wyoming, be, and he hereby is, directed to forthwith call a special meeting of the legal voters of said district to vote upon the proposition to change the site of the schoolhouse to the site described in the petition of A. R. Mills and others, voters of said district, dated August 9, 1905, and presented to said Pratt on or about that date, or to such other site at or near the village of Rossburg as said meeting shall deem proper and suitable.

It is also ordered, That the said Fred E. Pratt shall forward to me immediately after the said meeting shall have been held a true certified copy of the proceedings of said meeting and the whole thereof.

5387

In the matter of the appeal of Una Beth Davis from a decision of the board of education of the village of Spencerport, N. Y.

A girl 18 years of age who has abandoned her parental home and resides with her grandmother is entitled to attend school in the district in which her grandmother resides, without the payment of tuition.

Decided May 19, 1908

Berton W. Brown, attorney for respondent

Draper, *Commissioner*

The appellant in this proceeding is 18 years of age and claims that she has abandoned the home of her parents and has resided since September last and is now residing in the village of Spencerport with her grandmother, Mrs Abbie B. Hiscock. The pleadings show that Mrs Hiscock is 78 years of age and has

resided in the village of Spencerport for the past 16 years and that no one except appellant resides with her. It further appears that because of the age of Mrs Hiscock it is necessary that she should have some one residing with her permanently. Appellant swears that she has abandoned her father's home to reside permanently with her grandmother and that her grandmother is responsible for her clothing and education. Mrs Hiscock swears that appellant has resided with her since September 1, 1907, and that she has assumed general care and absolute responsibility and control over appellant. The father of appellant swears that because of the age of Mrs Hiscock he has permitted his daughter to live with her grandmother and that she is to remain with her grandmother permanently and that he has relinquished all rights and claims to his daughter's services. He further swears that he relies upon Mrs Hiscock for the general bringing up of his daughter, and to provide her moral and temporal education and to furnish her clothing etc.

Under these conditions appellant claims the right to attend school in the Spencerport district without the payment of tuition. Such right has been denied her by the board of education and this proceeding is instituted for the purpose of obtaining an order directing the board of education to recognize appellant as a resident student of the Spencerport district.

The contention of the board of education is that the father of appellant is a well-to-do farmer and abundantly able to pay the tuition of his daughter. The financial condition of appellant's father has no bearing upon the question. If appellant is a resident of the district she is entitled to the school privileges of such district. It is contended by the board of education that the claim of residence on the part of appellant is not founded upon sufficient facts or made in good faith. The whole theory of respondents' answer is founded upon information and belief. No evidence is offered to controvert the testimony of appellant, of her grandmother and of her father. The testimony of these three persons fully establishes that appellant is a resident of the Spencerport district.

Mrs Hiscock has resided in the Spencerport district for 16 years. It is claimed by the board of education and much stress is placed upon this point, that Mrs Hiscock for several summers has closed her residence at Spencerport and passed the summer elsewhere and usually at the home of appellant's father. Even if she did, such action on her part would not affect her residence. The fact that a person leaves his home to spend the summer in some other part of the country is not an abandonment of his residence.

The record in this case shows that Mrs Hiscock is a resident of the Spencerport district and that appellant resides with her and is entitled to all the privileges of resident pupils in such district.

The exact point in this case was fully considered and determined by this Department in decision no. 4344, decided March 20, 1895. Such decision is also supported by the Supreme Court in People ex rel. B.C.A.Soc. v. Hendrickson (54 Misc. 337).

The appeal herein is sustained.

It is ordered, That the board of education of union free school district no. 1, town of Ogden, shall receive into the school of said district the appellant herein, Una Beth Davis, as a resident pupil thereof and accord the said Una Beth Davis all the rights and privileges to which resident pupils of such district are entitled.

5363

In the matter of the appeal of Beverly R. Crowell from the action of the board of education of union free school district no. 1, town of Palmyra, county of Wayne.

It is manifest that school authorities should give greater weight to the opinions of physicians who are officially charged with responsibility concerning the public health than to the views of other physicians who are not charged with such official responsibility.

A board of education is not justified in barring from attendance upon school, children who are alleged to have had a contagious disease when the health authorities have formally declared that such children did not have the alleged disease.

Decided December 16, 1907

S. K. and B. C. Williams and Hon. W. P. Rudd, attorneys for appellant
Hon. Charles McLouth, attorney for respondents

Draper, *Commissioner*

This is an appeal from the action of the board of education of union free school district no. 1, town of Palmyra, Wayne county, in excluding the children of the appellant from school. There is no contention about the right of the appellant to send his children to the school, except for cause. The cause alleged by the school board is that the children had scarlet fever in May 1907 and that the house has not since been fumigated. The appellant admits that the children were ill for a brief period, but contends that the disease was not scarlet fever and that there has been no scarlet fever in the house. He resists the desire of the school board to have his home fumigated, and stands on what he conceives to be his legal right that his children be admitted to the school without it.

The pleadings show that the children *were* admitted to the school on September 3, 1907, and attended until October 15th, when they were excluded by the board of education because of some apprehension about the matter, which was quickened by the presence of considerable scarlet fever in the school district. Fortunately, there appears to be no wrongful intent; the school board appearing to be only desirous of fully meeting its responsibilities.

Of course, a very material question is, did appellant's children really have scarlet fever? This question is apparently involved in one of the unfortunate controversies which too frequently prejudice the medical profession. Several physicians in the town, some of whom saw the patients, say that the disease

was scarlet fever; the attending physician says that it was not. The proper representative of the State Department of Health visited the place and saw each of the children at the time of the illness, consulted the attending physician and other physicians who saw the children, and determined that the disease was not scarlet fever. The local board of health took the same view and, as the matter seems to have been much discussed, the local board of health was called upon several times to determine whether the disease referred to was or was not scarlet fever. On four different occasions it formally declared that it was not. The local health officer also officially reports that he has traced to his satisfaction the origin of each case of scarlet fever occurring in this district and that no case has been traced to the house or family of appellant.

Thus, the school authorities are called upon to meet the question whether they should be guided by the official attitude of the health authorities upon a question of health, or should feel free to ignore the opinions of the health officers who are charged with official responsibility, and act upon the advice of other physicians.

The opinion of the physicians upon which the board of education claimed to act in suspending appellant's children was a statement signed by such physicians on the 6th day of October. These physicians say in this statement that as it has been *reported* that members of appellant's family have been afflicted with scarlet fever and as it has been *reported* that the health officer of the village as a matter of precaution has recommended that appellant's house be disinfected that they concur in such recommendation. It appears upon the record that no report was ever received by the board of education from the health officer recommending that Crowell's house be fumigated. It also appears that the health officer reported to the village health board that the facts in the case did not authorize the board of health to fumigate the Crowell house. Section 24 of the public health law confers very broad powers upon local boards of health and if it appeared necessary to fumigate the house of appellant in order to protect the health of the citizens of Palmyra the board of health not only possessed the power to direct that such house be fumigated but it was the duty of that body to give such direction.

It is manifest that the school authorities ought to give greater weight to the opinions of physicians who are officially charged with responsibility concerning the public health than to the views of other physicians who are not charged with such official responsibility.

It might have been well if the appellant had thought proper to submit his home to the process of fumigation, but it can not be overlooked that his house is his castle and that when the public authorities sought to invade it he was entitled, if he saw fit, to stand upon his legal rights, and it seems to me that he had lawful warrant for taking the position that whether his house must be invaded by public authority for the protection of the public health was to be settled by the concurrent action of the local and State health authorities. It would also seem that the board of education would be abundantly protected in

such a matter by the attitude of the health authorities, and that where the right of a citizen to send his children to school was insisted upon, the board of education should have recognized the right when the health authorities formally declared that the children did not have scarlet fever and thereby held in effect, that the presence of the children would be no menace to the school.

The able and ingenious counsel for the school board raises a question about the legal right of the Commissioner of Education to entertain and decide this appeal, on the ground that the discretional power of the local board of education is not subject to review by the Commissioner. The precedents of the State Department or the decisions of the courts do not sustain this view. The board of education would doubtless be absolved from responsibility in damages for a mistaken course when acting with reasonable judgment and correct purpose, but it is manifestly the intent of the school law that local controversies affecting the schools or relating to the rights of citizens in the schools shall be determined by appeals to the Commissioner of Education, and that fundamental school policies shall be settled in this way. Otherwise, it would only be necessary for a school board to allege its good purposes and that it had exercised its discretion in order to wholly defeat the purposes of the Consolidated School Law as to the speedy, inexpensive and conclusive settlement of differences which are related to the administration of the schools.

Counsel cites several court decisions of other states to show that trustees are sole governors of the school under their managements. These decisions however relate to schools in states where appellate power to judicially determine school controversies is not vested in a state officer having general supervisory powers over the school system of the State. He also cites People ex rel. King v. Gallagher, 93 N. Y. 438, and In the matter of Walters, 84 Hun 457 in support of his contention. In each of these cases however the action of the board of education was explicitly authorized by the statutes. The courts therefore denied an application for a writ of mandamus and held that the action of the school authorities in such case was conclusive. The appeal under consideration is not analogous to these cases. In this proceeding the action of the board of education was not based upon any provision of law explicitly authorizing such action. Such action was based upon an implied power under the Consolidated School Law which in express terms confers the right of appeal therefrom to the Commissioner of Education and authorizes that officer to determine the matter.

The action of the school board appealed from, so far as it relates to the children of the appellant and their right to be admitted to the school, is held to be erroneous, and the appeal is therefore sustained.

It is ordered, That the board of education of union free school district no. 1, town of Palmyra, Wayne county, shall forthwith admit the children of Beverly R. Crowell, the appellant herein, to the public school maintained in said district.

5311

In the matter of the appeal of William H. Ash from the action of the board of education of union free school district no. 1, town of Islip, Suffolk county, in suspending his daughter from the high school thereof without a hearing after demand.

In the suspension of a pupil a board of education is not required to proceed with the formality of a trial. To hold such procedure necessary would be subversive of proper discipline in a large public school. In such case a board should acquire full knowledge of the facts in the case and take such action as will promote the best interests of the school. The action of a board in suspending a pupil pending suitable apology to a teacher to whom she had been impudent and insubordinate will be sustained.

Decided April 12, 1907

Hon. John B. Merrill, attorney for appellant
Freeman T. Hulse, Esq., attorney for respondent

Draper, *Commissioner*

Esther E. Ash, daughter of appellant, was a resident pupil in attendance upon the academic department of union free school district no. 1, town of Islip, Suffolk county. On December 19, 1906, she was suspended from school for insubordination. Her reinstatement was conditioned upon an apology to one of the teachers for her alleged misconduct. Miss Ash was 17 years of age at the time of her suspension. On December 19, 1906, Miss Ash had trouble with Mr Platner, the vice principal of the school. He reported the case to the principal. The principal interviewed Miss Ash on the subject and on her statement of what occurred and the statement of Mr Platner, the principal suspended her on the condition above stated. Miss Ash refused to make the apology. The case was referred by the principal to the board of education. The board of education investigated the case and sustained the action of the principal. The father of Miss Ash, through his attorney, made demand upon the board of education for her immediate reinstatement in school. This the board declined to do. Thereupon the father of Miss Ash applied to the Supreme Court for a writ of mandamus commanding the board of education of said district to reinstate his daughter. The court denied such application without prejudice to an appeal to the Commissioner of Education. This proceeding was then instituted.

The claim of appellant is that his daughter was not officially notified by the board of education of charges against her, that no hearing was granted her by the board of education even after a request therefor was made by her father, and that to protect the rights of this pupil the board of education was required to order a formal hearing and to permit her to appear with counsel and proceed with all the formality of a trial.

This contention is not sound. The school law contains no provision contemplating such procedure. Such procedure would be subversive to proper discipline in a large public school. Subdivision 2 of section 15, title 8 of the Con-

solidated School Law confers on a board of education the power to establish such regulations concerning the order and discipline of the schools under its charge as it shall deem necessary to secure the best educational results. Subdivision 10 of the same section among other things provides that a board of education is "to have, in all respects, the superintendence, management and control of said union free schools." It appears that the board of education pursued the proper course in dealing with this case. The board made an informal inquiry into all the questions involved. Members of the faculty were consulted. Pupils of the school having knowledge of the affair were consulted. The principal had talked the matter over with Miss Ash. The board acquired full knowledge of the facts in the case and took such action as it deemed for the best interests of the school.

I shall not hold that in such cases a board of education shall proceed with the formality of a trial. A board should ascertain what the conduct of a pupil has been and should take such action as the facts in the premises warrant. If a board violates any of the rights of a pupil the statutes afford adequate relief.

The pupil was not expelled. She was simply suspended until she made suitable apology to a teacher to whom she had been impudent and insubordinate. It was not stipulated that the apology should be public or attended by humiliation. The requirement was that Miss Ash should conform to that decorum by which ladies and gentlemen are governed when one has unintentionally violated the conventions of good society. She may return to school any time upon suitable apology. It does not appear from the pleadings submitted that any injustice has been imposed upon appellant's daughter by the action complained of.

The appeal herein is dismissed.

Suspension from school for more than a year sufficient punishment for using language to a teacher unbecoming a gentleman. Should not be made perpetual.
Decided July 21, 1875

Gilmour, *Superintendent*

The appellant was and still is suspended, "for disrespectful conduct and language toward his teacher," and the board of education refuse to restore him to the school until he shall make an apology to the teacher. This the pupil refuses to do.

The Superintendent finds that the language of the pupil was such as no provocation would justify a gentleman in using toward a lady, and that his own sense of self-respect should have prompted him to make an apology to the teacher without any requirement from the trustees.

But in view of the fact that the pupil has already been deprived of the privileges of the school for more than a year, which may perhaps be regarded as a sufficient punishment for an offense committed in a moment of excitement, and by a scholar of uniform previous good conduct, the appeal is, with considerable reluctance, sustained, and the pupil restored to the privileges of the school.

Colored children are entitled to attend the common schools in this State, in all districts, except those in which, by law, provision is made for their education in separate schools.

Decided December 21, 1865

Rice, *Superintendent*

The petition of appeal in this case states, as the ground of appeal, that the trustees came to the schoolhouse and ordered a certain colored lad, commonly called "Dick," to leave the school. The petition alleges that said "Dick" was at the time over 5 and under 21 years of age, and was of the age of 14 or 15 years; and that he was an actual resident of the district, and has for the last two years been included, by the trustees of the district, in the enumeration of the children made in their annual report to the school commissioner. These facts would give him the right to attend the district school, while the trustees would also have the right to expel him from the school for any good cause shown. The appellant alleges that "the trustees gave 'Dick' no reason for his expulsion, except that, if he continued to go to school, the school would be broken up," and he also alleges that after the dismissal of "Dick" from school, the teacher said to appellant that "Dick" had been an orderly scholar, and had not disobeyed the rules or orders of the school.

The only allegations in the answer which may be considered as contradicting these are in the language of the respondent, as follows, namely: "On the morning of the 1st day of December 1865, the teacher dismissed school on account of disturbance caused, as the teacher declared, and as the trustees verily believe, on account of said colored boy being in school; and on the 4th day of December 1865, the teacher commenced school again, and the trustees did there and then dismiss the said colored boy from school, and at the time did assign to him the reason why they so dismissed him; and that, on the 11th day of December 1865, the said colored boy went to school, and on the same day the above-named John Skatts and William R. Parker went to the schoolhouse and dismissed the said colored boy again for the same reason, and told him that he could not come to school until the weather was settled; that they dismissed him because he was offensive and a laughing stock for the scholars both in and out of school; and that his presence there did annoy and disturb the school to such an extent that the teacher could not preserve or keep order."

These are all the facts of any consequence alleged in the case.

It is, therefore, admitted by the respondents, that "Dick" was primarily entitled to attend the school, being a resident and of school age; and that he was expelled because "his *presence* did annoy and disturb the school to such an extent that the teacher could not preserve or keep order." I know no law of this State, or decision, excluding a pupil from a public school merely because his *presence* annoys and disturbs the school. If he had the small-pox, or some other dangerous and contagious disease, the presence of such disease would be dangerous to the school, and the disease might legally be removed by removing the pupil. But no such complaint is made of "Dick," and the presumption is that he is a strong, healthy, intelligent boy.

But the respondents allege that he "was offensive and a laughing stock for the scholars." It is not alleged that he actively engaged in any offensive operations at school, to the injury of the scholars. Therefore, the cause of his offense, if there was any cause, must have been that he was "colored," or in some other respect, was not by his Creator so made as to be adapted to the tastes of his school-fellows, or that his tailor was at fault. The offense was committed by those who made sport of him. They ought to have been taught better manners. The mere fact that "Dick" was "a laughing stock for the scholars" is not a just ground of punishment or censure to be visited upon him, but may be the result of the highest virtues, the noblest purposes, and the most commendable action in *him*.

In the absence of evidence to the contrary, such is presumed to have been the case, in view of the allegations of the appellant, "that when the colored lad returned to school on the 11th day of December, other boys in school hours annoyed him with opprobrious looks and actions." There is no allegation in the answer that "Dick" has ever, on any occasion, in school or out of school, acted in a manner unbecoming a high-minded, earnest boy. For *such* boys this great State has, by the labors and money of a willing people, organized and sustained a beneficent common school system, and has designed thus to extend a protecting and guiding hand to them, and by these means to bless and exalt all her children.

The trustees of said school district nos. 21 and 11, in the towns of Darien and Alexander, in the county of Genesee, are, therefore, hereby ordered forthwith to admit said colored lad "Dick" to all the privileges of said district school.

The authority of trustees, and hence of teachers over pupils, ceases after the close of school, and their departure from the school premises.
Decided May 13, 1875

Gilmour, *Superintendent*

A rule adopted by the board of education of a union free school district, among other things forbade pupils attending parties, and their being "absent from their rooms and studies at unusual and improper hours during school week," and further provided that pupils "violating this rule, or any part thereof, may be suspended, or on repeated violations, expelled from the school by the principal, subject to the approval of the board of education."

This rule was enforced against the appellants, two pupils of said school, by their suspension therefrom, the offense charged against them being their attendance upon a meeting of a society in the village known as the Good Templars, an organization for the promotion of the cause of temperance, of which the appellants were members, their attendance therein being charged as a violation of the above rule.

The appellants do not lodge in the school building, and the rule in question is avowedly for the purpose of regulating the conduct of the scholars out of school hours, and when absent from the school premises.

I am aware of the existence of no law under which trustees or teachers have the right to regulate the conduct of the scholars out of school hours, and when away from the school premises. When the school closes and the pupil leaves the school premises the authority of trustees and teacher ceases, and that of the parent or guardian is resumed.

All rules or regulations founded upon any different basis are without authority, and no penalty for their violation can be legally enforced.

"Cruel and unusual punishments" of pupils reprehended.
Decided April 15, 1873

Weaver, *Superintendent*

A pupil accused of whispering was ordered by the teacher, as a punishment for the offense, to take a seat near a very hot stove. This the young man declined to do, and because he would not subsequently acknowledge that he had done wrong in thus disobeying his teacher, the trustee suspended him from school until he should make the required acknowledgment.

Held, to be the duty of teachers to exercise a sensible discretion in their dealings with the pupils under their charge. To compel a scholar to sit by a *hot* stove is an improper punishment for any offense, and when one refuses to acknowledge that he has done wrong in declining to submit to its infliction, a proper case is not presented for suspension from school.

The right of a pupil to wear her hair in school according to the taste of the parent, maintained.
Decided April 6, 1874

Weaver, *Superintendent*

A mother appeals from the action of the trustees in expelling from the school her two children, a girl of 9, and a boy of 7 years of age.

The alleged ground of expulsion is the refusal of the mother to comply with a requirement of the teacher and the trustees, in regard to the mode in which the hair of the little girl of 9 should be arranged.

Though this, as the reason of the expulsion, is denied by the trustees, it would seem that the conflict of opinion between mother and teacher, upon this important question of the arrangement of the child's hair, led the way at least to the final act in the controversy, the exclusion of the children from school. The Superintendent says: "There is no evidence of the infraction of the rules

of the school by the boy, and the girl does not appear to have violated any rule, unless it is by coming to school with her hair arranged by her mother in a manner different from that required by the trustees.

"The action of the trustees is without lawful authority. They had no right to make such a regulation as they say was disregarded in this case, and consequently they could not legally inflict any penalty for its violation."

Nor could they lawfully insist upon the conditions prescribed by them for readmitting the children to the school, which are, that the mother shall make a written apology to the teachers of the school for alleged insults offered to them in connection with this matter, and shall stipulate in writing with the trustees that all rules and regulations of the school shall be strictly conformed to, and that she "will not seek to enter upon the school lot, speak to, or address by letter either of the teachers."

Trustees directed to admit the children to the school.

Right of children, residing on lands within a district which have been ceded to the United States, to attend the school of the district.
Decided July 13, 1869

Weaver, *Superintendent*

Within the limits of school district no. 13, Champlain, Clinton county, are certain lands, jurisdiction over which has been ceded by the State of New York to the United States, "for the defense and safety of the State." Resident upon these lands are persons with children of school age whom they desire to send to the school of the district within whose boundaries they are embraced. The trustee of district no. 13 refuses to allow these children to attend the school in said district without payment of a tuition fee, claiming that the cession of jurisdiction referred to has had the effect of entirely excluding the lands in question from the said district. The Superintendent says: "In this position, the respondent, in my judgment, is in error. There exists no good reason either in the purpose for which the cession of jurisdiction was made, or in the terms of the cession itself, for excluding any of the children resident upon the lands in question from the advantages for education afforded by the State." Trustee directed to permit the children resident upon said lands, to attend the district school in equal terms with other children of the district.

Trustees have no power to impose a fine upon a pupil, and suspend him from school until it is paid.
Decided March 25, 1873

Weaver, *Superintendent*

It appears that the appellant, a minor of the age of 15 years, residing in union free school district no. 2, town of Onondaga, has been suspended from the school until a fine of fifteen cents, inflicted upon him for damages done to

seats and desks in the schoolhouse, shall be paid. The appellant denies the charge as against him, but the decision is made without regard to his guilt or innocence in the matter.

If to protect the district property the trustees deem it necessary or proper to suspend from the school for a reasonable period any of the scholars guilty of injuring such property, there is no doubt of their right to do so. But there is no provision of law which authorizes school officers to inflict a *pecuniary fine* upon the pupils for any cause. It will be the duty of the board of education to readmit the appellant to the school on his application therefor.

Abuse of discretion in the enforcement of discipline rebuked.
Decided April 27, 1872

Weaver, *Superintendent*

The son of the appellant, a boy about 11 years of age, had been guilty of some light offense against the discipline of the school, and the same was reported to the trustee by the teacher in accordance with previous instructions to that effect. The trustee ordered the boy to ask pardon *upon his knees* of the teacher, on penalty of expulsion from school for a refusal to comply. The scholar expressed his willingness to ask pardon of the teacher, but declined to do so in the humiliating posture required. He was thereupon expelled from the school.

Such an abuse of his discretion by the trustee is in my opinion entirely without excuse. While I would always cheerfully sustain trustees in enforcing discipline in the schools by the use of proper means, such an act of petty tyranny as the one complained of can receive no countenance from me.

3891

In the matter of the appeal of William McDonough v. Lorenzo Smith, trustee of school district no. 6, town of Springfield, Otsego county.

A child was excluded from the school by a teacher, with the trustee's approval, upon the alleged ground that he was idiotic, lacked capacity for education, and was unable to care for himself. Evidence offered before the school commissioner did not sustain the charges, but rather refuted them. *Held,* that the boy should be received as a pupil.
Decided July 18, 1890

Draper, *Superintendent*

During the last term, Miss Fannie E. Ingalls, teacher in the above-named district, sent a son of the appellant from the school and refused to permit him to reenter. In this action, she is sustained by the trustee. This appeal is brought to determine whether or not the child should be permitted to attend school in the district.

The ground upon which the child was sent from school was that he was idiotic, and not only lacked capacity for education, but also was unable to care for his own person. It is alleged by the trustee and others, that upon occasions he permitted his clothing to be disarranged, even to the exposure of his person, and that he said and did things detrimental to the interests of the school and incompatible with his continuance therein.

These allegations are stoutly denied by the father and at his instance, I directed the school commissioner having jurisdiction to take testimony touching the matter. He has taken the testimony offered by the appellant, but his report discloses the fact that the respondent entirely failed to maintain his side of the case at such inquiry. Neither the teacher nor any one else was produced before the commissioner to give testimony touching the matter. I observe, however, that two or three witnesses who had previously made affidavit on the side of the respondent, were produced by the appellant before the commissioner, and contradicted material parts of the affidavits which they had previously made, stating that such affidavits were read to them by the father of the teacher, and that either he did not read them as written, or that they did not understand them to that effect. These discrepancies are not at all explained by the respondent, and it must be said that they materially weaken his case.

I have read all the allegations of the parties, and all the testimony taken before the school commissioner, with much care. From all of the statements made, I conclude the fact to be that the boy in question, who is now 11 years of age, is of weak physical and mental organization, and has been of no little trouble and annoyance to the teacher. Yet, but one instance is set forth by her when his conduct was subversive of the good order and decorum of the schoolroom, and touching that occasion, it occurs to me that more may have been said than was justified. No less than three persons who have previously taught the school, and of unquestioned credibility, state that the boy was in the school while they had charge of it, and that they not only suffered no severe annoyance or inconvenience because of his presence, but that they considered him capable of receiving an education, and that they believed that he had made some progress in that direction.

I suppose the true rule touching such a case is that the child should be permitted to attend the school unless his presence is obnoxious to others, and unless he is so weak-minded as to be incapable of caring for himself and receiving the elements of an education. The school ought to help this boy if it can do so without detriment to the interests of other pupils. Not the mere pleasure or convenience of the teacher is to be considered, but the efficiency and success of the school. Although he may be the occasion of some annoyance, and of a little unusual care and attention, he should be permitted to continue in the school unless his presence there will injure it.

Applying this view to the facts in this particular case, I can not resist the conclusion that it is my duty to direct the trustee to again receive the boy into the school.

The appeal is sustained, and it is so ordered.

3861

In the matter of the appeal of Patrick Horan v. the board of trustees of school district no. 19, of the town of Watervliet, county of Albany.

Appeal from the refusal of the trustees of a district to receive a pupil in the school who had been expelled for a breach of discipline. The boy has been denied the privileges of the school for several weeks. The act for which the punishment was inflicted was evidently the result of momentary impulse, and for which he is now contrite. Nothing is shown against him but this one act. *Held,* that he should be admitted to the school.

Decided March 4, 1890

Draper, *Superintendent*

The appellant has a son, William Horan, who has been a pupil in the school, in the above-named school district, and who has been expelled from the school for a breach of discipline on or about the 28th day of January 1890. Since that time the father has made repeated efforts to have the boy received into the school again, but the trustees persistently refused to admit him. From this refusal he brings this appeal to the Department.

The trustees make no answer. The boy is about 14 years of age. It nowhere appears that he is of such a character as to make his presence in the school destructive of its efficiency. Nothing is shown against him except the one act for which he was expelled. That act was evidently the result of momentary impulse, and there is apparent contrition on the part of the boy. The father is evidently a hard-working, industrious man, with a large family, and is anxious to give the boy a suitable education. It is not necessary to determine whether the board was justified or not in turning the boy out of the school.

It is manifest to me that whatever may be said upon that point, he has been deprived of the privileges of the school as long as he ought to be.

The appeal is sustained, and the trustees are directed to forthwith admit William Horan to the privileges of the school.

3689

In the matter of the appeal of E. Parmly Brown v. the board of education of the village of Flushing, in the county of Queens.

The action of a teacher and of a board of education in suspending a pupil will be upheld when it is shown that the pupil was disorderly and refused to obey the teacher and properly deport himself in the school.

Until it is made to appear by proof that the pupil has been subjugated and is ready to conduct himself properly, he should not be admitted to the privileges of the school.

Decided May 30, 1888

Draper, *Superintendent*

This is an appeal from the action of the respondents in suspending the son of the appellant, a young man named Anthony Brown, 17 years of age, from the privileges of the school under their charge.

The papers submitted by the respective parties are voluminous, containing much irrelevant matter, but they have been read and compared with care. The cause of the suspension of the boy was his misconduct. The facts touching his misconduct are in dispute. The statements of the parties are contradictory. Without entering into an extended or detailed account of what is alleged on either side, it may be said that there is considerable evidence to show that the boy had been irregular in attendance and frequently disorderly and troublesome to his teachers, in consequence of which he was kept on the front seat. On the 12th day of October 1887, while the principal of the school, Mr John H. Clark, was speaking to the pupils of the room in which the boy was, in relation to some matter of discipline, the young man partly rose in his seat and turned around to look at other pupils in a manner so contemptuous to the principal as to lead the latter to take hold of him. The boy resisted and a trial of physical strength between the two ensued. It seems to have been so severe as to have required the intervention of the janitor of the building on behalf of the teacher. The boy was taken to the office of the principal and talked with until he indicated his willingness to make an apology before the school and promise future good behavior, which he did the same day. The next morning the lady teacher, in whose room the boy was, reported to the principal that he was continually troublesome, and later, upon the same day, she sent him to the principal, pursuant to a rule of the school that such action should be taken when a pupil had received four demerits during the month, which this boy had now received. The principal swears that upon his remonstrating with the pupil he became insolent and abusive, defended his action, applied a vile and offensive epithet to him, dared the teacher to undertake to put him out of the school, said that, if he did not look out, he (the teacher) would have to go himself, and if he did not take care he would get hurt. The teacher told the pupil that he should suspend him from the privileges of the school and directed him to leave, which he finally did. The next morning, however, the boy appeared in the school and was, it is alleged, a leader in a plot for scattering numerous paper caps upon the floor and in exploding the same, to the great confusion of the school. Thereupon, the boy was removed from the school and the matter reported to the board of education, which body, by resolution, sustained the action of the principal.

The appellant's statements put a coloring upon these facts more favorable to his son, but I think I state them as favorably to the boy as the proofs submitted will justify. The principal of the school is a man of mature age and long experience. His affidavit is clear and minute in its statements of all the circumstances. He is strongly supported by the sworn statements of two lady teachers, and the janitor of the school, as to the facts of which they were witnesses and which were the more important and essential ones. All the surrounding circumstances, many of which are admitted by the appellant and his son, are in corroboration of the statements of the board and the principal.

The facts lead to the conclusion that the boy undertook the task of overthrowing the government of the school. It was necessary that he be reduced to subjection immediately and effectually, or removed from the school. There is no

proof of oversevere punishment. There is proof of moderation and forbearance on the part of the teacher. There is evidence of persistent insubordination on the part of the pupil. This, even after suspension and to an extent which rendered him, in my judgment, liable to punishment in the criminal courts for interfering with and disturbing the school. There is no doubt of the power of the school authorities to deprive pupils of the privileges of the school until they are ready to abide proper discipline. The propriety of exercising this power is more manifest in the case of pupils of advanced age. The pupil in the case under consideration is 17 years of age. He may have strength equal to that of the teacher. The public has no right to call upon teachers to test their physical powers with those of young men already grown to man's estate. I do not see that the principal or the board could have done anything less than suspend this boy. The action of the board indicates that the suspension was intended to continue only so long as was necessary to reduce the boy to subjection. No proof is offered of contrition on the part of the boy or of any application for his readmission upon promise of good behavior. The main purpose of the appeal seems to be the overthrow of the teacher and defeat of the board. Facts are not shown which would justify me in sustaining this attempt. The boy is the one to be subjugated and until there is proof of that having been accomplished and the board still refusing to admit him to the privileges of the school, I shall not feel justified in interfering with its action.

In view of these considerations, the appeal must be dismissed.

3698

In the matter of the appeal of W. C. Baldwin v. L. Duane Streeter, trustee of school district no. 16, town of Volney, county of Oswego.

A pupil was denied the privileges of the school because he persisted in leaving the school grounds during the noon recess; *held*, insufficient cause. That the teacher has no claim upon a pupil's time during the recess.

Decided July 16, 1888

Draper, *Superintendent*

From the statement of the appellant, it seems that the trustee and teacher in district no. 16, town of Volney, county of Oswego, dismissed one Clarence Stead from the school in said district in the latter part of March 1888. The reason for such dismissal which is alleged is, that the boy persisted in going away from the school grounds during the noon recess. It seems that he was on one occasion called away from the school during the afternoon session in order to assist his uncle in an emergency, but the principal difficulty alleged is that he refused to remain upon the school grounds during the noon recess, in violation of a rule which the teacher had established. No answer has been served upon the appellant by the trustee, and none has been filed in the Department. Fearing that there was some misunderstanding or oversight about the matter on the part of the trustee, a letter was addressed to him on the 8th day

of June, asking why no answer had been interposed and also requesting him to advise me whether the boy was still denied the privileges of the school, and, if so, upon what grounds. In the course of time a reply was received, in which he states that the boy had not been permitted to reenter the school, and that no answer had been interposed because he "did not think there was enough to it to bother with it," and he volunteers the statement that "if this is not sufficient, let me know and I will go into details."

The rules of this Department, which are, or should be, familiar to all trustees, require that all appeals shall be answered within ten days from the time of service. That not having been done in the present case, the unusual course was pursued of communicating with the trustee, in order that he might make no mistake about the matter. Even after this, he neglects to interpose an answer in justification of his own act in dismissing the boy from the school. Such gross negligence is hardly tolerable on the part of a trustee.

There being no answer interposed, I must accept the statements of the appellant as true. That being so, I can see no good reason for depriving the boy of the privileges of the school. The teacher had no claim upon his time during the noon recess. He was at liberty to go where he chose at that time, assuming that he did so with his parents' knowledge and consent. It is not shown that his attendance during school hours was with any such irregularity as to interfere with the efficiency of the school or justify the school authorities in dismissing him.

The appeal is, therefore, sustained, and the trustees and teacher directed to admit Clarence Stead to the privileges of the school whenever it shall be in session.

3574

In the matter of the appeal of Lyman Randall v. Homer Titus, trustee of school district no. 2, towns of Lindley and Erwin, Steuben county.

When a pupil has been suspended from school for violating a rule of propriety, and before an appeal was taken, the officer who suspended the pupil had given public notice that the pupil might return to school, an appeal subsequently taken from the act of dismissal will not be sustained.

Decided March 10, 1887

Draper, *Superintendent*

This is an appeal by a resident of school district no. 2, towns of Lindley and Erwin, Steuben county, New York, from the action of the trustee of said district, in suspending appellant's son, who is a pupil at the public school in said school district.

The alleged cause of the suspension is that the boy broke a pane of glass in the schoolhouse, which the boy, or his father, the appellant, would not replace.

It is claimed by the appellant that the glass was broken accidentally.

The trustee has answered the appeal, and filed affidavits of two boys who were present at the time, which tend to show that the boy undertook to go through a window of the schoolhouse instead of using the door, which was unlocked; that he was warned to go to the door, but he persisted in using the window, and in so doing broke the glass. The trustee admits that he suspended the boy, but before this appeal was brought he had publicly stated to the scholars, among them one of appellant's children, that the boy could return to school, and that he, the trustee, would pay for the glass.

The appellant asks that the action of the trustee in suspending his boy, be set aside. As the evidence shows that this has already been done by the trustee's action in inviting the boy to return to school, the necessity for the appeal to me does not exist, and I therefore dismiss the same.

4362

In the matter of the appeal of Daniel Lynch, sr, and others v. R. F. Ford, sole trustee, school district no. 22, town of Verona, Oneida county.

Where it is established to the satisfaction of the trustees of a district that pupils attending the school in the district have indecently exposed their persons and acted in obscene or indecent manner, and used vile and indecent language, the trustee of said district has the power, and it is his duty, to suspend such pupils from the school.

Decided July 9, 1895

M. H. Powers, attorney for appellants
Davies & Johnson, attorneys for respondent

Skinner, *Superintendent*

This is an appeal by Daniel Lynch, sr, and Edward Lynch and Daniel Lynch, jr, his sons, from the action and decision of R. F. Ford, sole trustee of school district no. 22, town of Verona, Oneida county, suspending said Edward Lynch and Daniel Lynch, jr from the school in said district.

The respondent has filed an answer to the appeal; to said answer a reply has been made; to the reply a rejoinder, and to the rejoinder a subrejoinder. The papers are somewhat voluminous, but much of the matters contained therein is not relevant to the issue presented by the appeal and answer.

From the proofs filed herein it appears: That R. F. Ford is the trustee of school district no. 22, town of Verona, Oneida county, for the present school year; that the appellant, Daniel Lynch, sr, is, and has been, a resident of said school district during the present school year, and that the appellants, Edward and Daniel Lynch, jr, are the sons of said Daniel Lynch, sr, residing with their father in said school district, and of school age, to wit: said Edward is 16 years of age, and said Daniel, jr, is 14 years of age; that said Edward and Daniel, jr, have been attending the school in said school district in the present school year,

and in the term of school in said year in which said school was maintained, commencing March 11, 1895; that at different times during said school year complaint was made by scholars attending the school in said district that said Edward Lynch and Daniel Lynch, jr, had each of them at different times in the schoolhouse and upon the school grounds indecently exposed their persons to the scholars attending said school, and had acted in the presence of scholars in said school in the schoolhouse and upon the school grounds in an obscene and indecent manner, and had also used vile, obscene and indecent language; that within the week of said school next preceding April 12, 1895, for a day or two a large number of scholars absented themselves from said school by reason of the aforesaid conduct on the part of said Edward and Daniel Lynch, jr; that on or about April 10, 1895, seven of the scholars attending said school informed the respondent herein of the aforesaid acts on the part of said Edward and Daniel Lynch, jr, and severally signed a paper in which they stated that during school hours they had repeatedly seen said Lynch boys indecently expose their persons to them and other scholars of said school, and delivered said paper to the respondent; that the respondent, after receiving said statement, informed the appellant, Daniel Lynch, sr, of the charges made by scholars attending said school against his sons, Edward and Daniel, jr, and asked or advised that he take his said sons out of school temporarily, and thus save the respondent from the necessity of suspending them from school; that said appellant, Lynch, sr, declined to take his sons out of school, and informed the respondent that he must act in the matter as he thought best; that on April 12, 1895, the respondent went to said schoolhouse while the said school was in session, and the said Edward and Daniel Lynch, jr, being then present in said school, he directed them to leave the school and informed them that they were suspended from said school until such time as he (the respondent) deemed advisable for them to return, and they should conduct themselves properly; that on April 16, 1895, the appellants herein filed their appeal from said action and decision of the respondent, as such trustee.

It must be conceded that if said Lynch boys had conducted themselves in the schoolhouse or upon the school grounds in the presence of the scholars attending said school in the manner they were charged to have acted and the respondent was satisfied from the statements made to him that said statements were true, it was the duty of the respondent to suspend them from attending said school. Under the school law, the Lynch boys and their parents, if they felt aggrieved, that is, injured, by the action of the respondent, had the right to appeal to the State Superintendent of Public Instruction from the action and decision of the respondent, when the proofs relative to said charges and their answer thereto could be presented. The respondent has filed the affidavits of eleven scholars attending said school, all of whom allege that they have seen both Edward and Daniel Lynch, jr, in the school building and upon the school grounds, while the school was in session and in recess and intermission, indecently expose his or their person or persons, and act in an obscene and indecent manner, and heard them use vile, obscene and indecent language.

In the proofs filed by the appellants, Edward and Daniel Lynch, jr, deny, in the affidavits made by them, the charges brought against them. The other affidavits filed by the appellants, so far as they relate to the aforesaid charges, the affiants state therein that they never saw the Lynch boys indecently expose their persons, or act in an obscene or indecent manner, or hear them use vile, obscene and indecent language, and that the said affiants do not believe the said boys are guilty of the charges made against them.

I can not disregard the positive testimony presented by the respondent in this appeal, that said Lynch boys were guilty of the conduct alleged therein. I am clearly of the opinion, upon the proofs presented herein, that the respondent acted within the powers and duties given him under the school law in suspending said Lynch boys from the school in said district, and upon sufficient proof of the improper conduct of said boys. The appellants have failed in establishing their appeal and the appeal should be dismissed.

Appeal dismissed.

RELIGIOUS SERVICES

Trustees have no warrant of law for directing religious exercises to be conducted in the school during school hours, nor for excluding pupils from the school altogether on the ground of their declining to be present at such reading.

Decided August 23, 1870

Weaver, *Superintendent*

The appellant states that by the express orders and directions of the trustee, the teacher of the district school, each morning at the opening thereof, reads a chapter of the protestant version of the scriptures. That the appellant from conscientious and religious scruples has kept his children from going to school until after such reading of the scriptures was ended. That in consequence thereof, appellant's children get to the school ten or fifteen minutes after the opening of school, and that they are for that reason refused admission by the teacher, and are by her sent home, she declaring to them "that they must be present at the reading or stay away all day."

The object of the common school system of the State is to afford the means of secular instruction to all the children within its borders. For their *religious* training, the State does not provide and with it does not interfere. The advantages of the schools are to be free to all alike, and the consciences of none are to be legally violated. There is no authority in the law, as a matter of right, to use any portion of the regular school hours in conducting any religious exercise at which the attendance of the scholars is made compulsory. On the other hand, there is nothing to prevent the reading of the scriptures or the performance of other religious exercises by the teacher in the presence of such of the scholars as may attend voluntarily or by the direction of their parents or guardians, if it be done before the hour fixed for the opening of the school or after the dismissal of the school. (Decisions of Secretary Spencer and Superintendent Rice, above quoted, commented on and approved.)

The action of the trustee in directing the reading of the scriptures as a part of the school exercises, and in causing the exclusion of any of the pupils from the school on the ground of their declining to be present at such reading, has been entirely without warrant of law.

Decided June 5, 1872

Weaver, *Superintendent*

A long and bitter controversy between certain of the inhabitants and the board of education of Long Island City, involving precisely the same question as that in the last preceding decision, leads the Superintendent to recite quite fully the previous rulings of the Department upon the question and the same are

upheld by him in the following conclusion concerning the particular issue presented upon those separate appeals from that city:

"The action of the board of education of Long Island City, in directing the reading of a portion of the Bible as an opening exercise in the schools under their charge during school hours, and in excluding pupils from those schools or any of them, on the ground of declining to be present at such reading, has been without warrant of law."

2847

Decided April 18, 1870

Gilmour, *Superintendent*

Religious exercises that are held before nine o'clock a. m., and are not compulsory, do not violate any legal right.

Trustees can not, under any circumstances, be required to open the schoolhouse for religious meetings.
Decided June 7, 1860

Van Dyck, *Superintendent*

This Department, in its late action, has favored the policy of opening the schoolhouse for religious and other worthy objects, when not wanted for school purposes. Where this power is exercised by the trustees, within the limits of a proper discretion, and regard for the district property, the Department will not interfere.

But this is very different from compelling the trustees to open the house for such purposes. They can not, as trustees of the district, be compelled to do any act not specifically within the range of duties prescribed. They are under no obligation to yield, even to the unanimous wish of the district, to open the schoolhouse for other than school purposes; and for the reason that they are not elected as guardians of the moral or religious interests of the district, but of its educational interests. They can not be compelled to take action outside of their official relations. For their refusal to comply with the wishes of the district in matters outside their official relations, there is no remedy but to elect others in their places, as fast as their terms of service shall expire.

Trustees will not be ordered to open the schoolhouse for religious meetings.
Decided May 5, 1862

Rice, *Superintendent*

No denomination has a right to the use of the schoolhouse for religious or other purposes. Whoever occupies it for other than school purposes does so by sufferance only. The trustee who allows such privileges to be exercised does so without the sanction of any statute law, and is personally responsible for any injury to the property caused thereby.

No inhabitant of the district has a right to demand any thing from the trustee as an officer, which he is not lawfully bound to grant; and this Department has no authority to order him to do any thing not required or contemplated by the law prescribing his duties. Consequently, the Superintendent has not authority to order the trustee to open the schoolhouse for other than school purposes.

School may be opened with prayers, provided that it be done before school hours, and that there be no compulsion to enforce attendance.
Decided May 13, 1839

Spencer, *Superintendent*

In an appeal to the Superintendent, certain inhabitants of district no. 15, Barre, complained that the teacher, with the permission of the trustees, "made prayer part of school discipline." The trustees replied that they had permitted the teacher to have prayers on condition that they should be had previous to school hours, and they alleged that he did not occupy school hours. The Superintendent dismissed the appeal, with the following remarks:

"In this conduct of the trustees, the Superintendent can perceive no cause of complaint. Both parties have rights; the one to bring up their children in the practice of publicly thanking their Creator for his protection, and invoking His blessing; the other, of declining, in behalf of their children, the religious services of any person in whose creed they may not concur, or for other reasons satisfactory to themselves. These rights are reciprocal, and should be protected equally; and neither should interfere with the other. Those who desire that their children should engage in public prayer have no right to compel other children to unite in the exercise, against the wishes of their parents. Nor have those who object to this time, place or manner of praying, or to the person who conducts the exercises, a right to deprive the other class of the opportunity of habituating their children to what they conceive an imperious duty. Neither the common school system, nor any other social system, can be maintained, unless the conscientious views of all are equally respected. The simple rule, so to exercise your own rights as not to infringe on those of others, will preserve equal justice among all, promote harmony, and insure success to our schools. In the present case, the Superintendent thinks the trustees had lawful right to permit the teacher to commence the business of the day by public prayer, with the children of such parents as desired it; and they were also right in directing that such exercises should not take place during school hours, nor form a part of school discipline."

Another branch of this first question is whether the teacher has a right to compel the children to kneel, during prayer, or to dispense with their ordinary business.

The answer already given proceeds upon the principle that prayer is no part of the business of a common school, but that parents may place their children

under the superintendence and government of a teacher for that purpose. Of course his jurisdiction would extend to that only. But others have no right to disturb the performance of what is considered a sacred duty. As the one class is required to abstain from all attempts to compel the children of the other class to engage in an exercise which the latter disapprove, so the latter should abstain from interrupting such exercise, and should instruct their children, accordingly, not to enter the schoolroom, until the usual hour of commencing school, and not to disturb those within by any noise, or other conduct calculated to annoy them. And the teacher should allow the children of all parents who do not desire them to engage in prayer to withdraw from the room, or to absent themselves from it. But if they come into the room before the usual school hours, and choose to remain there during prayer, they must preserve the order and decorum befitting such an occasion.

Religious exercises are not a part of district school exercises, and, therefore, no portion of the regular school hours is to be consumed in conducting them.
Decided February 5, 1866

Rice, *Superintendent*

A teacher has no right to consume any portion of the regular school hours in conducting religious exercises, especially where objection is raised. The principle is this: Common schools are supported and established for the purpose of imparting instruction in the common English branches; religious instruction forms no part of the course. The proper places in which to receive such instruction are churches and Sunday schools, of which there is usually a sufficient number in every district. The money to support schools comes from the people at large, irrespective of sect or denomination. Consequently, instruction of a sectarian or religious denominational character must be avoided, and teachers must confine themselves, during school hours, to their legitimate and proper duties.

5440

In the matter of the appeal of Rev. Charles A. Logue from the decision of the board of education of district no. 9, town of Hempstead, Nassau county.

Religious services in schools. The policy of the State education system has been to deny the right of school authorities to compel the attendance of pupils upon religious exercises held during school hours. The rule is that religious instruction may not be given in the public schools as a part of the prescribed course of instruction therein; that religious services consisting of prayers, reading of the Bible and singing of hymns shall not be held during the hours customarily allotted to the performance of school work, and that the pupils of the schools may not be compelled to attend such services whenever held.
Decided November 18, 1909

Draper, *Commissioner*

The appellant, Rev. Charles A. Logue, complains that the board of education of union free school district no. 9, town of Hempstead, unlawfully permits the reading of the Bible, the recitation of the Lord's prayer and the singing of hymns as a part of the school exercises of the schools of such district, and during school hours. The respondents have not answered the appellant's petition, and the allegations therein will therefore be taken as true.

The appellant states that he has protested to the board of education against the reading of the Bible, the recitation of the Lord's prayer and the singing of hymns during school hours, but that such board has ignored such protests, and that such exercises have been continued as a part of the school curriculum.

The question here submitted is not a new one. The established policy of the State education system has been to deny the right of school authorities to compel the attendance of pupils upon religious exercises held during school hours. There has been no departure from the rule that under the general school laws of the State, religious instruction may not be given in the public schools as a part of the prescribed courses of instruction therein, that religious services consisting of prayers, reading of the Bible, and singing of hymns shall not be held during the hours customarily allotted to the performance of school work, and that the pupils of the school may not be compelled to attend such services whenever held.

The decisions of Superintendent Weaver in the case of the appeal of Thomas McMahon (Decision no. 1985, June 5, 1872) and of Superintendent Ruggles in the matter of the board of education of union free school district no. 4, Orangetown (May 27, 1884) are declaratory of the Department's policy in respect to this question. These decisions control the determination of this appeal, which is hereby sustained.

It is hereby ordered, That the board of education of union free school district no. 9, town of Hempstead, Nassau county, take such action as may be necessary to conform to the rule set forth and declared in this decision.

1985

1. On the appeal of Thomas McMahon and others, board of trustees of the first ward of Long Island City, Queens county, against John Fahnstock and others, board of education of Long Island City. 2 Owen McEleamey and others, against the same. 3 Edward McBennett against the same.

Decided June 5, 1872

Weaver, *Superintendent*

These three appeals are all against the same respondents, and, as they involve but one and the same question, they may conveniently and properly be considered and disposed of together. The respondents compose the board of education of Long Island City, a body created under the provisions of chapter 461, Laws of 1871, for the general local supervision and control of the public schools of Long Island City. The ground of appeal, in all these cases, is the action of

the respondents under a provision in a by-law adopted by them for the conduct of the schools under their charge. That provision is in the following words: "The daily opening exercises shall consist of the reading of a portion of the Holy Scripture, without note or comment."

The appellants in the first of the above entitled cases, who are the trustees of the first ward of Long Island City, complain of the enforcement, under the direction of the respondents, of the provision of the by-law above cited, by compelling the pupils in the school of the first ward to be present at the reading of the Bible therein, under penalty of expulsion from school in case of their non-attendance at such reading. The appellants allege that the regulation was directed to be so enforced, against their protest, and that of many of the scholars, and of the parents or guardians of those scholars.

The appellants in the second appeal complain of the threatened expulsion, in some instances, of their children from the first ward school, because the appellants forbade their attendance upon the religious exercise in question, and in other instances they show that their children were actually expelled from that school, for refusing, in obedience to the direction of their parents, to attend school when the Bible was read.

The third appeal is by a resident of the second ward of Long Island City, who alleges that his child was expelled from the school of that ward for refusing, under the direction of the appellant, to attend at the reading of the Bible therein. In this case an attempt has been made to show that the pupil left the school voluntarily, but it is manifest, from the evidence, that the enforcement of the regulation in question caused his withdrawal, and that he was refused permission to remain in the school, except upon the condition of compliance with the requirements of the rule by attending when the Bible was read.

The question presented by these cases is not a new one in the history of the public schools of this State. The claim by trustees, of the right to enforce the attendance of pupils in the public schools upon religious exercises therein, has been frequently passed upon in this Department by my predecessors in office and by myself, and it has uniformly been held that no such right legally existed.

The following observations in a former decision rendered by me are equally applicable here: "The object of the common school system of this State is to afford means of secular instruction to all children over 5 and under 21 years of age, resident therein. For their religious training the State does not provide, and with it does not interfere. The advantages of the schools are to be free to them all alike. No distinction is to made between Christians, whether Protestants or Catholics, and the consciences of none can be legally violated. There is no authority in the law to use, as a matter of right, any portion of the regular school hours in conducting any religious exercise, at which the attendance of the scholars is made compulsory. On the other hand, there is nothing to prevent the reading of the Scriptures or the performance of other religious exercises by the teacher in the presence of such of the scholars as may attend voluntarily, or by the direction of their parents or guardians, if it be done before the hour fixed for the opening of the school or after the dismissal of the school. These

principles were set forth by Secretary Spencer more than thirty years ago. In a decision made by that able officer in the year 1839, in which he sustained the action of the trustees of a school district in permitting a teacher to have prayers in the school, on condition that they should be had previous to school hours, the following remarks occur: "Both parties have rights; the one to bring up their children in the practice of publicly thanking their Creator for his protection, and invoke his blessing; the other, of declining, in behalf of their children, the religious services of any person in whose creed they may not concur, or for other reasons satisfactory to themselves. These rights are reciprocal, and should be protected equally, and neither should interfere with the other. Those who desire that their children should engage in public prayer have no right to compel other children to unite in the exercises against the wishes of their parents."

Neither the common school system, nor any other social system can be maintained, unless the conscientious views of all are equally respected. The simple rule, so to exercise your own rights as not to infringe on those of others, will preserve equal justice among all, promote harmony, and insure success to our schools" (Code of Public Instruction, p. 355). The same view of this subject was expressed by my immediate predecessor. The late Hon. V. M. Rice, in a decision rendered by him February 5, 1866, said: "A teacher has no right to consume any portion of the regular school hours in conducting religious exercises, especially where objection is raised. The principle is this: Common schools are supported and established for the purpose of imparting instruction in the common English branches; religious instruction forms no part of the course. The proper places in which to receive such instruction are churches and Sunday schools, of which there is usually a sufficient number in every district. The money to support schools comes from the people at large, irrespective of sect or denomination. Consequently, instruction of a sectarian or religious denominational character must be avoided, and teachers must confine themselves, during school hours, to their legitimate and proper duties." (Code of Public Instruction, p. 349.)

The action of the board of education of Long Island City, in directing the reading of a portion of the Bible as an opening exercise in the schools under their charge, during school hours, and in excluding pupils from those schools, or any of them, on the ground of declining to be present at the reading, has been without warrant of law.

The appeals must therefore be, and are hereby sustained. The proper course for those who are dissatified with the rule established by the decisions above cited, and who desire a different or more explicit regulation on the subject, is to apply to the Legislature for such enactments as will meet their views. Contentions about the construction of general principles of law might thus be obviated by plain statutory provisions.

All persons, otherwise entitled to attend any of the schools of Long Island City, and who have been and are excluded therefrom for a refusal to be present at the reading of the Bible therein, have had the right to be admitted to such schools upon the same footing as other pupils rightfully attending them; and it

is, therefore, the duty of the said board of education to see that the right of all such persons, in that respect, is accorded to them.

This decision must be filed with the clerk of the board of education of Long Island City, and notice thereof must be given by him to the members of the board, and to the appellants in the appeals above, numbered 2 and 3, with opportunity to examine the same.

In the matter of the application of the board of education of union free school district no. 4, of Orangetown, Rockland county.
Decided May 27, 1884

Ruggles, *Superintendent*

This application represents that the above-named board of education "wish to move unerringly, but firmly, in the matter of sustaining the reading of Scripture and prayer as a part of the exercises in opening the daily sessions of our public school," that the board has "not required the children of non-protestant families to participate in repeating Scripture or the Lord's prayer, but have simply required them to behave with decorum," that a number of Catholic families "ask that their children be allowed to remain outside until the devotional exercises are concluded," and that "this interference causes much disorder outside of the room, and the subsequent entrance of these pupils causes a loss of time and disturbance to class work."

I have carefully examined the special act under which this school was organized to see if there was any provision therein which might be held to authorize any other or different rule for the government of this particular school, in the respect in question, than that which applies to the public schools organized under the general law. I do not find any such exceptional provision.

By the Constitution of this State all people, in respect to the free exercise and enjoyment of religious profession and worship, stand upon a footing of absolute equality. Interference therewith, in the way of discrimination or preference, even by legislative enactment, is, by the express words of that instrument, prohibited.

Under our public school system, within the legal limitations of age and residence, instruction is free. The material resources necessary for the maintenance of this immense and complicated system, are drawn at large from a population characterized by dissimilar religious beliefs, observances, modes of worship and preferences. With such a public furnishing the money to support the schools, supplying them with the children in attendance, and having equal rights to the full and equal enjoyment of all the benefits of the schools, if it were possible to devise some limited measure of religious instruction for adoption in the schools, upon which all these diverse classes and sects could harmonize, it would be a gratifying result.

But this is manifestly impracticable and impossible. The only alterative, therefore, to preserve the benefits of the constitutional guaranties, in letter and

spirit, and to secure to all absolute equality of right in matter of religious predilection, must be, however reluctantly the conclusion is arrived at, to exclude religious instruction and exercises from the public schools during school hours.

This conclusion involves the enunciation of no new principle.

An examination of the records in this Department shows a uniform series of decisions by my predecessors, extending over a period of more than forty years, in substantial conformity with the views above expressed.

In 1838, Hon. John A. Dix, then Superintendent of Common Schools, referring to a former decision in 1837, says: (Orders and Decisions, 6:391) "I have heretofore decided that a teacher might open his school with prayer, provided he did not encroach upon the hours allotted to instruction, and provided that the attendance of the scholars was not exacted as a matter of school discipline." This was a case in which the teacher was in the habit of attending at the schoolhouse at 15 minutes before 9 in the morning (9 o'clock being the hour for opening the school), and devoting the intermediate time to religious exercises.

In 1839, Superintendent John C. Spencer, having occasion to examine and pass upon the question (Orders and Decisions, 8:101) says: "Prayers can not form any part of the school exercises or be regulated by the school discipline. If had at all they should be had before the hour of 9 o'clock, the usual hour of commencing school in the morning, and after 5 in the afternoon.

. . . Both parties have rights, and it is only by a mutual and reciprocal regard by each to the rights of the other, that peace can be maintained or a school can flourish. The teacher may assemble in his schoolroom before 9 o'clock the children of those parents who desire him to conduct religious exercises for them, and the children of those who object to the practice will be allowed to retire or absent themselves from the room. If they persist in remaining, they must conduct themselves with decorum and propriety becoming the occasion. If they do not so conduct, they may be dealt with as intruders."

On another occasion during the same year (Orders and Decisions, 8:87) he says: "Neither the common school system, nor any other social system can be maintained, unless the conscientious views of all are respected. The simple rule, so to exercise your own rights as not to infringe on those of others, will preserve equal justice among all, promote harmony, and insure success to our schools."

The principles laid down in these early decisions have been followed by every one of my predecessors in office, no distinction having been made between Scripture reading and prayers, but each having been held, in separate and distinct appeals, to constitute no legitimate part of the business of the public schools. They will be my guide and govern my action in all cases of like nature which may come officially before me.

In the particular case now under consideration, with these principles in view and a disposition to carry them out fairly, and to respect the rights and conscientious opinions of all, the board of education will, I think, have no difficulty in avoiding further contention and securing harmony in the school.

RELIGIOUS GARB

3520

In the matter of the appeal of Leander Colt v. the board of education of union free school district no. 7, of the village of Suspension Bridge, town of Niagara, Niagara county.

Wearing an unusual and distinctive garb, one used exclusively by members of a certain religious sect, and for the purpose of indicating membership in that sect, by public school teachers, constitutes a sectarian influence prejudicial to the interests of the public school system and must not be persisted in.

Pupils in a common school should not be permitted to address the teachers by an assumed religious name, as Sister Mary or Sister Martha, but by their family name with the prefix, Mr, Mrs or Miss, as the case may be.

Decided March 24, 1887

Messrs Tucker & Cary, attorney for appellant
Hon. W. Caryl Ely, attorney for respondents

Draper, *Superintendent*

The circumstances out of which this appeal has arisen are as follows: St Raphael's church, of the village of Suspension Bridge, after having maintained a school in connection with said church at their own expense for twenty years, presented a petition to the board of education of union free school district no. 7, upon the 3d day of October 1885, in which they requested said board to take said school under its care and maintenance. It was also requested, in the language of the petition, "that we may be permitted to retain our sisters for teachers provided they be found competent." The request of the petitioners was granted at a meeting of the board held October 8, 1885, since which time the school has been under the care and direction of the board and has been supported by public moneys. On the 10th of November 1885, the board entered into a written agreement with the trustees of St Raphael's church, by the terms of which, the board leased from the trustees of the church the premises known as "St Raphael's school lot," together with the schoolhouse, furniture, fixtures, stoves and pipe and all school appliances, for the term of one year, at the nominal rent of one dollar per year and also agreed that, during the term of the lease, they would "cause one of the schools of said free school district no. 7 to be kept in operation in said schoolhouse building and keep employed as teachers therein of such school at the same wages as are paid to other teachers in schools of said district, of the same grade, three competent teachers of the class commonly known as "sisters." An appeal was taken to this Department from the action of the board in entering into this agreement, and the decision of the acting superintendent (Morrison) sustained the appeal and held that the

agreement to keep three teachers of the class called "sisters" was a discrimination in favor of a particular class, which was contrary to the spirit of the school laws and against public policy, and, consequently, void. After such decision and on the 1st day of February 1886, the board entered into another written agreement with the trustees of the church, whereby they leased the property for the purposes of a public school for the term of five years from the 11th day of January 1886, at the nominal rent of one dollar per year.

The appellant now alleges, that the school has since been maintained by the board of education, at public expense, under about the same management, and with substantially the same pupils, as before the leasing of the property by the board; that it has been taught by Sisters of Charity of the Roman Catholic Church, who wear, at all times, the distinctive garb of their order, with crucifix and rosary; that it is attended exclusively by children of Roman Catholic parents; that the authorities of that church require the members of their church to send their children to this particular school, and that the school is opened and closed by religious exercises in conformity with the usages of that church. The appellant alleges, also, that this school is not a component part of the school system of the district, and particularly says that the pupils in this school are not classified and graded according to their different degrees of proficiency as is done in the other schools, and as their educational interests require. He alleges, also, that the leasing of St Raphael's school building is an unnecessary expense and to his injury as a taxpayer, because the district school building is sufficiently commodious to accommodate all the pupils in both schools, and that one additional teacher in the district school would provide amply for the pupils of both schools combined. He objects, moreover, to the presence in the schoolroom of Sisters of Charity, wearing the dress of that order, on the ground that these things tend to inculcate in the minds of the children the faith and doctrines of the Roman Catholic Church, and insists that the employment of such persons as teachers affords extra privileges to that church and constitutes an unlawful discrimination or preference to that religion, in violation of the well-settled laws governing the public school system and of the spirit of article 1, section 3, of the Constitution of the State.

It is shown that the appellant presented a petition, setting forth the abovementioned grounds of his complaint, and demanding that, in consequence of them, the school should be abandoned, to the board of education, at a meeting held on the 4th day of June 1886, but that the board laid the communication upon the table and refused to consider the matter. From such refusal the appellant brings this appeal, and asks that the board be overruled and the prayer of his petition be granted.

The board of education, in their answer, admit that St Raphael's Roman Catholic Church, in the village of Suspension Bridge, has, for some years, maintained a private school in connection with said church, and that said church presented a petition to the board requesting it to take said school under its charge and maintenance, and that the two written agreements relative to the

leasing of the school property were made as alleged, and that, since making the said agreements, the board has maintained a school in the leased property, which is taught by three duly qualified and licensed teachers. They say that they are informed that said teachers "are members of some religious order of the Roman Catholic Church, but are not Sisters of Charity; and that the garb, dress or habit worn by said teachers consists of a loose, flowing dress of black serge, with a black veil, and that the said dress conceals from view all portions of the form of said teachers, except the hands and head, . . . and that in addition to this, is worn a slight girdle about the waist from which depend a cross and beads, which hang upon the folds of said dress."

The board says that the school maintained in the leased property is needed for the accommodation of the pupils of the district and that it is cheaper to hire than to build; that the capacity of the district school building is inadequate; that the second school is conducted substantially like the first or older one; the books used and the rules and regulations for the management and conduct of both schools are the same. They say, furthermore, that neither of the religious connections nor the religious belief of the teachers have been the subject of notice or inquiry by the board. They say that the board "is under no agreement, express or implied, with any board, body, person or persons to employ any particular person or persons, or members of any particular denomination as teachers in said school. They deny that the school is opened or closed with religious exercises. They allege broadly that their entire action in the premises has been in good faith, without any intention of discriminating in favor of any religious creed or belief, and actuated only by the desire to accommodate all children of school age, of all creeds and conditions, in the enjoyment of the benefits of the public school system."

In view of the disputed questions of fact presented by the appeal and answer, the case was referred to the school commissioner of the second district of Niagara county to take the evidence of the parties and their witnesses and to allow them an opportunity to cross-examine each other, and such evidence has been returned and examined with care.

From the allegations and admissions of the parties in the pleadings, and from the evidence taken before the commissioner, I find the facts of the case to be as follows:

1 St Raphael's Church, at Suspension Bridge, for several years prior to October 1885, maintained and managed a private and sectarian school at its own expense.

2 On October 1885, the board of education of union free school district no. 7, of the village of Suspension Bridge, leased this school property at a nominal rental value, and has since maintained a school at public expense in said property.

3 A written lease, dated November 10, 1885, was executed between the board and the trustees, in which, among other things, it was agreed that the board should maintain a public school in the property and should keep continually employed in such school three teachers of the class commonly known as

"sisters." This lease was, because of this provision, set aside upon an appeal to this Department. On the 1st day of February 1886, another written lease was executed between the parties, by which the property was leased to the board for five years at a nominal consideration.

4 The school accommodations of district no. 7, other than the St Raphael school property, were not sufficient for the convenience of the pupils of both schools.

5 Since the St Raphael school has been in charge of the public school authorities it has been continually taught by three duly qualified and licensed teachers, who are members of the order of St Joseph of the Roman Catholic Church. Two teachers, who served up to September 1886, then resigned, and two others, who were members of the same order, were appointed in their place.

6 The teachers of the school wear in the schoolroom and at all times, in common with all the members of their order, black serge dresses, hanging loosely in folds about the person, white linen coronets and black veils falling down to the shoulders, and white linen capes. Tied about the waist is a black cord and tassels, to which are attached beads and a crucifix.

7 The teachers are commonly known to the world and are uniformly addressed by the pupils by their Christian names, with the prefix of "Sister," as "Sister Martha," "Sister Mary," etc.

8 No question is raised as to the personal character or intellectual or practical qualifications of these teachers. Their high character and capabilities are conceded.

9 The pupils attending the St Raphael school are very generally, if not exclusively, of Roman Catholic parentage.

10 There is some evidence that the authorities of the Roman Catholic church seek to have the members of that church send their children to this particular school, but the fact is not established.

11 It is shown that there are no religious ceremonies or exercises held in the school during school hours.

Upon this state of facts, the appellant asks to have the action of the respondent in taking the St Raphael school under its maintenance and supervision, and in refusing to discontinue the same upon demand, set aside and overruled.

It is the duty of the people of every school district to provide public school accommodations for all the children of school age in the district, desiring to attend the public schools. When application was made to the respondent in this case to take the St Raphael school under its charge, it was bound to take the children of that school into the public school of the district, if there were accommodations for them there, and if not, it was bound to go to the extent of its lawful authority to provide accommodations for them. The statutes confer authority upon boards of education, or trustees, to lease property for school purposes, and as the fact appears that there were not accommodations for the children of the St Raphael school in the district schoolhouse, the board seems to have acted within its lawful authority in entering into the lease for the St

Raphael school property. It is impossible to see any reason why the taking of that particular property and the maintenance of a school in it, was not a proper exercise of the lawful authority of the board. If the owners of the property found themselves unable or unwilling to continue their school at their own expense, and were desirous of leasing the property to the board at a nominal rent upon condition that the board would maintain a public school therein, I see no objection to the arrangement.

But the school which the board maintains in this property must be, in all regards, a *public* school. Being supported by general taxation, it must be absolutely free from all things not essential to the purpose for which it is maintained, namely, the general education of its pupils. All must have equal and common rights in it. There must be no discrimination in favor of or against any one. Nothing must be done in it or about it to which any interested person can reasonably or properly object, and most surely must this be so concerning matters which the people hold so sacred as their religious faith and opinions.

The appellant here particularly objects to the appointment of all the teachers in the school from one religious denomination and from one class of persons within that denomination, and to the fact that these teachers wear, at all times, clothing which distinguishes them everywhere, as members of their particular sect or order, as well as to the fact that these teachers are known to the pupils and are usually addressed in school, not by their family names, but by names assumed by them in the religious order of which they are members.

A board of education has no right to discriminate in favor of any religious denomination in the appointment of teachers. Inasmuch as the board assumed charge of and continued a school previously in existence, it ought not to be considered reprehensible to have continued the teachers previously employed there, even though they were all of one religious order, provided they were properly qualified, as is undisputed in this case. But three facts appear in this connection. (*a*) In a written lease of the St Raphael school property entered into between the board and the church trustees prior to the execution of the lease now in force, and held to be void by my predecessor in office (Superintendent James E. Morrison), it was agreed that the board should continually keep employed in this school three teachers "of the class commonly known as 'sisters.'" (*b*) The three teachers first employed were representatives of this class, and the teachers of the school have been exclusively confined to this class. (*c*) During the time the school has been under the charge of the board, two of the teachers have resigned and their places have been filled by two others of the same class. These facts, taken together, must be held to indicate a purpose on the part of the board to discriminate in the employment of teachers in favor of this particular class. The purpose to discriminate would not be so manifest if these teachers had all held a common religious faith and nothing more. That would be found to be true in many other schools, I apprehend. But when the facts above suggested are taken in connection with the fact that the "class known as 'sisters'" is not a numerous class, it is impossible to arrive at any

other conclusion than that the board has intended to appoint none but the members of this particular class of persons. This constitutes a discrimination or reference, which is in violation of the fundamental law of the State.

I have given the question raised in relation to the dress of the teachers and the names by which they are known among the pupils very full consideration, and have arrived at the conclusion that the wearing of an unusual garb, worn exclusively by members of one religious sect, and for the purpose of indicating membership in that sect, by the teachers in a public school, constitutes a sectarian influence which ought not to be persisted in. The same may be said of the pupils addressing the teachers as "Sister Mary," "Sister Martha," etc. The conclusion is irresistible that these things may constitute a much stronger sectarian or denominational influence over the minds of children than the repetition of the Lord's prayer or the reading of the Scriptures at the opening of the schools, and yet these things have been prohibited, whenever objection has been offered by the rulings of this Department from the earliest days, because of the purpose enshrined in the hearts of the people and embedded in the fundamental law of the State, that the public school system shall be kept altogether free from matters not essential to its primary purpose and dangerous to its harmony and efficiency.

In view of the conclusions which I have reached, I am compelled to deny the application of the appellant that the school shall be abandoned, but to direct that the respondent require that the teachers shall discontinue the use in the schoolroom of the distinguishing dress of the religious order to which they belong, and shall cause the pupils to address them by their family names with the prefix of "Miss," as teachers are ordinarily addressed.

It is ordered that the board of education take action for the purpose of carrying the above direction into effect within fifteen days from the date hereof, and that the direction be fully complied with within thirty days from said date.

4516

In the matter of the appeal of Fayette B. Durant and others v. board of education of West Troy school district.

It is the policy of the school law that each of the school districts of the State should become the owner of a schoolhouse or houses or school building or buildings, either by purchase or by building, upon a suitable site or sites; and where power is given to lease a room or rooms, it is only for a limited time to provide for an emergency. When in a school district, abundantly able to provide by construction or purchase, sufficient rooms and buildings for the proper accommodation of the pupils, the school authorities hire rooms in a parochial school building in which to maintain a public school, with the right of the control of such rooms only during the school hours of each day, and consenting and giving to the lessors complete control of the rooms at all other times; and such lease is continued beyond the period of emergency contemplated by the statute, such hiring is without legal authority on their part.

Where the teachers in the public school, who are members of any religious sect or order, wear the distinctive garb or dress of such order, it is the duty of the school authorities to require such teachers to discontinue, while in the public schoolrooms and in the performance of their duties as teachers therein, the wearing of such dress or garb.
Decided November 25, 1896

Ward & Cameron, attorneys for appellants
James F. Tracey, attorney for respondents

Skinner, *Superintendent*

The appellants in the above-entitled matter, Messrs Durant, Ross, Covert, and Hilton, as residents and qualified voters in the West Troy school district, appeal from the action of the board of education of the West Troy school district, consisting of Messrs Van Vranken, Phelps, Sabin, Mace, Neason, McKeever, McLeese and Ball, in leasing for school purposes rooms in a building known as "St Bridget's Parochial School," the property of St Bridget's Roman Catholic Church, during school hours only, and at the nominal rate of $1 per month, the church authorities to furnish fuel, pay the fireman and janitor, and maintain therein a school of said district, and to employ eight persons as teachers in such school, all of whom are members of the Roman Catholic Church, and six of whom are of the class known as "Sisters," residing in St Joseph's Convent. These sisters dress in a garb peculiar to their religious sect or order, and are usually addressed in school by the names assumed by them in the religious order of which they are members, prefixed by the term "Sister."

The appellants allege that by reason of the action of said board of education, the school is wholly or partly under the control or direction of a religious sectarian denomination; that denominational doctrines, or tenets, are taught therein, and that by the reason of the sectarian character of the school many parents residing within the district object to sending their children thereto.

The appellants ask that the action of the board of education in leasing said school rooms be annulled and set aside; that the contracts with the teachers be annulled and set aside, and that the board of education be instructed to provide a suitable building or rooms for school purposes, if the public school buildings now owned by the district are inadequate, and to employ duly qualified teachers to teach the school, irrespective of any religious denomination, order or sect, to which they belong, and that the teachers be prohibited from teaching any denominational doctrines or tenets in the school, and for such other or further relief as may be proper in the premises.

The members of said board of education, with the exception of Mr Ball, have joined in an answer to the appeal, in which they give their statements as to the leasing of the rooms, the contracts with the teachers, and the charges of sectarian influences, with denials, either upon information and belief, or positively, of certain allegations in the appeal.

Mr Ball, in an affidavit made by him and annexed to the answer, alleges that he has read the answer, and that he concurs in the statement of facts as to all past transactions of the board contained therein, but is unable to concur in the

conclusions thereof, as to sectarian influences, and for that reason refuses to sign or verify the answer.

To the answer of the respondents the appellants have filed a reply containing statements controverting certain allegations in the answer, and stating certain matters relative to the establishment of union free school district no. 1 in West Troy, all of which occurred prior to the election of the respondents as members of said board of education, and are not relevant to the action of the board complained of in the appeal.

It is contended by the appellants in the reply, in substance, that the public school buildings in the district are of sufficient capacity to accommodate the scholars attending school, provided they are put in proper condition to receive pupils applying for admission, and such pupils not residing in the first ward are required to attend the schools in those portions of the district in which they reside.

Annexed to the reply are the affidavits of twenty-five persons, residents of said West Troy school district, who are the parents of, or stand in parental relations to, in the aggregate, fifty-two children of school age, in which they severally allege that, while they have no personal knowledge of religious doctrines being actually taught as part of the studies in the school maintained in St Bridget's Parochial School building, the sectarian character of the school is so well known and denominational influences in the school are so great that they are unwilling to submit their children to such influences while attending school, and for that reason would not allow their children to attend the school.

A rejoinder to the reply has been filed, in which all of the members of the board of education join, excepting Mr Ball, who, in his affidavit annexed to the rejoinder, states that he prefers not to sign the same for the same reasons substantially as stated in his affidavit annexed to the answer, and for the further reason that he believes the capacity of the public school buildings in the first ward is conservatively stated in the reply of the appellants. Mr Ball, one of the members of the board of education, has filed a separate affidavit relative to the capacity of said public school buildings.

The following facts are admitted:

That by chapter 881 of the Laws of 1895 the territory embraced in what, on February 1, 1895, constituted union free school district no. 1, and school districts numbers 2, 9 and 20 of the town of Watervliet, and that portion of school district no. 22, town of Watervliet, lying west of the track of the main line of the Delaware and Hudson Canal Company's Railroad was, from and after the organization of the board of education provided for in said chapter, consolidated into one school district to be known as the "West Troy school district."

That the public schools of said West Troy school district shall be under the exclusive charge of eight school commissioners to be chosen as in said chapter provided, who were constituted a body corporate under the name of "The board of education of the West Troy school district."

That on the first Tuesday of August 1895, at an election to be held in the

aforesaid districts, eight school commissioners were to be elected or appointed as in such chapter provided, and at such election Messrs Van Vranken, Phelps, Sabin, Mace, Neason, McKeever, McLeese and Ball were elected as the board of education of the district, and are acting as such.

That said board has power to appoint a superintendent of schools; to raise by tax such sums as it may determine necessary and proper (not, however, more than two and one-half times the amount of school moneys apportioned to the district or the consolidated districts composing said district for the previous year, except as thereinafter provided), for the purposes, among others, to purchase, lease or improve sites for school purposes; to build, purchase, lease, alter and repair schoolhouses, outhouses and appurtenances; but the board, whenever in its judgment a greater sum will be required in any one year for such purposes than it is authorized to raise, as hereinbefore stated, is authorized to call a special meeting of the qualified voters of the district to consider the proposition to raise such additional sum.

That said board has the power and it is its duty to organize, establish and maintain such and so many schools in said school district, including the common schools now existing therein, as it shall deem requisite and expedient, and to alter and discontinue the same; to purchase and hire schoolhouses and rooms, lots or sites for schoolhouses, and to fence and improve them; upon the lots and sites owned by the board of education, to build, enlarge, alter, improve and repair schoolhouses, outhouses and appurtenances as it may deem expedient; to have the custody and safe-keeping of the schoolhouse and all the school property belonging to the district, and to see that the regulations of the board in relation thereto be observed; to contract with and employ all teachers in the schools and for sufficient cause to remove them; to have in all respects the superintendence, supervision and management of the schools in the district; . . . from time to time to adopt, alter, modify and repeal, as it may deem expedient, rules and regulations for the organization, government and instruction of the schools, and for the reception of pupils and their transfer from one class to another or from one school to another, and generally for their good order, prosperity and utility. By said chapter 881 it is further enacted that nothing therein shall be construed to limit, restrain or annul the powers of the State Superintendent of Public Instruction; that in all matters of dispute which shall be referred to him by appeal and which shall arise under and by virtue of such act or under and by virtue of any other act which is now or shall hereafter be applicable to the schools, school officers or school property of or in said district, his decisions or orders shall be final and binding.

That on the first Tuesday of August 1895, upon a parcel of land situate in the first ward of West Troy, and in former union free school district no. 1, and within said West Troy school district, which land is bounded on the north by an alley, on the east by Fourth avenue, on the south by Seventh street and on the west by Fifth avenue, there were three buildings — one known as St Joseph's Convent, one as St Bridget's Roman Catholic Church, and the third as St

Bridget's Parochial School. That said third building was erected in or about the year 1886, and is owned by the St Bridget's Roman Catholic Church, having over the front entrance on Fifth avenue a tablet with the inscription "St Bridget's Parochial School," and the building is surmounted by a large gilt cross similar to the one on St Bridget's Church. That after the completion of this building the officers of St Bridget's Roman Catholic Church conducted a parochial school therein, and during the school year of 1894–95 the board of education of former union free school district no. 1 leased certain rooms in the building in which a portion of the schools of the district were maintained.

That at a meeting of the board of education of said West Troy school district, held on August 10, 1895, an offer in writing was received from the trustees of St Bridget's Roman Catholic Church to lease for one year to the West Troy school district the schoolrooms in the building at the corner of Fifth avenue and Seventh street (St Bridget's Parochial School building), the board to have control of all schoolrooms during school hours; the said church officers to furnish fuel and pay the fireman and janitor; and the consideration to be paid being one dollar per month. That the board of education, at this meeting, unanimously adopted a resolution accepting the offer. That thereupon at the opening of the schools of the district by the board for the school year of 1895–96, the rooms in said building so leased were occupied and used during the school hours of each school day in which the schools have been in session therein for schools conducted by the teachers employed by the board. That no religious emblems are displayed in the schoolrooms.

That at a meeting of the board of education held on August 19, 1895, a resolution was adopted for the employment of eight teachers in the school to be conducted in the rooms so leased, and such teachers designated, all of whom were members of the Roman Catholic Church, and six of whom resided in St Joseph's Convent, and were members of a religious order or sisterhood of said church, namely: Catharine Walsh, known as Sister Leonie; Anna G. Conway, known as Sister Gertrude; Kate Rice, known as Sister Ludwina; Victoria Melinda, known as Sister Adelaide; Hannah Keefe, known as Sister Ignatia; Jennie Higgins, known as Sister Dechautal.

That on August 31, 1895, each of the six teachers named received a contract, partly printed and partly written, dated that day, addressed to each, respectively, by name at St Joseph's Convent, stating that at a meeting of the board, held August 19, 1895, she was appointed a teacher in the first district for the probationary term of one year, at a salary therein named, and stating further the manner in which the payment thereof would be made, and providing as to payment in the event of a resignation by her for sickness or any other good cause; and containing a statement that it was to be distinctly understood that the appointment was for one year only, and her further retention was wholly within the discrimination of the board, and which contract was signed by the president of the board and the superintendent of schools; that upon each of the contracts was the following form of acceptance: "To the board of education, West Troy,

N. Y.: I hereby accept the employment mentioned in the foregoing contract upon the terms stated therein, dated August 31, 1895;" and which acceptance was duly signed by each of the six persons respectively on the contract addressed to her.

That the six persons named under these contracts entered upon their employment as teachers in the school conducted in the leased rooms, and at the date of the submission of this appeal were still performing the duties of teachers therein under the direction of the board of education and under the rules and regulations adopted by the board. That each of the six persons, during the school hours of each school day, in the performance of her duties as such teacher, respectively, was dressed in the particular garb of the religious order or sisterhood of which they are respectively members.

The following facts are established:

That in August 1895, each of the six persons so employed as teachers in the schools in the West Troy school district was duly qualified to teach in the public schools of this State under the provisions of the school law prescribing the qualifications necessary to be possessed by persons to qualify them to teach in the schools of this State.

That during the school hours in which the school conducted in said leased rooms has been held no prayers have been said and no religious exercises have been held, nor any denominational tenets or doctrine taught, either orally or by the use of books.

That the West Troy school district has a superintendent of the schools therein, duly elected, pursuant to the provisions of chapter 881 of the Laws of 1895.

That it is the belief of a large number of the residents of that part of the West Troy school district known as the first ward that, by reason of the leasing of rooms in St Bridget's Parochial School building for school hours only, and conducting a school therein, and the employment of eight teachers, all of whom are members of the Roman Catholic Church, and of whom six are members of a religious order or sisterhood of said church, and who wear the distinctive garb of their order, that denominational tenets or doctrines are taught in the school, and hence a large number of children are not permitted by their parents or guardians to attend thereat.

The first question presented by the appeal herein for my consideration and decision is in relation to the action of the respondents herein in the leasing of certain rooms in St Bridget's Parochial School building during the school hours of each school day only, and maintaining a school therein.

The respondents state as grounds for such leasing: that the public school buildings in the West Troy school district do not furnish adequate accommodations for the children of school age residing therein, or for such children enrolled therein, or for the average number of children attending the schools; that more schoolrooms were needed, and the offer to lease the rooms seemed in the interest of the district; that the board of education of union free school

district no. 1 (a part of the present West Troy school district) had, for the ten years prior, leased the same rooms; that no other suitable building in the first ward could be leased, and to build and furnish a new school building would cost the district many thousand dollars; that they believe that they and their predecessors in union free school district no. 1 have saved the taxpayers of West Troy great sums of money by annually renewing the lease; that there were two school buildings owned by the district within four blocks of the St Bridget building, so that no scholar was without a choice of schools; that they have express authority to hire schoolhouses and rooms by subdivision 2 of section 21 of chapter 881 of the Laws of 1895, and cite decision no. 3520 of Superintendent Draper, in the matter of St Raphael's Church, decided March 24, 1887.

No proofs have been presented to me herein of the number of children of school age residing in the school district, nor the number registered in the schools therein respectively, nor of the average attendance at the schools respectively; nor as to the number of school buildings the property of the district, and the seating capacity of each building; nor whether said buildings or any of them would properly accommodate more children than now attend school therein if additional seats and desks were provided.

No proof has been presented herein as to the aggregate assessed valuation of the district upon which taxes for school purposes could be assessed.

The appellants herein, in their reply, annex thereto a map showing two school buildings in ward one on Sixth street, one school building in ward two on Fourteenth street, one school building in ward three, near Sixteenth street, and one school building in ward four, near Fourth avenue. An affidavit of Mr Ball, one of the respondents, alleges that he has personally inspected and investigated as to the capacity of the public school buildings of said district in the fourth ward, and that the floor space of the buildings is sufficient for 394 scholars without more crowding than in the other public school buildings in the district; that in the larger building with four rooms, with a capacity of 60 scholars in each room, one room had 13 scholars enrolled, one 18, one 45 and one 36, aggregating only 112, with a capacity for 240. The brief for the appellants states that in these two buildings, with a capacity for 394, but 250 children are enrolled. The respondents allege in their answer that the daily attendance for the past two years in the school in the St Bridget's School building was 351. The appellants allege that of the number attending the school, 150 should properly be required to attend at the other school buildings in the district.

From the statements contained in the papers herein it is not clearly established that the public school buildings, the property of the school district, if put in proper condition in August 1895, were not sufficient to accommodate all the children attending school in the district.

It has been uniformly the policy of this Department to call the attention of the inhabitants of school districts, and the trustees and boards of education therein, to the condition and improvement of schoolhouses and grounds, to the end that the comfort and health of the pupils attending may be promoted, and

the best educational interests secured. It is the policy of the school law and of this Department that each of the school districts of the State should become the owner of a schoolhouse or school building, either by purchase or by building, upon a suitable site or sites.

The school law provides that in the levying of taxes for the construction of schoolhouses such taxes may be collected in instalments, extending several years, and thus obviate any heavy burden upon the taxpayers of such districts, By section 26 of the law creating the West Troy school district it is enacted that in case a tax shall be voted to erect a suitable building for an academy or high school the same may be raised in instalments, the amounts of which and the times of payment of which to be left optional with the board of education; and it is further enacted that the provisions of said section shall extend to all amounts required for building schoolhouses where the estimated cost exceeds $3000.

It was the duty of the respondents herein, admitting for the purposes of argument that when they entered upon their duties in August 1895, there were not sufficient public school buildings in the district to accommodate all the children desiring to attend school therein, to have taken into consideration the erection of a new school building, and the submission of the question of such construction and the voting of a tax therefor, to a meeting of the qualified voters of said district. Instead of taking such action they entered into a lease with the trustees of St Bridget's Roman Catholic Church for certain rooms in the parochial school building owned by the church, alleging as a reason for such leasing that the building and furnishing of a new school building would cost the district many thousand dollars; that the board of education of union free school district no. 1 had for several years previously hired the rooms, and that the respondents believed that they and the former lessees thereof saved the taxpayers of West Troy great sums of money.

Care in the expenditures made by the authorities of school districts, to relieve the burden of taxation, is commendable when reasonably exercised, and when it does not result unfavorably to the best educational interests of the district; but when the money saved to the districts is obtained solely by the occupation of leased property for school purposes, thereby postponing the construction of needed school buildings, or necessary additions to school buildings then existing, it can not be claimed in good faith that the result is in any sense really of benefit to the districts.

If the West Troy school district is financially weak, such action might be deemed excusable; but this is not the fact.

From the reports in this Department made by the school commissioner of the third commissioner district of Albany county, I find that on July 31, 1895, the aggregate assessed valuation of taxable property in union free school district no. 1 was $1,185,501; that by the reports of 1894, on July 31, 1894, the aggregate assessed valuation of taxable property in school district no. 2, town of Water-

vliet, was $733,682; that of school district no. 9, of Watervliet, was $867,736; that of school district no. 20, of Watervliet, was $1,013,010.

Under chapter 881, Laws of 1895, the territory which on February 1, 1895, constituted union free school district no. 1, and districts nos. 2, 9 and 20, and part of no. 22, of Watervliet, were consolidated into the West Troy school district, and in August 1895, in the West Troy school district there was an aggregate assessed valuation of taxable property therein of $4,000,000. A tax of half a mill upon a dollar (a low rate for a school tax), would produce the sum of $20,000. The West Troy school district, by the apportionment made in March 1896, of the public school money to the district so constituted, received from the State between $5500 and $6000.

The respondents claim that under the provisions of chapter 881, Laws of 1895, they had and have had the power to hire schoolhouses and rooms. It is true they had and have that power, and such grant or power is given, in like language, to the trustees of the common and union free school districts by the general school law of the State; but such provisions have never been held to authorize school authorities to lease rooms except to temporarily supply the lack of schoolhouses and rooms in buildings the property of the district, or during a time when the district does not own sufficient school accommodations, and pending action on the part of the school authorities or the inhabitants of the district to supply such deficiency.

Admitting for the purpose of argument that the respondents had lawful authority to hire rooms in which to conduct a public school in the district, they had no legal authority to hire the schoolrooms in St Bridget's Parochial School building or elsewhere for the term of one year, with the right of control of the rooms during the school hours only of each day in which a school, under the direction of the respondents, should be held during the year; they consenting and giving to the lessors complete control of the rooms at all other times except during school hours.

Under the lease entered into between the respondents and the trustees of St Bridget's Roman Catholic Church, the trustees thereof retained the use, custody and control of the leased rooms for and during the term of time mentioned except between the hours of 9 o'clock in the forenoon and 4 o'clock in the afternoon of each day in which the school conducted under the direction of the respondents should be in session. The lessors had the right to use the rooms for any purpose they desired during all the time on every day and night of the year, except the school hours during the school days on which the school was in session. The respondents had no control of the janitor of the building, the fires and lights therein, nor of any school property or apparatus placed therein by the respondents for school purposes, nor of the books and property of the pupils attending such school which might be left in the rooms, as is customary to be left in public school buildings.

The decision of Superintendent Draper, in 1887, cited by the respondents, is not in point in this appeal for the reason that the lease taken by the board of

education was of the St Raphael's Catholic School building for a period of five years, and not of certain rooms in said building during school hours only.

I am clearly of the opinion that the action of the respondents in hiring the rooms upon the conditions demanded by the trustees of the church, and assented to by the respondents, was an unwise exercise of the power given to them in relation to the leasing; nor can I escape the conclusion that while no direct instruction of a religious character is, or has, so far as appears from the pleadings, been given in this school, nevertheless it is worthy of inquiry why the church authorities are willing to indefinitely contribute to the school authorities the use of this valuable property for a mere nominal consideration. Formerly the church authorities had maintained a separate denominational school therein.

It is entirely natural to suppose that those parents who now object to its present use, reason that such school, with its close proximity to the church building and convent, with the inscription over the doorway, the emblem surmounting the building and the teachers therein employed with their distinctive garb, furnish an object lesson at least, and all the surroundings of the school therein maintained tend to lead the mind of the child toward this particular religious denomination. This result is but natural, and I am convinced is quite in conflict with the trend of American sentiment toward public schools, and the school authorities should perform no acts in their official capacity tending to subject the schools under their charge to this criticism.

Since this appeal was presented the territory embraced within the village of West Troy has been incorporated into the city of Watervliet, but no provision was made in this legislative enactment for additional school facilities, nor has any provision been made for the ownership by the new city, so far as I am informed, of additional school facilities. If such neglect is to be considered as an indication that the present system of leasing — a system only intended to meet sudden emergencies — is to be continued indefinitely, I can not approve such a course, and the respondents herein must be directed to surrender said rooms and discontinue the public school maintained therein.

The second question presented by the appeal herein for my consideration and decision is, in relation to the action of the respondents in the employment as teachers in the school conducted in the St Bridget's Parochial School building of the six persons, members of a sisterhood or order of the Roman Catholic Church, and the wearing by them during school hours of the particular dress or garb of such order. The appellants allege that these six persons, with others of their order, in their examination under the rules of uniform examinations for commissioners' certificates, established by the State Superintendent of Public Instruction, occupied a separate room apart from other persons taking such examinations; that such persons have not attended at the teachers institutes held in the school commissioner district in which the school is situate; that it is contrary to the rules and regulations of the religious order of which such persons are members for them to attend mixed gatherings, such as public examinations and teachers institutes.

The appellants have failed to establish by proof these allegations or any of them.

It appears that the examination referred to by the appellants was conducted by School Commissioner Main, assisted by Examination Clerk Mr Finegan, of this Department, and several other examiners from this Department, in accordance with the rules established; that the six persons, with others, attended thereat and complied with the rules; that the six persons, with the others attending, were distributed in three rooms, and were under the direction and subject to the supervision of the examiners at all times during such examination; that the answer papers of all those examined were forwarded to this Department for examination, marking and filing, and that upon such examination, etc., it was found that these six persons were qualified, and each received the proper certificate of qualification, and each became, under the school law, a qualified teacher in the common schools of this State of the grade and for the term of time in the certificates respectively stated.

As to the allegation that these persons have not attended at a teachers institute, it appears that the West Troy school district has a population of more than 5000 and employs a superintendent of schools, and it is therefore optional with the board of education as to whether or not it will close the schools in the district during the time a teachers institute shall be in session; that it is not shown that the schools were closed during any session of a teachers institute in the school commissioner district in which the West Troy school district is situated.

The appellants also allege that the six teachers, members of a religious order or sisterhood, were usually addressed in school hours by the scholars, not by their family names, but by the names assumed by them in the religious order, prefixed by the term "Sister." The appellants have failed to sustain this allegation by proof.

The allegation that these six teachers, members of a sisterhood or order of the Roman Catholic Church, have worn, and continue to wear, during school hours the particular dress or garb of the order, is admitted by the respondents.

It is also established that at the meeting of the respondents, on August 19, 1895, when a resolution was adopted to employ these six persons as teachers, it was stated that they would wear such dress or garb while teaching.

There is no statutory law in this State which prescribes that any particular dress or garb shall be worn by the teachers in the public schools in this State during school hours, nor which prohibits the wearing by them of any particular dress or garb during school hours; neither is there any decision of any court of this State upon the matter. Therefore, the questions to be determined are whether such practice shall be discontinued as a matter of school polity; and what the effect of the recent amendment of the Constitution is upon such practice.

In the appeal of Leander Colt v. the board of education of union free school no. 7, village of Suspension Bridge, town of Niagara, county of Niagara, taken to State Superintendent Draper in 1887, it was established that the board of

education on February 1, 1886, hired of St Raphael's (Roman Catholic) Church, by a written lease, a building owned by it for the term of five years at a nominal consideration, and established a school therein under the board, and employed in the school three duly qualified and licensed teachers, who were members of the Order of St Joseph, of the Roman Catholic Church; that the teachers wore in the schoolroom, and at all times in common with all of the members of said order, a particular dress or garb; that such teachers were commonly known to the world, and were uniformly addressed by their pupils by their Christian names, with the prefix of "Sister," as "Sister Martha," etc.; that there were no religious ceremonies or exercises held in the school during school hours. Superintendent Draper in his decision, no. 3520, made on March 24, 1887, held that:

"The wearing of an unusual garb, worn exclusively by members of one religious sect and for the purpose of indicating membership in that sect by the teachers in a public school, constituted a sectarian influence, which ought not to be persisted in. The same may be said of the pupils addressing the teachers as 'Sister Mary,' 'Sister Martha,' etc. The conclusion is irresistible that these things may constitute a much stronger sectarian or denominational influence over the minds of children than the repetition of the Lord's prayer or the reading of the Scriptures at the opening of the schools, and yet these things have been prohibited whenever objection has been offered by the rulings of this Department from the earliest days, because of the purpose enshrined in the hearts of the people and embedded in the fundamental law of the State, that the public school system shall be kept altogether free from matters not essential to its primary purpose and dangerous to its harmony and efficiency."

Superintendent Draper directed the board of education to require that the teachers should discontinue the use, in the schoolroom, of the distinguishing dress of the religious order to which they belonged, and to cause the pupils to address such teachers by their family names with the prefix "Miss," as teachers are ordinarily addressed. It does not appear that this decision has been modified or vacated by Superintendent Draper or modified or disapproved by his successors in the office of State Superintendent of Public Instruction.

The respondents herein cite the decision of the Supreme Court of the state of Pennsylvania in the case of John Hysong et al. v. Gallatzin Borough School District et al., decided in the October term 1894, 164 Penn. State Reports, p. 629, etc.

From an examination of the case it appears that a bill in equity was filed in the Common Pleas of Cambria county to restrain the school directors of Gallatzin borough from permitting sectarian teaching in the common schools of the borough, and from employing as teachers sisters or members of the order of St Joseph, a religious society of the Roman Catholic Church. It was alleged in the bill that the "Sisters," while teaching in the public schools wore the garb, insignia and emblems of their order, and that they used the garb, etc., in such manner as to impart to the children under their instruction certain religious and sectarian lessons and ideas peculiar to the Roman Catholic Church. The court

of common pleas found as a fact that there was no evidence of any religious instruction or religious exercises of any character whatever during school hours. The fact being admitted that such "Sisters," as teachers, wore, while teaching, the habit or garb of their order, the judge said:

"We conclude, as to this branch of the case, that, in the absence of proof that religious sectarian instruction was imparted by them during school hours, or religious sectarian exercises engaged in, we can not restrain by injunction members of the order of Sisters of St Joseph from teaching in the public schools in the garb of their order, nor the school directors from employing or permitting them to act in that capacity."

An appeal was taken from the decision of the common pleas to the Supreme Court, the main assignment of error being that, "the court erred in finding that the employment of the Sisters of St Joseph as teachers in the public schools, and their acting as such while wearing the distinctive sectarian garb, crucifixes, and rosaries of their order and sect, could not be enjoined."

The Supreme Court affirmed the decree of the court below and dismissed the appeal. The opinion was written by Justice Dean and Justice Williams wrote a dissenting opinion. The decision of the court appears to be made upon the ground that the school directors of Gallatzin, in the absence of any special provisions of law upon the subject, had the discretion to employ the sisters as teachers in the school and to permit them to wear, while teaching, the distinctive dress or garb of the religious order of which they were members, and that the court had no power to revise the exercise of such discretion.

Justice Dean, in his opinion, said: "In thus expressing our full accord with the learned president, judge of the court below, we intimate no opinion as to the wisdom or unwisdom of the action of the school board in selecting six Catholic school teachers, members of an exclusively religious order. In this matter was involved, solely, the exercise of discretion by the school board in the performance of an official duty, for which they alone are responsible. This discretion, when it does not transgress the law, is not reviewable by this or any other court. When a teacher of good moral character applies for a school, and presents a certificate of qualification as to scholarship and aptness to teach, that is the end of judicial inquiry into the action of the board in appointment, because the law makes no further inquisition up to this point. . . . We can not infer, from the mere fact that a school board composed of Catholics has selected a majority of Catholics as teachers that, therefore, it has unlawfully discriminated in favor of Catholics; because the selection of Catholic teachers is not a violation of law, or, which is the same thing, is not an abuse of discretion. Unless this be the case, no court has power to revise the exercise of this discretion, for the very sufficient reason that the law has not made the court school directors, while it has devolved on six citizens of Gallatzin borough the duties of that office."

Upon the contention that such teachers, wearing such distinctive dress while teaching in the school, should be enjoined from wearing it, the court declined to decide, as a matter of law, that it is sectarian teaching for a devout woman to

appear in a schoolroom in a dress peculiar to a religious organization of a Christian church and, as Judge Dean said, "We decline to do so; the law does not so say."

Justice Williams, who dissented from his associates on one point, namely, the wearing of a distinctive garb while teaching, said: "Clergymen sometimes wear on the street a coat or hat that affords some evidence of their profession, but they do not appear in churchly robes when about their daily work, or in any garb that points out the church to which they belong, or the creed to which they adhere; but these six teachers in Gallatzin do just that. They wear, and must wear at all times, a prescribed, unchangeable ecclesiastical dress, which was plainly intended to proclaim their nonsecular and religious character, their particular church and order, and their separation from the world. They come into the school not as common school teachers, or as civilians, but as the representatives of a particular order, in a particular church, whose lives have been dedicated to religious work under the direction of that church. Now, the point of the objection is not that their religion disqualifies them. It does not. Nor is it thought that church membership disqualifies them. It does not. It is not that holding an ecclesiastical office or position disqualifies, for it does not. It is the introduction into the schools as teachers of persons who are, by their striking and distinctive ecclesiastical robes, necessarily and constantly asserting their membership in a particular church, and in a religious order within that church, and the subjection of their lives to the direction and control of its officers."

It appears that at the first session of the Legislature of the state of Pennsylvania, held after the decision of the Supreme Court in Hysong et al., above referred to, an act was passed, which became a law, prohibiting any teacher in any public school of the State from wearing any dress or garb peculiar to or distinctive of any religious denomination, sect or society. So long as such law is operative so much of the decision in the case of Hysong et al. as holds that school directors in the public schools in that State may permit teachers employed by them to wear, while teaching, the garb of any religious denomination, order, sect or society, is of no force or effect.

The passage of the act by the Legislature of the state of Pennsylvania prohibiting any teacher in any public school in that state from wearing any dress or garb peculiar to or distinctive of any religious denomination, order, sect or society, is indicative of the intention of the people of that state to restrain the directors of the public schools therein from permitting in their schools anything that would create the impression or belief on the part of the patrons of such schools that even indirectly the schools are under the control or direction of any religious denomination, or in which any denominational tenet or doctrine is taught.

It has been the policy of this Department, when the matter has been brought to its attention and its action invoked, as in the case of the Colt appeal decided by Superintendent Draper, that when the wearing by teachers in the public schools of this State of any dress or garb peculiar to or distinctive of any religious denomination, order, sect or society, creates the impression or belief on the part

of the patrons of the school that the school was under the control or direction of any religious denomination, or in which any denominational tenet or doctrine was taught; or when by reason of said distinctive garb being so worn contentions and dissensions have arisen among the inhabitants of a school district, threatening the harmony therein and the efficiency of the school, and antagonistic to the best educational interests therein, to advise that the wearing of such distinctive garb should be discontinued.

By section 4 of article 9 of the Constitution of the State, it is enacted: "Neither the State nor any subdivision thereof shall use its property or credit or any public money, or authorize or permit either to be used, directly or indirectly, in aid or maintenance, other than for examination or inspection, of any school or institution of learning wholly or in part under the control or direction of any religious denomination, or in which any denominational tenet or doctrine is taught."

This amendment to the organic law of the State has but recently been adopted by an overwhelming majority. It indicates very clearly an unmistakable and earnest desire on the part of our citizens to permanently establish and maintain a public school system that shall be entirely nonsectarian. That this is the trend of public opinion, both in this country and in the neighboring provinces on the western continent, is manifest. With this spirit I am heartily in accord. The public school system has achieved its greatest measure of success where this has been insisted upon. It is my duty, as it is the duty of the school authorities of the public schools in the several districts of the State, to see that the provisions of the Constitution above cited are neither directly nor indirectly violated.

I take great pleasure in stating that the clergy and laity of the Roman Catholic Church have given to this Department their earnest support and aid in the enforcement of the compulsory education law, as well as every other act relating to the public school system of the State.

The appellants ask that the contracts with the six teachers herein referred to be annulled and set aside. This I have no power to do. These teachers are duly qualified teachers within the provisions of the school law, and having been duly employed by the respondents herein, can not be dismissed during their term of employment without sufficient cause, and no sufficient cause has been shown. Nevertheless, upon this branch of the case I desire to express my disapprobation of the custom of their dressing, while in the performance of their duties, in the garb peculiar to and indicative of the particular sect or order of which they are members. Such dress or garb taken in connection with the location, surroundings and distinguishing characteristics of the building leased by the school authorities and in which they are employed, is a constant and hourly reminder to the pupils under their charge of the existence of one particular religious denomination or sect, and this public declaration under all the circumstances is such an object lesson to the susceptible mind of the pupils under their charge that it comes dangerously near the line of prohibition laid down in the Constitution as herein quoted.

The proofs herein show that it is considered such by the parents of upwards of fifty of the pupils who would otherwise attend this school. They are the people whose interests are to be conserved by this particular school. The objections herein urged against such influences would, of course, apply to like public declaration of religious preference or belief on the part of teachers connected with any other denomination. The fact that but few, if any, of the many sects or denominations insist upon members of their order dressing upon all occasions in a distinctive garb adds force to the objection as it presents itself to my mind. I therefore concur in the opinion of my predecessor in office, namely, that the teachers in the public schools of the State ought not to wear the distinctive garb of any religious denomination, order, sect or society, but dress in the usual costume worn by men and women generally; and that any other costume or usage is inimical to the best educational interests of the locality and should be discontinued by direction of the local school authorities whose duty it is to so administer the trusts reposed in them as to bring about the very best results with the least irritation, and in harmony with the spirit of the section of the organic law herein quoted.

The school best does this which avoids any reference directly or indirectly to any particular denomination, sect or order, both in the construction of the buildings used for school purposes and in the dress worn by the teachers employed therein. To those not satisfied with this complete and absolute severance of secular and religious instructions, the private school is open.

If we ask ourselves in what particulars this school differs from the usual parochial school as formerly maintained therein, before the adoption of the constitutional amendment herein quoted, what reply shall we make? By the nature of the lease, by the wearing of distinctive garb, by the emblem surmounting the building, by the inscription over the doorway, by the practical result that only the children of one particular faith attend this school, the conclusion is irresistible that the State, to all external intents and purposes, is maintaining a sectarian school therein at public expense. It was clearly the intent of this amendment to the organic law that this practice should be prohibited.

The delay in rendering a decision in this appeal was primarily caused by the hope and expectation that in the legislative enactment incorporating the city of Watervliet and providing for the school system thereof, such legislation would determine the questions raised in this appeal. No provision has, however, been made for school facilities to be owned by the city, and to take the place of those secured by such lease.

The contracts made by the respondents herein both in respect to leasing said building and the employment of the teachers engaged therein from which the appeal herein is taken, having expired at the termination of the school year 1895–96, this decision can not be operative except as a determination of the principles involved, and to that extent this decision will be valuable only as indicating the policy to be pursued by school authorities.

A new appeal to reach the result here indicated as the policy to be pursued by local school authorities ought not to be necessary.

I decide, That the action of the respondents herein, in hiring the rooms in St Bridget's Parochial School Building, in which to conduct a public school, with the right of the control of the rooms during the school hours only of each day, in which a school under the direction of the respondents is maintained, and consenting and giving to the lessors complete control of the rooms at all times other than during school hours, and the continuation of such lease beyond the period of emergency contemplated by the statute, was without legal authority on the part of the respondents.

I also decide that it is the duty of the respondents to require the teachers employed by them to discontinue the use in the public schoolroom of the distinguishing dress or garb of the religious order to which they belong.

4546

In the matter of the appeal of Samuel Kennedy, Edward M. Getman and James Forsyth v. the board of education of the city of Watervliet, Albany county.

The wearing of an unusual garb worn exclusively by members of one religious sect for the purpose of indicating membership in that sect, by the teachers in a public school, constitutes a sectarian influence which ought not to be persisted in. It is clearly the duty of trustees of school districts to require such teachers to discontinue the use in the public schoolroom during school hours of the distinguishing dress or garb of the religious order to which they belong.

Decided May 15, 1897

William Hollands, attorney for appellants
John H. Gleason, attorney for respondents

Skinner, *Superintendent*

The appellants, in the above-entitled matter, as residents of, and qualified voters in the city of Watervliet, Albany county, appeal from the action of the board of education of such city, consisting of School Commissioners William H. Flewellin, James B. McLeese, Isaac G. Braman and John H. McKeever, in refusing to require six teachers now employed and teaching in one of the public schools of such city, namely, Catharine Walsh, Anna G. Conway, Kate Rice, Victoria Melinda, Hannah Keefe and Jennie Higgins, to discontinue the use in the public schoolroom of the distinguishing dress or garb of the religious order to which they respectively belong.

The appellants allege that the teachers above mentioned are members of a religious order or sisterhood, namely:

Catharine Walsh, known as Sister Leonie; Anna G. Conway, known as Sister Gertrude; Kate Rice, known as Sister Ludwina; Victoria Melinda, known as Sister Adelaide; Hannah Keefe, known as Sister Ignatia; Jennie Higgins, known as Sister Dechautal; and that they were at the time of bringing this

appeal, to wit, March 1, 1897, performing the duties of teachers in one of the public schools of the city of Watervliet, being held and conducted in the building on the northeast corner of Fifth avenue and Seventh street, commonly known as "St Bridget's Parochial School Building," and that each of said six persons, during the school hours of each school day, in the performance of their duties as such teachers respectively, is dressed in the particular garb of the religious order or sisterhood of which they are respectively members.

The appellants also allege that at a meeting of the board of education of said city of Watervliet, held February 22, 1897, at which all four of the aforesaid school commissioners were present, and at which Michael J. Day, the mayor of such city as chairman ex officio, presided, the following preamble and resolution were introduced and their adoption moved and seconded, namely:

Whereas, the Superintendent of Public Instruction recently decided on an appeal from the action of the board of education of the West Troy school district, that it was the duty of said board to require teachers employed by them, "to discontinue the use in the public schoolroom of the distinguished dress or garb of the religious order to which they belong," and the same not having been done, and the school particularly referred to in such decision being now a part of the school system of the city of Watervliet, and under the control and management of their board, therefore, be it

Resolved, That the clerk of this board be, and is hereby, instructed to forthwith notify Catharine Walsh, Anna G. Conway, Kate Rice, Victoria Melinda, Hannah Keefe and Jennie Higgins, now acting as teachers in the public school maintained in the St Bridget's school building, to discontinue the use in the public schoolroom of the distinguishing dress or garb of the religious order to which they belong.

It is also alleged by the appellants that upon a vote being taken thereupon such resolution was declared lost by a tie vote, two of such commissioners voting in the affirmative, and two of the commissioners voting in the negative, the chairman ex officio, not being a member of said board and not being entitled, under the law, to vote in the proceedings of said board.

The appellants further allege that the school referred to in their appeal was, until and including the 31st day of December 1896, one of the public schools of the West Troy school district, and the same school referred to in decision in appeal case no. 4516 of the Department of Public Instruction made by the State Superintendent November 25, 1896; that according to the provisions of chapter 905 of the Laws of 1896 (the act incorporating the city of Watervliet) from and after said 31st day of December 1896, the said West Troy school district ceased to exist, and all the public schools within the city of Watervliet and under the control of the board of education of such city, which board has, "to the exclusion of all boards and officers, except the Superintendent of Public Instruction of this State, the entire supervision and management of the schools of said city"; that by the provisions of said chapter 905 of the Laws of 1896, such board of education is required annually to make and transmit to the State Superintendent of Public Instruction a report in writing, which report shall be

in all respects as is required by law of trustees of school districts, and deposit and file the same as required by law.

The appellants ask that the State Superintendent of Public Instruction issue an order directing said board of education of the city of Watervliet to forthwith require the aforesaid teachers to discontinue the use in the public schoolrooms in such city during school hours of the distinguishing dress or garb of the religious order of which they are members.

Two of the members only of such board of education of the city of Watervliet, namely, School Commissioner McKeever and School Commissioner McLeese, have made answer to the appeal herein. The answer does not contain any denial of the allegations contained in the appeal.

The respondents in substance allege:

That the teachers named in the appeal are legally qualified to teach in the public schools of the city of Watervliet, and each is legally employed to teach pursuant to the terms of a written contract duly executed until the close of the present school year; that as the respondents are informed and believe such teachers refuse to wear, while engaged in the discharge of their duties in such school any other than the apparel, dress or garb which they have worn while thus engaged for many years last past; that the adoption of the resolution mentioned in the appeal, and its attempted enforcement by the board of education of said city would be an infringement upon the legal rights and an unlawful and unwarranted interference with the personal freedom of each of such teachers, and a violation of the written contract, and equivalent to an illegal and unwarranted dismissal and discharge of each of such teachers before the end of the contract term, and the city would be liable for compensation without securing the service; that the employment of other teachers, which the adoption and enforcement of the resolution would necessitate, would be a serious injury to the present school system; that they (the respondents) were prior to February 22, 1897, and are now advised, and believe that the board of education of such city has no legal authority to adopt or enforce the resolution mentioned in the appeal; that the respondents deny that the wearing by the teachers, during school hours, of the garb objected to by the appellants is in violation of, or conflicts with, any law of the State of New York, and that the adoption by said board of education and the enforcement or attempted enforcement of said resolution, would be in violation of law, and void and of no legal effect.

Upon the facts established herein, and the law and decisions of the State Superintendents of Public Instruction, the contentions of the respondents herein are not tenable and the appeal herein should be sustained.

Under the laws relating to the public schools of the State the State Superintendent of Public Instruction has supervisory powers over all public schools within the State. He possesses the power to entertain and examine an appeal brought to him by any person considering himself aggrieved, concerning any matter under the school law, or any other act pertaining to common schools, and to decide the same. Such decisions when so made have all the force and effect of statutes and are binding upon school officers until modified or reversed.

Under the provisions of subdivision 10 of section 12, title 5 of chapter 905 of the Laws of 1896, entitled, "An act to incorporate the city of Watervliet," the power given to the board of education of such city to supervise and manage the schools therein, is subject to the supervision of the State Superintendent of Public Instruction.

State Superintendent of Public Instruction Draper, in his decision no. 3520, made on March 24, 1887, in the appeal taken to him by Leander Colt v. the board of education of union free district no. 7, village of Suspension Bridge, town and county of Niagara, held that:

"The wearing of an unusual garb, worn exclusively by members of one religious sect and for the purpose of indicating membership in that sect by the teachers in a public school, constituted a sectarian influence, which ought not to be persisted in. The same may be said of the pupils addressing the teachers as 'Sister Mary,' 'Sister Martha,' etc. The conclusion is irresistible that these things may constitute a much stronger sectarian or denominational influence over the minds of children than the repetition of the Lord's prayer or the reading of the Scriptures at the opening of the schools, and yet these things have been prohibited whenever objection has been offered by the rulings of this Department from the earliest days, because of the purpose enshrined in the hearts of the people and embedded in the fundamental law of the State, that the public school system shall be kept altogether free from matters not essential to its primary purpose and dangerous to its harmony and efficiency."

Superintendent Draper directed the board of education to require that the teachers in such school should discontinue the use in the schoolroom, of the distinguishing dress of the religious order to which they belong. It does not appear that Superintendent Draper ever modified or vacated such decision, nor that his successors in the office of State Superintendent of Public Instruction have ever modified or disapproved of such rulings and decision. Such decision had the force and effect of a statute in relation to the matter examined and determined therein, and became binding upon the school authorities of the several public schools of the State.

On November 25, 1896, in a decision made by me, no. 4516, in the appeal of Fayette B. Durant and others v. board of education of West Troy school district, relative to the employment of the same six teachers mentioned in the appeal herein, and the wearing by them in the schoolroom during school hours, of the particular dress or garb of the religious order or sisterhood of which they were respectively members, I approved of and concurred in said decision of Superintendent Draper, and stated:

"I therefore concur in the opinion of my predecessor in office, namely: that the teachers in the public schools of the State ought not to wear the distinctive garb of any religious denomination, order, sect or society, but dress in the usual costume worn by men and women generally; and that any other costume or usage is inimical to the best educational interests of the locality and should be

discontinued by the direction of the local school authorities whose duty it is to so administer the trusts reposed in them as to bring about the very best results with the least irritation, and in harmony with the spirit of the section of the organic law herein quoted.

"The school best does this which avoids any reference directly or indirectly to any particular denomination, sect or order, both in the construction of the buildings used for school purposes and in the dress worn by the teachers employed therein. To those not satisfied with this complete and absolute severance of secular and religious instruction, the private school is open.

"If we ask ourselves in what particulars this school differs from the usual parochial school as formerly maintained therein, before the adoption of the constitutional amendment herein quoted, what reply shall we make? By the nature of the lease, by the wearing of a distinctive garb, by the emblem surmounting the building, by the inscription over the doorway, by the practical result that only the children of one particular faith attend this school, the conclusion is irresistible that the State, to all external intents and purposes, is maintaining a sectarian school therein at public expense. It was clearly the intent of this amendment to the organic law that this practice should be prohibited, and that a new appeal to reach the result here indicated as the policy to be pursued by local school authorities ought not to be necessary."

I decided that it was the duty of the respondents therein to require the teachers employed by them to discontinue the use in the public schoolroom of the distinguishing dress or garb of the religious order to which they belong.

Such decision was duly filed with the clerk of such West Troy school district and notice thereof given to the appellants and respondents in such appeal; that the respondents herein were two of the members of the board of education of such West Troy school district.

It was clearly the duty of the board of education of such West Troy school district to require such teachers to discontinue the use in the public schoolroom during school hours of the distinguishing dress or garb of the religious order to which they belonged.

No new or different state of facts are established in this appeal from those presented in the appeal of Durant and others v. board of education of West Troy school district.

The board of education of the city of Watervliet is conducting one of the schools of such city in the St Bridget's Parochial School Building and employing the same six persons as teachers therein that were employed by the authorities of the West Troy school district, each of whom wears, during school hours, and in the public schoolroom, the distinctive dress or garb of the religious order to which she belongs or of which she is a member.

There is nothing presented in this appeal to alter, change or modify my ruling and decision, as contained in said decision no. 4516, and such decision is in all things affirmed

It was, and is, the duty of the board of education of the city of Watervliet, under the aforesaid decision of Superintendent Draper and my decision no. 4516, as aforesaid, to require of each of said six persons, teaching in said school, to discontinue the use in such public schoolroom and during school hours, of the distinguishing dress or garb of the religious order to which they severally belong.

The appeal herein is sustained.

It is ordered:

That the board of education of the city of Watervliet be, and it is, hereby directed forthwith to notify and require Catharine Walsh, Anna G. Conway, Kate Rice, Victoria Melinda, Hannah Keefe and Jennie Higgins, and each of them, now teaching in one of the public schools of said city, which school is conducted and maintained in the building known as the St Bridget's Parochial School Building, situate on the northeast corner of Fifth avenue and Seventh street of said city, to forthwith discontinue the use and wearing by them, and each of them, during the school hours of each school day such public school is held and maintained and is taught by them or either of them, of the distinctive or distinguishing garb of dress of the religious sect or order to which they, and each of them, belong or of which they are members.

It is further ordered:

That in the event such teachers above named, or either of them, after such notification and requirement to them by said board of education, refuse to comply therewith or obey such requirement and the decisions of the State Superintendent of Public Instruction, as set forth in the foregoing decision, and continue the use and wearing, in school hours, in such public schoolroom or rooms, as such teachers, such distinctive garb or dress of the religious order of which they are members, that said board of education forthwith dismiss the above-named persons, and each of them, as teachers in such public schools.

It is further ordered:

That such board of education of the city of Watervliet, report in writing to the State Superintendent of Public Instruction on or before June 1, 1897, all acts performed and proceedings had and taken by such board of education, and by the said six teachers, and each of them, under and pursuant to the foregoing decision and the orders made to carry such decision into effect.

Whereas, on March 10, 1897, I made an order in the appeal herein directing E. L. Barckley, county treasurer of the county of Albany, to retain in his hands and withholding payment to the city of Watervliet of the school funds theretofore apportioned by me to said city in the annual apportionment made in January 1897, until the hearing and final determination of the above-entitled appeal, or until my further order in the premises.

It is, therefore, further ordered:

That said order of March 10, 1897, directing the retention in his hands by the county treasurer of Albany county of such school funds apportioned to such city, and the withholding by him of the payment thereof to such city, be, and the same hereby is continued in full force and effect until a further order in relation thereto shall be made by me.

This decision must be filed with the clerk of the board of education of the city of Watervliet and that notice thereof be by him given to the appellants and respondents herein, with opportunity to examine the same; and that a copy of such decision be forthwith served personally upon the treasurer of the county of Albany and the city chamberlain of the city of Watervliet, and each of them.

4722

In the matter of the appeal of Edward Keyser v. the board of education of the city of Poughkeepsie.

Since 1894 it has been the settled policy of the State that localities must own school buildings in which their public schools are conducted; that the leasing and renting of rooms and buildings for school purposes are not authorized except under extraordinary conditions, and to provide for emergency.

The wearing of an unusual garb worn exclusively by members of one religious sect, and for the purpose of indicating membership in that sect, by the teachers in the public schools, constitutes a sectarian influence which ought not to be persisted in. The fact that such members do not associate in public places with the world at large, and will not be employed in any building not consecrated or devoted under the rules of the denomination of which they are communicants, to charitable or religious purposes, and their right, while thus attired, and holding these strict views, to be employed as teachers in the public school system of the State goes far beyond the mere question of the garb or distinctive dress worn by them. It is fundamental that teachers employed in the public schools of the State, in fitting children for useful citizens, should keep themselves in close touch with everything that will enhance their usefulness in this direction. To do this requires association with others engaged in like employment, and familiarity to the every-day affairs of life with which such pupils in future years will be engaged. They should be in touch with men and women in the every-day affairs of life, and above all, the professional training which comes from association with educational representatives ought never to be barred from any teacher employed in the public schools. Transfers from one position to another, as the needs of a city school system may require, ought always to be possible, and no teacher should be employed who owes such allegiance to any other institution, organization or denomination as makes such transfers impossible. It is the duty of the school authorities to require such teachers to discontinue, while in the public schoolroom, and in the performance of their duty as teachers therein, the wearing of such dress or garb.

Decided December 23, 1898

P. Alverson Lee, attorney for appellant
J. L. Williams, attorney for respondent

Skinner, *Superintendent*

The above-named appellant appeals from the action of the board of education of the city of Poughkeepsie in leasing for school purposes the building known as school 11, situate on North Clover street in the city of Poughkeepsie, and the building known as school 12, situate at 101 Mill street in said city, both of said buildings being the property of St Peter's Roman Catholic church, and in the employment of two teachers in school 11, and two in school 12, each of

whom are members of the order known as the Sisters of Charity, who dress in the garb peculiar to their religious sect, and are addressed usually in the school by their christian names prefixed by the term "sister."

It is contended on the part of the appellant that by reason of the sectarian character of the school thus maintained in these two buildings, parents residing within the first ward of said city where said schools are situate, object to sending their children thereto, and parents residing at long distances from said schools send their children thereto in order to obtain the religious instruction given therein.

The respondents admit the leasing of such buildings at the rental alleged, and admit the employment of teachers who are dressed in the garb described in the appellant's papers, but they deny that there is any religious instruction imparted in such schools, and deny that any "denominational doctrines or tenets are taught in these buildings at any time during the school days of the week." They also allege that the board of education has no power under the provisions of the charter of said city to provide buildings or rooms for school purposes, except by renting the same; that buildings can only be purchased or erected by the affirmative vote of the taxpayers, and allege that the present bonded indebtedness of said city bears such a relation to the total assessed valuation thereof that the constitutional prohibition precludes the city from incurring any further indebtedness.

The material allegations are therefore admitted except as to the teaching of religious doctrines or tenets in these schools, and the power of the city to purchase or erect new buildings by reason of its bonded indebtedness.

The right of boards of education to employ teachers who dress in the peculiar and distinctive garb of any religious denomination and who are addressed by the pupils under their charge by their christian names with the prefix "sister" thereto, has been determined by this Department in several decisions, and I can not state the settled policy of the Department of Public Instruction in this State upon this question more aptly than to quote the following language from Superintendent Draper's decision, 3520, rendered March 24, 1887:

"The wearing of an unusual garb worn exclusively by members of one religious sect and for the purpose of indicating membership in that sect by the teachers in the public schools, constitutes a sectarian influence which ought not to be persisted in. The same may be said of the pupils addressing the teachers as 'Sister Mary,' 'Sister Martha,' etc. The conclusion is irresistible that these things may constitute a much stronger sectarian or denominational influence over the minds of the children than the repetition of the Lord's prayer or the reading of the Scriptures at the opening of the schools, and yet these things have been prohibited whenever objection has been offered by the rulings of this Department from the earliest days, because of the purpose enshrined in the hearts of the people and embedded in the fundamental law of the state that the public school system shall be kept altogether free from matters not essential to its primary purpose and dangerous to its harmony and efficiency."

The teachers referred to herein are members of a religious and charitable order known as " Sisters of Charity," who wear at all times a garb peculiar to their order. It is well known that they do not associate in public places with the world at large, and will not be employed in any building not consecrated or devoted by the rules of the denomination of which they are communicants, to charitable or religious purposes, and their right while thus attired and holding these strict views to be employed as teachers in the public school system of the State goes far beyond the mere question of the garb or distinctive dress worn by them.

To my mind, it is fundamental that teachers employed in the public schools of the State in fitting our children for useful citizens, should keep themselves in close touch with everything that will enhance their usefulness in this direction. To do this requires association with others engaged in like employment and familiarity with the every-day affairs of life with which the pupil in future years must battle for his own existence. They should touch men and women in the multitudinous and intricate affairs of life which perplex and discipline us, and above all, the professional training which comes from association with educational representatives ought never to be barred from any teacher employed in the public schools. Transfers from one position to another, as the needs of a great city school system may require, ought always to be possible, and no teacher should be employed who owes such allegiance to any other institution, organization or denomination as to make such transfers impossible.

Upon the susceptible mind of a child the influence of a teacher always wearing the garb of a particular denomination with the insignia of a religious order upon her person, who is never seen by the child except under the protection imposed by the rules of that order, employed in a building thus consecrated and known to the child to be in the opinion of the teacher a sacred and holy place, and surmounted by an emblem everywhere known as a religious symbol, is, to my mind, the identical influence which is sought to be excluded from the public schools by the organic law of our State. This State annually spends many thousand dollars for visual instruction, recognizing it as one of the legitimate and most useful methods of imparting instruction. It is idle, in my judgment, to recognize this educational influence and close our eyes to the fact that the teacher described herein exerts a like influence upon the susceptible minds of the children. The principle laid down in the language herein quoted from the decision of Superintendent Draper has been followed in several cases and must be considered as the settled and established policy of this State.

With reference to the renting of the buildings complained of by the appellant herein, the proof submitted by the respondent establishes the fact that on the 21st day of August 1873, the board of education of the city of Poughkeepsie entered into an agreement with the Right Reverend John McCloskey, archbishop, etc. whereby the city leased the land and buildings thereon situate on the north side of Mill street in the city of Poughkeepsie, known as " St Peter's Church School for Boys," and the school furniture and facilities connected therewith, and also

the land and school building and outbuildings situate on the lot in the rear of the dwelling house of the Sisters of Charity on the west side of Clover street, known as the "Girls' or Female School of St Peter's Church," and the school furniture and fixtures belonging thereto, for a period of ten years from the 1st day of September 1875, at the yearly rental of one dollar, to be paid in yearly payments, the said city also to pay the premiums of insurance on the leased property during the continuance of this lease. By the terms thereof the board of education were to have the absolute control and use of such buildings and lands and school furniture for the use and purpose of public schools "during the school hours fixed or to be fixed by said board," and before and after school hours the said building, land and school furniture were to be under the control of the lessor.

It appears that at the expiration of such term said buildings continued to be occupied by the board of education and respectively designated as schools 11 and 12, and are and since that date have been part of the public school system of the city. No new or other lease seems to have been executed between the church authorities and the board of education, but the board continued in possession of such property after the expiration of their lease without any other agreement, further than that the respondents allege that in the year 1897 it was verbally agreed between the parties to such lease that all religious or denominational instruction therein during school days should be discontinued, and the right to use such buildings for such purposes was waived by the lessor. The buildings thus leased are each surmounted by a cross, and over the doorway of one is the following inscription cut in stone, "St Peter's Male Academy, 1869," while the other building stands partially in the rear of a dwelling house owned by the church authorities, which is occupied as a residence by the sisters teaching in the above-named schools.

It appears from the evidence that prior to the leasing of the buildings herein described, a parochial school was maintained in each of said buildings, and teachers then employed were continued in the school by the board of education. As their places have become vacant by resignation or otherwise, care has always been taken that their successors should be members of the same order or sect, wearing a like attire, whether in pursuance of any understanding with the church authorities or not, is not clear, but it is fair to assume that some agreement of that character outside of the written lease must have existed. The teachers thus employed have been paid by checks drawn by the board of education upon one of the banks of that city, payable to the teacher by her full christian name, and such checks prior to the commencement of these proceedings all bore the indorsement when presented for payment, of "Sister Alexis," alleged to be the sister in charge of the parish house in which the teachers resided.

I am asked by the board of education to hold that the employment of teachers thus attired, teaching in buildings of the character described and permanently leased in the manner set forth, is not a violation of the Constitution of this State. In my judgment such action of this board of education is unwise as

a matter of school polity, is a violation of the letter and spirit of the Constitution, and such leasing of buildings is without warrant of law.

The charter of the city of Poughkeepsie makes provision for its public school system. It provides for the election of a board of education, whose powers and duties are defined in section 189 thereof. Subdivision 4 of this section provides that "said board of education are to exercise the powers and discharge the duties of said schools the same as trustees of school districts under the statutes of this State." No provision is made in the charter for the renting of buildings or rooms for school purposes. Section 192, however, makes ample provision for the "purchase or erection of an additional schoolhouse, if the board of education deems such course proper or necessary." Hence we must look to the provisions of the Consolidated School Law for the authority of the board of education of this city to lease property for school purposes. Such authority is given to them only by section 50 of title 7 of the Consolidated School Law, which reads as follows:

"Whenever it shall be necessary for the due accommodation of the children of the district, by reason of any considerable number of said children residing in portions of said district remote from the schoolhouse in said district, thereby rendering it difficult for them in inclement weather and in winter to attend school at such schoolhouse, or by reason of the room or rooms in said schoolhouse being overcrowded, or for any other sufficient reason the due accommodation of said children can not be made in said schoolhouse, they shall establish temporary or branch school or schools in such place or places in said district as shall best accommodate such children, and hire any room or rooms for the keeping of said temporary branch school or schools, and fit up and furnish said room or rooms in a suitable manner for conducting such school or schools therein. Any expenditure made or liability incurred in pursuance to this section shall be a charge upon the district."

This language clearly contemplates only the temporary leasing of property for school purposes by school authorities, and was not intended to authorize school boards to permanently maintain schools in leased rooms or buildings. Prior to 1894 trustees were authorized by subdivision 5 of section 49 of title 7 of the Consolidated School Law of 1864 "to purchase or lease a site for the district schoolhouse or schoolhouses as designated by the meeting of the district, and to build, hire or purchase such schoolhouse as may be so designated, and to keep in repair and furnish such house with necessary fuel and appendages and pay the expense thereof by tax." But in the consolidation of the school law in 1894, the power of leasing school buildings was hedged about with certain conditions not in the former statute, clearly indicating the intent on the part of the Legislature to limit such leasing to temporary and extraordinary conditions. Since 1894 it has been the settled policy of the State that localities must own the school buildings in which their schools are conducted, and that the leasing and renting of property for school purposes was not authorized except under extraordinary conditions.

The condition existing in the city of Poughkeepsie for the past fifty years is the best illustration possible of the wisdom of the State in taking away from school officers the power to perpetually rent property for school purposes. Since 1843 the schools in that city have been wholly or partially conducted in buildings and rooms rented for the purpose. In 1843 the village corporation owned no school buildings, and the board supplied the want by the rental of a building formerly occupied as a theater, situate in Market near Jay street. Since that time there have been rented rooms in buildings situate on the corner of Clinton and Thompson streets, in the coach factory at the junction of Mill street and Dutchess avenue, in the basement of the Universalist church, in a building rented of the Baptist church, known as the Hoffman street chapel, in Faith chapel on Union street, in the primitive Methodist church on Church street, and the present board of education is now renting in addition to schools 11 and 12, described in the petition of appeal herein, the Hoffman street chapel of the Baptist church, at an annual rental of $185, the building known as the "Poughkeepsie Military Institute," formerly Waring's Military School, a frame building erected over thirty years ago, paying an annual rent of $1000 therefor, and also a building rented of St Mary's parish in which school 9 is conducted.

The deplorable condition of school facilities in this city is best shown by stating the exact facts. Out of thirteen buildings in which schools are maintained, five are rented, one is a building formerly used as a dwelling house, one is an old machine shop repaired and converted into a school building, and with the exception of school 5, not a single building has any system of ventilation, and no means of heating except by coal stoves, in some cases within twenty inches of the desks occupied by the pupils, consuming the oxygen of the overcrowded schoolroom. No provision is made for children's wraps, which hang about the schoolroom four and five deep upon an insufficient number of hooks, a most unsanitary condition. Some of these buildings have water-closets in the basements, the odors from which permeate the whole building; in some the rooms are separated from others by glass partitions where the school exercises conducted in one room confuse the school work in the room adjoining. Narrow aisles, in some cases but fifteen inches wide, temporary outside frame stairways, built upon those old buildings as afterthoughts to meet the growing wants of the city; and insufficient seating accommodations for an attendance in some cases larger than the total seating capacity of the room, are among the bad conditions that prevail. Taken altogether, I know of no other city in the State with such deplorable school facilities as this city possesses.

If it be said that the limit of bonded indebtedness has been reached by this municipality, I can only say that that city is now engaged in erecting a brick and stone building for its fire department; has erected three such buildings within five years; has erected a commodious building for the use of its police and public works department within ten years; has found means for paving its streets with asphalt and Belgian block pavements, and if the choice has been presented between adequate school facilities and these improvements, the city seems deliberately to have chosen the latter in preference to the former.

The two buildings described in the appellant's petition herein are not adapted to school purposes. Access to the upper floor of one is had by a winding narrow stairway. One is upon low, undesirable ground. They can not be properly heated and neither has any satisfactory means of ventilation. The extravagance of the present system is clearly manifest when we consider that the building rented of the Baptist church is scarcely worth, including the land on which it stands, one year's rental paid therefor. It is an antiquated structure with small windows, low ceilings and dark rooms. The rear room is reached by a narrow passage, the entrance to which does not exceed twenty inches in width. The old Poughkeepsie Military Institute, while it is an antiquated frame building built more than thirty years ago is still probably the most comfortable school building in use in the city of Poughkeepsie. Its rental, however, is $1000 a year. This represents an investment of $25,000 at 4 per cent, while that amount would build at least two modern school buildings, with modern heating, lighting and ventilation and slate blackboards, not at present possessed by any school building in the city, with the possible exception of a portion of school 5.

Notwithstanding the continued leasing of school buildings in this city, there has been such an utter lack of school facilities that prior to September 1, 1898, 1004 of the school children in this city who by the laws of our State were entitled to free instruction, were compelled to alternate in their attendance and were able to obtain but two and one-fourth hours' instruction each day.

No evidence whatever is presented to me as to the amount of bonded indebtedness of this city. Hence I have no means of knowing whether the local authorities are permitted under the constitutional limitations to create any further bonded indebtedness. No evidence is presented that any effort has been made in recent years by the board of education to supply this woeful lack of school facilities by taxation. The respondents allege as a matter of belief that the inhabitants of that city would not vote the necessary funds for the erection of new school buildings, although I am at a loss to determine upon what such opinion is founded. They do not allege that any effort has been made to test public sentiment upon that question.

I shall be loath indeed to believe that a city possessing the wealth of Poughkeepsie and citizens of acknowledged intelligence would refuse to appropriate money sufficient to enable her board of education to comply with the school laws of the State, or to furnish reasonable accommodations for her children while in attendance upon the public schools.

I am very clearly of the opinion that the statutes of this State do not contemplate the leasing of school property as practised by this city and that such leasing is clearly contrary to the provisions of the charter of Poughkeepsie and of the school law of the State, although I am not unmindful of the fact that this system, known as the "Poughkeepsie plan," has been widely commented upon and in many quarters has been regarded as wise and practical.

How far the desires of those interested in its continuance may have influenced the board of education in the course pursued by it in regard to the

erection of new buildings, I do not know. That it has been eminently satisfactory to the lessors of these buildings is apparent. That the board of education has always considered that the employment as teachers of members of the religious order named, was to be some equivalent for rent, is evident from the fact that the rental of these comparatively large buildings has been but nominal, while to the other denominations, renting inferior buildings but with no effort to have their communicants employed as teachers therein, has been paid a sum fully equal to or in excess of the real rental value of the property. That the lessors of these buildings have always so regarded the arrangement is evident from the fact that for upwards of twenty-five years this large amount of property has been practically donated to the uses of the public school system of the city, and from the further fact that since the commencement of these proceedings great anxiety has been manifest to have the system continued.

This union of interests is no longer desirable, nor for the best interests of the schools of the city. It has been and is a cause of irritation and discord among the patrons of the schools, is against the spirit of our institutions which calls for a complete and total severance of church and state, and in my judgment is against the letter and spirit of the Constitution. Our public school system must be conducted in such a broad and catholic spirit that Jew, and Protestant, and Catholic alike shall find therein absolutely no cause for complaint as to the exercise, directly or indirectly, of any denominational influence. In this respect every school maintained at public expense should be free, open and accessible without reasonable ground for objection from any source whatever.

While the discussion of the facts in connection with the school system of this city has been somewhat broader than the issues raised by the pleadings herein, nevertheless the rental of other church property and private property by the board of education of this city has been and is so clearly a violation of the principle laid down herein that I deemed it advisable to treat the whole question in this opinion. I have also desired that this decision should state without uncertainty the position of the Department with reference to all questions raised herein. Cities, villages and school districts must own the buildings in which their schools are conducted save only when temporary hiring of rooms or buildings is made necessary by some sudden emergency.

The renting by the respondents of the property of the Baptist church and the renting of rooms or buildings by their predecessors from the Methodist or Universalist denominations, in which to permanently conduct the schools in said city is equally reprehensible, and I desire it to be hereafter clearly understood that the prohibition extends to all denominations, as well as to all individuals. All other questions raised herein are but incidental to this.

I decide that the action of the respondents herein in hiring rooms and buildings in which to conduct any of the schools of said city and in continuing the lease of buildings, rented by a former board, and in conducting schools therein beyond the period of emergency contemplated by the statute, is without legal authority on the part of the respondents.

I also decide that it is the duty of the respondents to require teachers employed by them to discontinue in the public schoolroom the use of distinguishing dress or garb of any religious order.

4642

In the matter of the appeal of Eugene Lockwood and others v. board of education of school district 9, Corning, Steuben county.

It is the policy of the school law that each of the school districts of the State should become the owner of the schoolhouse or houses or school building or buildings, either by purchase or by building upon a suitable site or sites; and where power is given to lease rooms or buildings it is only for a limited time to provide for an emergency.

The wearing of an unusual garb, worn exclusively by members of one religious denomination, for the purpose of indicating membership in that denomination, by the teachers in the public school during school hours while teaching therein, constitutes a sectarian influence which ought not to be persisted in. It is the duty of the school authorities to require such teachers to discontinue, while in the public schoolroom and in the performance of their duty as teachers therein, the wearing of such dress or garb.

Decided March 31, 1898

Skinner, *Superintendent*

This is an appeal by the appellants in the above-entitled matter, as residents and qualified voters of school district 9, city of Corning, from the action of the board of education of such district in refusing to take action upon, or to comply with the request contained in, a petition or memorial signed by the appellant Lockwood and twenty other qualified voters of such district, and dated September 27, 1897, that certain teachers named therein, teaching in the schools in such district, be required by such board of education to forthwith discontinue the use and wearing by them, during the school hours of each school day held and taught by them, of the distinctive garb, dress or badge of the religious sect or order to which they belong.

The appellants herein also appeal from the action of said board of education in leasing and paying rent for the brick building in which school 2 in such school district is being maintained.

Annexed to such appeal is a copy of the petition or memorial delivered to said board of education, dated September 27, 1897, as hereinbefore stated, and the separate affidavit of one Ira W. Ten Broeck and the appellant herein, Eugene Lockwood.

The appeal herein was filed in this Department on November 29, 1897. The respondents, the board of education, applied for and received an extension of time to answer the appeal, and on January 8, 1898, such answer was filed in this Department.

The following facts are admitted:

That the appellants herein are residents of school district 9, city of Corning, county of Steuben, and are qualified voters therein; that Amory Houghton, jr,

George R. Brown, John L. Lewis, O. P. Robinson, David S. Drake and William E. Gorton are members of, and compose, the board of education of such school district; that the following named persons were employed by such board of education to teach during the school year of 1897–98 and are now teaching in the school designated as 2 in such school district 9, namely, Genevieve Levett, Bercham Holway, Philomena Walsh, Beatrice Brown, Michel Donovan, Joseph ine O'Connor and Rita Connors, all of whom are members of a religious society, order of sisterhood, known as the "Sisters of Mercy," and are the only teachers employed and teaching in such school except one other not named; that during all the time that such persons have been employed as such teachers in such school, and during each school hour of each school day in which they have been employed in the instruction of the scholars in such school, they have worn the particular, distinctive, distinguishing garb or dress of the sisters of mercy, the religious society, order or sisterhood of which they are members, and wear upon their persons, conspicuously displayed, a cross, rosary or other badge or insignia peculiar to such religious order; that on or about October 2, 1897, a memorial or petition, addressed to the board of education of such school district and dated September 27, 1897, signed by the appellant Lockwood and twenty others, residents and voters in such school district, was delivered to George Hitchcock, the secretary of such board of education, in which, after stating the employment of the said teachers and that they wore during school hours and while teaching in the school, the distinctive dress or garb of the religious order of which they were members, together with the badge or insignia of the order, alleging that the wearing of such garb, they believe, constitutes a sectarian influence within the prohibition contained in section 4 of article 9 of the Constitution of this State, and requesting the board of education to require such teachers to forthwith discontinue the wearing of the distinctive garb or dress during school hours and while teaching in such school; that annexed to the memorial or petition were the separate affidavits of the appellant Lockwood and one Ten Broeck in support of the statements contained in the memorial; that one meeting of such board of education was held after the delivering to the secretary of the memorial and affidavits before the appeal herein was taken, but no action was taken at such meeting by the board relative to the memorial; that the board of education has not interfered with the style and mode of dress of any of the teachers employed by it.

The appellants allege that the scholars attending at said school 2 are expected to, and do, address such teachers habitually as "sisters." The respondents in their answer deny, upon information and belief, "that there is any rule as to the manner of address to said teachers by the pupils of the school."

It is established by the proofs filed herein:

That the building in which said school 2 is maintained is a brick structure, located in the fourth ward of the city of Corning, opposite St Mary's Roman Catholic church, and was formerly used as a parochial school building; that for the past ten years such building has been leased to the board of education of

school district 9 for use for the maintenance therein of one of the schools under its charge; that on September 1, 1893, the board of education of district 9 leased from one Peter Colgan, a priest of such church, said building for the term of five years, at the annual rent of $1000, such rental to include the keeping of the building in repair and to be furnished with school furniture, properly plumbed and supplied with water-closets, gas fixtures, etc. and the ground probably graded and drained; also the heating of the building with steam heat, and the services of a janitor; that said board during such term has the full and absolute control of such building.

The appellants herein appeal from the action of the board of education in leasing and paying rent for the brick building in which school 2 is maintained. Such lease, by its terms, will expire on September 1, 1898, and in my opinion, should not be thereafter renewed or continued; but measures should be immediately taken for the construction of a new school building for such district.

The respondents state, as the grounds for their action in leasing such building that by reason of the increase of population and of pupils requiring accommodation, the board of education since and including the year 1883, had erected three school buildings, the last of which was erected in 1895, and that on this account the bonds of the district to the amount of $55,000 are outstanding, the last of which will mature in the year 1931; that to be compelled now to erect another building would greatly embarrass the district, as the aggregate assessed valuation of the real and personal property therein does not exceed $3,000,000.

It has uniformly been the policy of this Department to call the attention of inhabitants of school districts, and of trustees and boards of education therein, to the condition of their schoolhouses and grounds and the necessity of erecting schoolhouses when necessary to properly accommodate the pupils therein. It is true the respondents herein have the power to hire schoolrooms in their school district, and such power is given to trustees and boards of education under the general school law and special acts relating to schools; but such provisions have been held to authorize such school authorities to lease rooms and buildings to supply temporarily only the lack of schoolhouses in the district, or where the same are not in condition for use, or are being repaired or added to, or pending action on the part of the school authorities, or the inhabitants to supply deficiencies.

School district 9, Corning, is financially a strong district, having at present an aggregate assessed valuation of $3,000,000, and is abundantly able to erect the additional schoolhouse needed therein. It has been decided and must be accepted as the settled policy of the State that, except in cases of extreme temporary emergency, localities must provide and in their corporate capacities, must own all necessary school buildings and their equipments.

The respondents herein are in error in assuming that the appeal herein is from their action in making the contracts with the seven teachers named in the appeal, and that as such contracts were made in April 1897, the appeal herein was not taken in time.

The appellants herein do not appeal from the action of the respondent in employing such persons as teachers, but in refusing or neglecting to take action upon the memorial presented to the respondents, and in refusing or neglecting to require such teachers to discontinue the wearing, during school hours and while teaching in the school, of the distinctive dress or garb of the religious order or society of which they are members.

I decide:

That the appellants having given a satisfactory reason for their delay in bringing such appeal, the appeal in that regard was taken in time, under the rules of this Department.

The question raised by the appellants herein, in relation to the wearing by teachers in the public schools of this state of the distinctive garb or dress of the religious order of which such teachers are members, and in being known and addressed by the pupils as "Sister Mary, etc." has several times been brought to the attention of and has received the consideration of this Department.

It has been uniformly held that the wearing of an unusual garb, worn exclusively by members of one religious denomination, and for the purpose of indicating membership in that denomination, by the teachers in a public school, during school hours, while teaching therein, constitutes a sectarian influence which ought not to be persisted in. The same may be said of the pupils addressing such teachers as "Sister Mary, etc." School authorities should require their teachers to discontinue the use in the schoolroom of the distinguishing dress of the religious order to which they belong, and should cause the pupils to address them by their family name with the prefix of "Miss or Mrs" as teachers are ordinarily addressed.

(Decision 3520 of Superintendent Draper, decided March 24, 1887, in the appeal of Leander Colt v. the board of education of union free school district 7 of the village of Suspension Bridge, Niagara county, page 854, etc. of the Report of the State Superintendent of Public Instruction for the year ending 1888; also, decision 4516, decided November 25, 1896, in the appeal of Fayette B. Durant and others v. board of education of West Troy school district, page 174, etc. of the Report of the State Superintendent of Public Instruction for the year 1897; also, decision 4546, decided May 17, 1897, in the appeal of Samuel Kennedy and others v. the board of education of city of Watervliet, Albany county, in the Report of the State Superintendent of Public Instruction for the year 1898.)

Nothing is presented in the appeal herein to alter, change or modify the decisions of this Department as hereinbefore cited, and such decisions are affirmed, and made operative and obligatory upon the respondents herein.

It appearing that each of the seven teachers mentioned in the appeal herein is under contract to teach in the school in such district until the end of the present school year, and that the dismissal of such teachers by the board of education for the refusal of such teachers to discontinue the wearing of their distinctive garb during school hours and while teaching in such school, would necessitate the

employment of other teachers for the balance of the school year, and cause complications in the school district, the directions hereinafter given to the respondents are not to take effect until the end of the present school year.

The appeal herein is sustained.

It is ordered, That the board of education of school district 9, city of Corning, Steuben county, be, and they are hereby, directed to require all teachers employed by them, to discontinue the wearing during the school hours of each school day in which the school is taught by them, of the distinctive or distinguishing garb or dress of the religious order, society or sisterhood of which they are members.

It is further ordered, That said board of education be, and it hereby is, enjoined and restrained from leasing or using, on or after September 1, 1898, the brick building in which school 2 is now maintained, for the purpose of maintaining or conducting therein any of the public schools of the city of Corning.

5010

In the matter of the appeal of William A. Ferris, Gerrit S. Preston, Horace A. Crane and Alfred K. Bates v. Henry Allen Sylvester, sole trustee of school district no. 9, Lima, Livingston county.

It has been the settled policy of the State since 1848 that localities must own the school buildings in which their public schools are conducted; that the renting of rooms and buildings for school purposes is not authorized, except under extraordinary conditions and to provide for emergencies.

The wearing by the teachers in the public schools, during school hours, while teaching therein, of an unusual garb worn exclusively by members of one religious denomination for the purpose of indicating membership therein, constitutes a sectarian influence, which ought not to be persisted in. It is the duty of the school authorities to require such teachers to discontinue, while in the public schoolroom, and in the performance of their duties as teachers therein, the wearing of such dress or garb.

Decided June 5, 1902

Albert H. Stearns, attorney for appellants
George W. Atwell, jr, attorney for respondent

Skinner, *Superintendent*

On April 16, 1902, the above-named appellants filed in this Department their appeal from the action of Henry Allen Sylvester, sole trustee of school district 9, Lima, Livingston county, in leasing for school purposes certain rooms in the building known as "Brendans Hall," situated on Lake avenue in the village of Lima, in said district, and in furnishing heat, light etc., therein, on the ground that such leasing is illegal and void under the Constitution and laws of this State.

The appellants also appeal from the action of such trustee in the employment of two teachers in the school in "Brendans Hall," both of whom they

allege are members of the religious order or sisterhood known as "Sisters of Charity," and both of whom, during school hours, dress in the garb or dress peculiar to such order, and are usually addressed by the scholars as "sister" instead of "miss."

They allege that the use of public school money by the trustee in paying said teachers is contrary to the Constitution and laws of this State.

On April 18, 1902, the above-named William A. Ferris and Gerritt S. Preston filed in this Department their withdrawal as appellants in this appeal.

Issue has been joined by service of the usual answer herein.

The following facts are established from the pleadings and proofs filed herein, and the records in this Department.

School district 9, Lima, Livingston county, is a common school district formed many years ago, and comprises the village of Lima, with certain contiguous portions of the town of Lima, and having a population of over 1000. The number of children of school age residing in the district, according to the school census of 1901, was 205. The schoolhouse of the district is a one-story brick building erected in 1860, having two rooms, the larger room having a capacity for seating 40 pupils, and the smaller room a capacity for seating 36 pupils, making a total of 76 pupils. During the present school year the trustee of such district has hired a room in the second story of a block of stores on Rochester street in the village of Lima, in which a school of 20 pupils has been conducted. For a number of years a school of the district, known as the "South School," has been maintained in a brick building situated on Lake avenue in the district, owned by a religious corporation of Lima, under a contract by which the school district pays the sum of $100 annually for heating the rooms in such building in which such "South School" is conducted. On August 22, 1901, Respondent Sylvester, as trustee of such district, employed as teachers in such "South School" Nora O'Connor, at a compensation of $9 per week, and Catherine Dougherty at a compensation of $7 per week, each of whom was a duly qualified teacher under the Consolidated School Law of 1894, and each of them is teaching in such school. The Misses O'Connor and Dougherty are both members of a religious order or sisterhood, and are habitually addressed by the scholars attending such school by the prefix "Sister" instead of "Miss." The assessed valuation of property subject to taxation for school purposes in such district as stated in the report of the trustee for the school year 1900–1, was $550,680.

Since 1848 it has been the settled policy of the State that localities must own the school buildings in which their public schools are conducted; that the renting of rooms and buildings for school purposes is not authorized except under extraordinary conditions and to provide for emergencies.

The wearing of an unusual garb, worn exclusively by members of one religious denomination for the purpose of indicating membership in that denomination, by the teachers in the public schools during school hours while teaching therein, constitutes a sectarian influence which ought not to be persisted in. It

is the duty of the school authorities to require such teachers to discontinue, while in the public schoolroom and in the performance of their duties as such teachers therein, the wearing of such dress or garb. (See decision 3250, dated March 24, 1887, by Superintendent Draper in Leander Colt v. board of education of union free school district 7, village of Suspension Bridge, Niagara county. Decision 4516, in the appeal of Durant and others v. board of education of West Troy school district, dated November 25, 1896, made by me. Decision 4546, in the appeal of Kennedy and others v. board of education of the city of Watervliet, Albany county, dated May 15, 1897, made by me. Decision 4642, in the appeal of Lockwood and others v. board of education of school district 9, Corning, Steuben county, dated March 31, 1898, made by me, and decision 4722, in the appeal of Edward Keyser v. board of education of the city of Poughkeepsie, dated December 23, 1898, made by me.)

I decide that the action of the respondent herein, in hiring rooms in which to conduct any of the schools of such district 9, Lima, Livingston county, and in continuing the lease of rooms rented by his predecessors in office, and in conducting schools therein beyond the period of emergency contemplated by the school law, was and is without legal authority.

I further decide that it is the duty of the respondent herein to require teachers employed by him to discontinue in the public schoolroom or rooms the use of the distinguishing dress or garb of any religious order.

The appeal herein is sustained.

It is ordered that Henry Allen Sylvester, as sole trustee of school district 9, Lima, Livingston county, be and he is hereby directed to require any and all teachers employed by him in the school or schools of such district to discontinue wearing, during the school hours of each school day in which school is taught by them, the distinctive or distinguishing garb or dress of the religious order, society or sisterhood of which they are members.

It is further ordered that said Sylvester, as such trustee, be and he is hereby enjoined and restrained from hiring or using, on and after June 30, 1902, the room in the block or store on Rochester street, in the village of Lima, and the room or rooms in the building on Lake avenue known as "Brendans Hall," in which the school known as the South school is now maintained, for the purpose of maintaining and conducting therein any of the public schools of such district 9, Lima, Livingston county.

RESIDENCE

4901

In the matter of the appeal of Francis B. Taylor from proceedings of annual meeting held August 7, 1900, in school district no. 17, Hempstead, Nassau county.

To acquire a domicile or residence in a school district two things are necessary, the *fact* of a residence in a place, and the intent to make it a home. A domicile or residence once acquired remains until a new one is acquired. Mere intention to remove without the fact of removing will not change the domicile; nor will the fact of removal without the intention to change the residence. A person, once established in any place, the presumption of residence continues unless rebutted, and the burden of proof is upon the party alleging the same.

Decided November 10, 1900

John Lyon, attorney for respondents

Skinner, *Superintendent*

This is an appeal from the action of the annual meeting held on August 7, 1900, in school district 17, Hempstead, Nassau county, in the election of L. Pflug as a trustee of such district for the term of two years, as a successor to the appellant herein, who it was claimed had ceased to be a resident of such district.

The grounds alleged by the appellant for bringing his appeal is that he was, at the time of the said annual meeting, a resident of, and a qualified voter in, such district, and hence, there was no vacancy created by his removal from the district or otherwise, which could be legally filled by the election of any person as trustee, for the unexpired term for which he was elected a trustee.

Messrs Lauer and Hartung, two of the trustees, have united in an answer to the appeal, and to such answer the appellant has made a reply.

It is admitted that the appellant is unmarried and was, on August 1, 1899, and until about the middle of October, 1899, a resident of school district 17, Hempstead, Nassau county; that at the annual meeting held in such district August 1, 1899, he was elected a trustee of such district for the term of three years to succeed one S. Elderd, whose term of office as a trustee then expired; that during the school year of 1899–1900 he acted as one of the trustees of such district and performed all the duties thereof, including the signing, on August 1, 1900, of the annual report of the board of trustees presented to the annual meeting therein held on August 7, 1900, and that he was present at such annual meeting; that at such annual meeting, after the election of Jacob Lauer as a trustee for three years, a motion was made to fill the vacancy in the term of appellant as a trustee, upon the ground of his not being a resident of the district, upon which the appellant stated that he was then a resident of the district and had been, since 1890; that the chairman ordered a vote to be taken of the sentiment of

the voters as to whether the appellant was then a resident of the district, with the following result: 4 yeas, 18 noes and 5 blanks; that after the announcement of the result of such vote the appellant again objected to the election of a trustee for two years to fill out his (appellant's) term of office; that a ballot was taken for a trustee for two years to fill out the term of appellant which resulted in the election of L. Pflug.

It is established by the proofs filed herein that the appellant is a lawyer, having an office in the village of Hempstead, Nassau county, in school district 1, and less than a mile from the boundary line between districts 1 and 17; that the appellant is the owner of certain real property situated in school district 17, known as the "Bedell homestead" and, since October 1890, has resided and still resides in said homestead, and in such district 17; that the appellant is, and for the past 10 years has been, a voter in the twelfth election district of Hempstead, in which election district part of school district 17 is situated, and in which election district the "Bedell homestead" is situated.

Inhabitancy and residence mean a fixed and permanent abode or dwelling place for the time being, as distinguished from a mere *temporary locality of existence*. To acquire a domicile or residence two things are necessary — the *fact* of a residence in a place, and the intent to make it a home. To *retain* a residence once acquired, actual residence, however, is not indispensable, but it is retained by the mere intention not to change it or to adopt another, or rather by the absence of any present intention not to change it or adopt another, or by the absence of any present intention of removing therefrom. A domicile once acquired remains until a new one is acquired. Mere intention to remove without the fact of removal will not change a domicile; nor will the fact of removal without intention to change the residence. Once established in any place the presumption of residence continues unless rebutted, and the burden of proof is upon the party alleging the change.

I decide (1) that the respondents herein have failed to establish by a preponderance of proof that the appellant herein, in October 1899 or at any time since October 1900, changed his domicile or residence from school district 17, town of Hempstead, Nassau county; (2) that the appellant herein, on August 7, 1900, was, and still is, a resident of, and a qualified voter in, said school district 17; (3) that the appellant herein was, on August 7, 1900, and still is, a trustee of said school district 17, having been elected such trustee in August 1899 for the term of three years; (4) that the action taken at the annual meeting, held in said district 17, August 7, 1900, that the appellant herein was not then a resident of such district, was without authority of law and void; (5) that the action taken at such annual meeting, held in such school district 17, August 7, 1900, in the election of Pflug as a trustee of such district, was without authority of law and void.

The appeal herein is sustained.

It is ordered that the proceedings taken at the annual meeting, held August 7, 1900, in school district 17, Hempstead, Nassau county, that Francis B. Taylor,

the appellant herein was not then a resident of such district be, and the same are, hereby vacated and set aside.

It is further ordered that the proceedings taken at such annual meeting in such school district 17, Hempstead, August 7, 1900, in the election of L. Pflug as a trustee of such school district, be, and the same are, hereby vacated and set aside.

4229

In the matter of the appeal of Edward T. McEnany v. union free school district no. 2, town of Highlands, Orange county.

Where a person has acquired a domicile or residence in any school district in the State and has children of school age, and enters into the employment or service of the United States, such person does not lose his residence and domicile in such school district by reason of his employment elsewhere in the service of the United States, and is entitled to send his children to school in the school district in which he had acquired such domicile or residence.

Decided March 28, 1894

M. H. Hirschberg, attorney for respondent

Crooker, *Superintendent*

This is an appeal from the action and decision of the board of education of union free school district no. 2, town of Highlands, Orange county, in refusing to permit the four children of the appellant to attend the school in said district free. An answer to the appeal herein has been interposed by the respondent.

It appears from the papers presented upon this appeal:

That from December 1879, to May 1882, the appellant resided with his family in said school district no. 2, town of Highlands, and appellant was a qualified voter in said school district, and was then and for a period of five years prior thereto in the employ of the United States on the military post or reservation at West Point; that about May 1, 1881, he moved with his family to West Point upon said military tract or reservation into a United States government building, where he and his family have since resided and still do reside; that the appellant is now and has been since May 1882, in the employ and service of the United States; that the respondents refuse to allow the children of the appellant to attend the schools in such district without payment of tuition.

The appellant on and prior to May 1882, had acquired a domicile or residence in the town of Highlands, Orange county, and in said school district no. 2, town of Highlands, Orange county; such domicile and residence of the appellant was that of his minor children unless such minors had been emancipated from parental control or had been adopted into a new family, and such does not appear to have taken place. To *retain* a domicile or residence once acquired, actual residence, however, is not indispensable, but is retained by the mere intention not to change it, and a domicile or residence once acquired remains until a new one is acquired.

There is no proof that the appellant has any intent to change or has changed the domicile and residence acquired by him in such school district. The fact of his removal of himself and his family upon the West Point reservation while employed in the service of the United States did not lose him his residence and domicile in such school district, nor gain him a residence or domicile in West Point.

By section 3 of article 2 of the Constitution of the State of New York, it is provided that no person shall be deemed to have gained or lost a residence by reason of his presence or absence while employed in the service of the United States.

I find and decide that the appellant herein is a resident in union free school district no. 2, town of Highlands, Orange county, and entitled, under the school laws, to send all and any of his children of school age free to the school in said school district.

The appeal herein is sustained.

It is ordered, That the board of education of union free school district no. 2, town of Highlands, Orange county, be, and said board is, hereby directed to receive into the schools in said district, all and any children of school age of the appellant herein, Edward T. McEnany, free.

4238

In the matter of the appeal of Mrs E. G. Cuddeback v. board of education of union free school district no. 10, town of Skaneateles, Onondaga county.

A person who has acquired a residence and domicile within a union free school district and whose business necessarily takes him away from the district a large part of the time, and whose wife and son are also temporarily absent from said district, does not lose his residence and domicile in said district, and his domicile and residence is that of his wife and their child, and such child is entitled to attend the school in the district without payment of tuition.

Decided April 24, 1894

M. F. Dillon, attorney for appellant

Crooker, *Superintendent*

The appellant appeals from a decision of the respondent, made on November 21, 1893, in refusing to permit her son to attend the school under their jurisdiction without payment of tuition.

It appears from the papers presented that the appellant is a married woman living with her husband, Egbert G. Cuddeback, and they have a son, Clarence Cuddeback, residing with them; that said Egbert G. Cuddeback is engaged in the wholesale produce business, and that such business calls him away from his home the greater portion of his time; that the residence of said Cuddeback is in the village of Skaneateles and in union free school district no. 10 of Skaneateles; that the appellant owns a house and lot in said school district and has

resided there for the past sixteen years; that on April 1, 1893, she leased her house until October 1, 1893, and since April 1, 1893, has been temporarily absent from said school district with her son. It affirmatively appears that Mr Cuddeback is a resident of the village of Skaneateles and of school district no. 10, and that the marital relations existing between Mr and Mrs Cuddeback still exist. There can not be any doubt but that Mr Cuddeback acquired a domicile and residence in said school district. To *retain* such domicile when once acquired, actual residence, however, is not indispensable, but it is retained by the mere intention not to change it or adopt another, or rather, by the absence of any present intention of removing therefrom. A domicile once acquired remains until a new one is acquired. A married woman follows the domicile of her husband. The domicile of the parent is the domicile of a minor, unless such minor has been emancipated from parental control or adopted into a new family, and there is no proof that the son of Mr Cuddeback has been so emancipated or so adopted.

I find and decide that Egbert G. Cuddeback was in the year 1893 a resident of union free school district no. 10, Skaneateles; that the domicile and residence of the appellant herein in 1893 was that of her husband; that the residence of Clarence Cuddeback, the minor son of said Mr and Mrs Cuddeback, in 1893, was that of his parents.

The appeal herein is sustained.

It is ordered, That the board of education of union free school district no. 10, Skaneateles, do receive into the schools in said district Clarence Cuddeback, the minor son of Mr and Mrs Cuddeback, free as a resident pupil in said district, and without demanding or receiving any tuition fees for his admission to and attendance in said schools.

5259

In the matter of the appeal of John S. Dennis, Thomas H. Golder and Edmund T. Ker, from the acts of Wm. Bunselmeyer in claiming to be trustee of union free school district no. 9, town of Greenburg, Westchester county.

Renting a room in a school district for the purpose of storing household goods is not sufficient to maintain a residence in the district when an actual home is maintained elsewhere.

Decided May 25, 1906

Henry C. Griffin, attorney for appellants
Frank V. Millard, attorney for respondent

Draper, *Commissioner*

There is no dispute as to the facts in this case. The only question to be determined is whether certain acts of respondent constitute a removal from the district. Respondent Bunselmeyer was elected trustee of school district no. 9, town of Greenburg, Westchester co., on August 2, 1905. His wife owned a house and lot in the district in which Bunselmeyer and his family resided. In

March 1906 Mrs Bunselmeyer sold the house and lot. Respondent was unable to rent another house in the district and on April 2, 1906, moved his family into another district in which he had rented a house. Since that time his child has attended school in the district into which he has moved. It does not appear that he has any business interests in district no. 9. He also rented one room in a house in district no. 9, Greenburg, and placed therein certain pieces of property. Respondent also claims that he owns a lot in district no. 9 and that he intends to erect a house on such lot. He does not show when he intends to erect such house or that he is making any preparation to erect it. Renting a room in a school district for the purpose of storing a few household goods, is not sufficient to maintain a residence in the district when an actual home is maintained elsewhere. A trustee of a school district should be accessible to the residents of the district and should actually reside in the district so that he may be in touch with the needs of the school and the wishes of the inhabitants of the district. Under section 29, title 7 of the Consolidated School Law removal from the district vacates the office of trustee.

I decide, That the acts of respondent constitute a removal from the district and that he thereby vacated the office of trustee. This vacancy has existed since April 2, 1906 and Respondent Bunselmeyer has not been a legal trustee of district no. 9, Greenburg, since that date and has not therefore been legally entitled to meet with the board of education of that district since such date. As more than thirty days have elapsed since such vacancy occurred the school commissioner has the power to fill such vacancy by appointment. The board of education may fill such vacancy if action is taken before the school commissioner makes an appointment.

5228

In the matter of the appeal of Orville T. Smith from the action of the board of education of school district no. 1, town of Catskill, Greene county.

A board of education may legally suspend a nonresident pupil until the tuition for which he is chargeable is paid.

A man who hires a house and lives in a district a portion of the time for the "comfort and convenience of business" is not necessarily a resident of such district.

If such arrangement is only temporary and he has an established permanent home elsewhere his residence must be regarded in the district of such permanent home.

Decided December 5, 1905

James H. Van Gelder, attorney for appellant
H. L. Austin, attorney for respondent

Draper, *Commissioner*

On October 31, 1905, the board of education of school district no. 1, Catskill, Greene county, suspended the 12 year old son of appellant from the school privileges of said district. The cause of this suspension was the failure or refusal of appellant to pay the regular tuition charged to him for the attendance of his

son at the schools of said district as a nonresident pupil. After his son had been suspended by the board of education appellant, under protest, paid the tuition in question so that his son might be accorded the school privileges of the Catskill schools. He then brought this appeal from the action of the board of education in charging him tuition for his son's attendance and also from the action of the board in suspending his son.

It is not clear from the moving papers in this appeal on what ground appellant claims the right to send his child to the Catskill school without the payment of tuition. The inference is that he claims a bona fide residence in the Catskill district, although he does not, as pointed out by the attorney for respondent, even allege that he is a resident of such district. Appellant states that he rents certain property in the district; that he is engaged in business in the district and that during a portion of the year his family lives or resides in the district. These conditions are not sufficient to make him a resident of this district. He states that " for the comfort and convenience of business he hires a house in Catskill and moves there in the fall." He could do this and still be a nonresident. If appellant claims to be a resident of district no. 1, Catskill, and therefore entitled to send his children to school in that district he must affirmatively show that he is an actual resident of the district. His pleadings do not show this and on his moving papers the appeal should be dismissed. The pleadings of respondent show conclusively that appellant is not a resident of the district, that he owns real estate and maintains a permanent residence in school district no. 2, Catskill, that at the last general election he voted in the election district in which his residence is located and that such election district does not include any part of the village of Catskill, and that his residence in district no. 1, Catskill, is only temporary and for his " comfort and convenience " in business matters and to obtain for his son the advantages afforded by the Catskill schools.

The board of education was lawfully protecting the interests of the district in charging appellant tuition for his son's attendance at school and appellant's failure or refusal to pay such tuition was good ground for suspending the child from school privileges.

The appeal herein is dismissed.

4084

In the matter of the appeal of D. L. Spaulding v. board of trustees of union free school district no. 1, town of Austerlitz, Columbia county.

Right to attend school. When children whose home has been broken up are brought to the residence of one who stands in the place of the parent, to find care and protection for an indefinite period, they become residents of the district in which said person resides.

Decided June 3, 1892

Crooker, *Superintendent*

This appeal is brought from the refusal of the board of trustees of union free school district no. 1 of Austerlitz, Columbia county, N. Y., to allow one Roscoe

Hamm to attend the public school in said district without paying tuition therefor, and for suspending him from school until such tuition shall be paid.

The following facts appear from the papers upon this appeal:

The appellant, with his family, resides in union free school district no. 1, town of Austerlitz, Columbia county, N. Y. Roscoe Hamm, a nephew of appellant, of the age of 12 years, resides with the appellant. The mother of said Roscoe Hamm is dead. His father is a poor man, and a day laborer, having no permanent domicile, and at present working in the state of Connecticut, and unmarried. The appellant, under authority from the father, has taken the said boy into his family, to care for, manage and correct him as if he were the son of the appellant, and without receiving any compensation therefor from the father. The boy has been attending the school in said district. That on April 29, 1892, the respondents, by resolutions adopted, declared that the said Roscoe Hamm, in their opinion, was not a resident of said district, and that the secretary of respondents be instructed to present a tuition bill for the last two terms to the appellant, and to notify appellant that if such bill was not paid by him or other relatives of said boy, the said Roscoe Hamm could no longer be allowed to attend said school. The bill for tuition was presented to appellant, who declined to pay it. The boy attended the school the following week, when the principal of the school, acting under directions of respondents, suspended the boy from attendance at school until the tuition bill should be paid.

The question involved in this appeal is that of residence, and it is often a difficult one to decide. The facts in this case establish that the appellant has taken the boy for an indefinite period to care for and manage, and establishes such a substantial adoption of the boy as to make him a resident of the district and entitled to the privileges of the school. It has been the rule of this Department that when children, whose home has been broken up, are brought to the residence of one who stands in the place of the parent, to find care and protection for an indefinite period, they become residents of the district in which said person lives.

The appeal is sustained, and the board of trustees of union free school district no. 1 of the town of Austerlitz, county of Columbia, is hereby directed to admit Roscoe Hamm to the privileges of the school in said district as a resident thereof.

4088

In the matter of the appeal of Joseph S. Hamlin v. the board of education of union free school district no. 2 of the town of Trenton, county of Oneida.

The granddaughter of the appellant, whose parents reside in the state of Missouri, and, from anything that appears, are able to maintain and educate their children, is temporarily residing with the appellant in Trenton, Oneida county. Such residence is subject to be

terminated at her option or that of her parents. The appellant does not occupy the relation of a parent or guardian to his said granddaughter. *Held*, that such granddaughter is not entitled to the privileges of the school in the district where the appellant resides without payment of tuition.

Decided June 10, 1892

Crooker, *Superintendent*

This is an appeal from a resolution and decision of the board of education of union free school district no. 2 of the town of Trenton, county of Oneida, refusing to allow Louisa Gosnell, a grandchild of the appellant, residing with him, to attend said school without the payment of tuition.

From the papers filed with this Department upon said appeal, the following facts are established:

That the appellant resides and is a taxpayer in said school district. That he is about 82 years of age. That his family consists of his wife, who is about 74 years of age; his daughter, Ada Hamlin; his grandson, Walter Hamlin, and a servant, Harriet Carpenter. That his granddaughter, Louisa Gosnell, who resided with her parents in Westport, Mo., at the request of her grandmother and her aunt, in or about February 1891, with the consent of her parents, came to reside in the family of the appellant. That the appellant had no knowledge that his said granddaughter was to come to his residence until her arrival. That the traveling expenses of said granddaughter from Missouri were paid by appellant or some of his family. That the arrangement under which the said granddaughter came to reside in the family of the appellant, as appears from the testimony of Miss Hamlin, was that a servant who had been in the employ of the family of appellant for some years left said employment. That in a conversation had between the mother of the granddaughter and Miss Hamlin, the mother had stated that if said servant left she (the mother) would let one of her daughters come to appellants to assist them. That Miss Hamlin wrote to the mother requesting that said Louisa come and remain a year or two or more and they would pay her traveling expenses. That in about three weeks the said Louisa came to appellant's residence. That during the residence of said Louisa with appellant, he has furnished her board and clothes and she has taken lessons in music from Miss Hamlin. That the said Louisa does the cooking, fine ironing, helps with the sweeping, and looks after her grandfather. That she is about 17 years of age. That the mother of said Louisa stated to her daughter and wrote to Miss Hamlin that she did not want her daughter to go to school, but desired her to devote her time to music. That said Louisa did not wish to attend school, but upon the request and advice of Miss Hamlin in or about September 1891, commenced to attend the union free school in district no. 2, in Trenton, Oneida county, and continued to attend said school during the term in the months of September and October 1891. That on or about October 30, 1891, the respondents adopted the following resolution: "Resolved, That Louisa Gosnell and Walter Hamlin are not considered by this board as resident pupils, and that Joseph Hamlin, the person with whom they reside, be notified

that they must pay tuition within one week from date (October 30, 1891), or they will not be allowed to attend the school after that time." That a letter of H. A. Pride, secretary of respondents, under date of November 2, 1891, containing such resolution, was delivered to the appellant. That at a meeting of respondents held on or about November 7, 1891, said respondents decided that said Walter Hamlin was entitled to the privileges of said school. That the appellant thereupon brought an appeal from the decision of respondents that said Louisa Gosnell was not a resident of said district and not entitled to the privileges of said school without payment for tuition.

It is clearly established by the foregoing facts that the said Louisa Gosnell did not come to reside in the family of the appellant for the purpose of attending school. The sole question presented by this appeal is as to the residence of Louisa Gosnell. The question of residence is often one difficult to decide. The residence of a minor is usually that of the parents or guardian. The residence of the parents of Louisa Gosnell is in the state of Missouri. They are possessed there of a home, at which, for anything that appears upon this appeal, they are able to maintain, care for and educate their children. The appellant does not occupy the relation of a parent or guardian to his granddaughter. Her residence in his family is but temporary, subject to be terminated at her option or that of her parents. In my opinion the said Louisa Gosnell is not a resident of union free school district no. 2 of the town of Trenton, and not therefore entitled to the privileges of the school in said district without payment of tuition.

The appeal is dismissed.

3993

In the matter of the appeal of citizens of Elmira, N. Y., v. the board of education of the city of Elmira.

The corporate authorities of a city having neglected to provide by tax the sums needed for the support of the public schools of such city for the school year, the board of education assumed to close the schools and dismiss the teachers employed; *held,* That the closure of the public schools, except in special cases, is contrary to the laws of the State.

The board of education directed to open the schools. The corporate authorities directed to levy a tax for the amount needed for school purposes for the school year.

Decided September 4, 1891

Draper, *Superintendent*

Chapter 113 of the Laws of 1859, as amended from time to time, is a somewhat comprehensive special statute providing for the administration of the schools of the city of Elmira. Among other things this act provides (section 20, subdivision 11) that the board of education shall annually, before the day for the last meeting of the common council in March, determine and certify to the common council the sums deemed necessary for the maintenance of the schools for the year commencing on the 1st day of September thereafter.

In accordance with this direction the board of education duly determined and certified that the sum of $49,340 would be needed for the purposes named.

The statute (section 21) directs the common council, upon the receipt of the estimates of the board of education, to proceed to consider the same and to approve, increase or diminish the same, but prohibits the council from reducing the sum below a sum sufficient to defray all the necessary expenses of the public schools, including the academy, and after fixing the amount to be expended for the purposes named, to certify the same back to the board of education, which body is required to limit its expenditures to the amount so fixed.

The common council proceeded to the discharge of this statutory duty and on the 25th day of May fixed and determined the amount deemed necessary for school purposes for the ensuing year, at the said sum of $49,340.

Section 12 of the act makes it the duty of the common council to raise by tax the sum so determined upon, and section 13 directs that it "shall be levied and collected in the same manner, by the same collector and at the same time that other city taxes are."

The charter of the city provides the machinery for collecting city taxes, but instead of being in operation as to the special school act contemplated is at a standstill in consequence of disagreement in the council as to the amount to be raised for such city taxes. Although the statute requires that the assessment

rolls with the tax warrant shall be delivered to the city chamberlain as the collecting officer on or before the 15th day of June in each year, this has not yet been done in the present year.

In view of this blockade of the machinery for raising taxes and because of the apprehension that funds for meeting the expenses of the schools would not be provided, and of the disinclination to incur an indebtedness not provided for, the board of education on the 29th of July determined to close the schools for the ensuing school year and took formal action to that effect.

From this action an appeal was brought to this Department by numerous residents of Elmira.

In communications to the board and in conference with a committee thereof, the Superintendent informally expressed his opinion that the board, in taking this action, fell into an error. The State undertakes to provide a common school within reach of every home. It insures this by raising some $4,000,000 through a general State tax levy for the support of a general system of common schools, and by providing for the organization and management of such a system. It authorizes localities to do as much more as they will to augment or perfect this system. It does not permit them to overthrow it. In one part of the State it provides for raising moneys, over and above what the State provides, in one way and in another part in another way. In one place it causes this system to be administered by local officers chosen in one way and in another place by officers chosen in another way. The particular way is largely left to the wishes of the locality. But everywhere the common schools are part and parcel of a general system. This is so in Elmira. No local authority, much less the failure to discharge an official and statutory duty can be permitted to stop their operation. The schools there have fortunately been organized upon a broader basis than the State required. Local intelligence and pride may always be relied upon to do this. The residents of Elmira desired this. In deference to their wishes the Legislature provided for it by enacting special statutes for the government of the schools of that city. These special statutes only supplement the general school laws of the State. All must be read and construed together. Having organized a city system of schools upon such a basis it must be operated on that basis. The statute makes the expenses thereof a city charge. The city authorities are directed by law to raise the money and how to raise it. If they fail to perform their duty they may be compelled to do it. If they do not raise the money and are not compelled to, the schools are to proceed all the same and teachers, employees and others acquire a right of action against the city for services or necessary supplies, which the courts will enforce.

Acting upon this view of their duty in the premises, the board of education on August 28th, rescinded their resolution of July 29th, determining to close the schools, and directed that they be opened at the usual time in September.

Having taken this step, the board, very properly presents the question as to whether there is not a way of requiring the city authorities to proceed with the collection of the tax without forcing teachers and others to the necessity of many suits against the city.

If there is a way it is manifestly to the interest of all concerned that it should be followed. As the amount to be raised for the schools is not a subject of controversy, as it has been absolutely fixed and determined in the manner provided by law, it is undoubtedly desired by the citizens of Elmira that its collection shall forthwith proceed in order to avoid, so far as possible, the annoyances which are impending.

The Elmira school act provides (section 13) that the amount to be collected in the city for school purposes "shall be levied and collected in the same manner, by the same collector and at the same time that other city taxes are."

The only thing in the way of the collection of the school taxes proceeding at once, and without awaiting the solution of the controversy in reference to other city taxes, is the provision that all shall be collected *at the same time*. But all the statutes relating to the matter must be read together. The legislative purpose in the premises is not to be determined by the literal wording of a single clause separated out from pages of statutory law bearing upon the matter. It is clear that the Legislature intended that the amount determined to be necessary for the support of the school establishment of Elmira should be collected. Its collection was not to take place upon the happening of some contingency. The moneys in question are for the expenses of the school year commencing September 1, 1891, which has already been entered upon. They are now needed to meet the expenses of the work which the Legislature directed to be carried on. The Legislature intended that they should be ready for use when needed. The direction that these moneys should be collected at the same time as other city taxes, was only for convenience and no essential part of the scheme. Suppose it should so happen that in any year no other city taxes are to be collected. Would any one contend that no school moneys could be raised? The provision as to time was not mandatory but only directory, and was made upon the confident expectation that other city taxes would be collected prior to the month of September in each year. There would seem, therefore, no good reason why, under existing circumstances, the city authorities should not have proceeded with the collection of the school moneys, or why they may not do so at any time. Nor is there any apparent reason sufficient to prevent their being compelled to do so by ordinary legal process.

But regardless of this the Legislature has evidently intended that the collection of taxes for school purposes shall not depend upon any local considerations whatever.

The Consolidated School Act (chapter 555, Laws of 1864, title 11) provides that any person conceiving himself aggrieved by any act or decision concerning any matter pertaining to common schools may appeal to the State Superintendent, and requires that officer to hear and decide the same and makes his decision final and conclusive. Section 2, subdivision 4 of the title above named provides that the Superintendent shall have power "to make all orders *by directing the levying of taxes or otherwise* which may in his judgment be necessary to give effect to his decision."

Arriving at the determination hereinbefore set forth upon the matters submitted, and in order to give effect to his decision that the schools must be kept in operation, the Superintendent

Orders that the clerk of the city of Elmira forthwith proceed to extend and apportion the amount fixed and determined by the common council of said city as necessary to be raised for the expenses of the schools of said city for the year commencing September 1, 1891, namely: the sum of $49,340 on the assessment rolls of said city, and to file the same and make a full duplicate or copy thereof with the tax so extended and apportioned and certify the same in the manner required by law, and shall deliver the same to the chamberlain of said city, and the said chamberlain shall thereupon proceed to collect from the several persons named in the said assessment rolls the sums set opposite their respective names. Said clerk and chamberlain will in preparing the rolls and collecting said school taxes proceed as directed by the statutes relating to the levying and collection of taxes in said city of Elmira, but without the formal authority of the common council or the warrant of the mayor of said city, and this order shall be their warrant and authority for so doing.

CLOSING OF PUBLIC SCHOOLS

Action of a board of education in resolving to close public schools for the reason that the corporate authorities upon whom the duty to provide funds devolves by law, neglect to provide necessary means, will not be upheld.

Statutes providing for the raising by tax of moneys for school purposes in the city of Elmira, set forth and considered.

Teachers under contract of employment would have a remedy by law, if wages provided for by contracts were in default, although prevented from teaching by reason of the closing of the schools.

State of New York, Department of Public Instruction
Superintendent's Office, Albany, N. Y., August 4, 1891

E. J. Beardsley, Esq., Superintendent of Schools, Elmira, N. Y.:

SIR: On the first instant I received by your hand petitions signed by many citizens of Elmira, addressed to the State Superintendent of Public Instruction, praying him to intervene and prevent certain resolutions adopted by the board of education of said city on the 29th day of July, and determining to close the public schools of said city during the next school year from taking effect. You also handed me a paper signed by the members of the board of education assuring me that the statements contained in the petitions were true and consenting that I should make whatever answer I deemed proper in the matter, without notice to the board or any of its members.

While evidently intending that the matter shall be brought before me by way of appeal from the action of the board, the rules governing the practice in appeals to the Department have not been complied with and the usual course

would be to return the papers that they might be perfected and completed. It is important, however, that there shall be no unavoidable delay in a matter of so much general concern, and I have therefore deemed it advisable to at once express my views of the subject rather than compel the board and the petitioners to await the slow progress of a formal appeal.

It seems that the board following the statute under which it operated (chap. 113, Laws 1859) certified to the common council of the city that the sum of $49,340 would be necessary to meet the expenses of the schools of the city for the school year beginning September 1, 1891, and that upon the 25th day of May the common council considered and approved the said estimate. The statute provides that moneys for school purposes "shall be levied and collected in the same manner, by the same collector and at the same time that other city taxes are," but it is generally known that the warrant for the collection of other city taxes has not yet been issued, although the same should have been in the hands of the chamberlain prior to the 15th day of June 1891, in consequence of a controversy in the common council touching taxes for other than school purposes, but of the precise nature of which I am not advised.

The board of education therefore appears to conclude that funds may not be available for school expenses during the next year, and with manifest unwillingness resolves that the schools be closed during the year.

I have given the subject such consideration as I have been able during the limited time afforded me and with the greatest respect for the opinion of the board, I am led to say that it seems clear to me that the action of the board can not be justified.

The public school laws of the State, applicable in Elmira as elsewhere, and the special statutes particularly applicable there, contemplate that schools shall be continuously maintained, save only at such times as may be deemed necessary for the purposes of recreation. It has been repeatedly held that local boards or officers have no power to discontinue schools. All the statutes exemplify this intention of the Legislature. Let us instance one that is particularly applicable in this case. The Elmira school law (section 21 as amended February 21, 1866) guards against the closure of the schools by expressly providing that upon the receipt of the estimates of the board of education "the common council *shall proceed to consider the same,* and approve, increase or diminish any or all of said estimates; *provided, however, that the aggregate amount shall not fall below a sum sufficient to defray all the necessary expenses for the support of the public schools in the school district of Elmira, including the academy, for the ensuing year.*" Fortunately the common council has performed this duty and approved the estimates for the expenses of the schools as presented by the board of education. The statute requires the board to limit its expenditures to the sum so fixed and approved, but does it not justify the board in assuming that such sum will be available for the purposes named?

Are all the provisions of the general school laws and these special provisions in the case of the city of Elmira to be neutralized and set aside because a

common council has delayed the issuance of a tax warrant longer than it should have done?

I am clearly of the opinion that the board has no authority to close the schools for a year nor for any length of time (usual vacations excepted), unless something occurs which necessarily stops their operation, and then only until the obstacle can be removed. Has any such thing yet occurred in Elmira? I think not. The schoolhouses have not been burned. There is no contagious disease prevailing. The teachers have not refused to act. No warrant has even been dishonored. An apprehension that one may be at some time in the future is not enough. In public administration it is well not to attempt to cross troublesome bridges until they are reached.

I observe that the board resolved that " persons engaged to teach be released from such engagement." But suppose they prefer not to be released? It takes two to make an engagement and two to unmake one. The board can not discharge the persons who have been engaged to teach the public schools of Elmira without their consent, because of the possibility that there may not be money with which to pay them. These teachers are entitled to have the city fulfill its engagement. They will be entitled to their pay or to such legal damages as they may suffer and can require the city to make them good by actions in the courts. In the event of possible contingencies let that course be taken. Aside from the requirements of the school laws, the board would surely not be justified in subjecting the city to this liability without securing to the city the benefit of the services of these teachers.

It occurs to me that it is very usual for city charters to forbid the incurring of any city liability beyond the amount in the treasury for meeting the expenses, and that the board may apprehend trouble from such a provision in the Elmira charter. Without the facilities for conveniently referring to such provisions which may exist and without stopping to look them up, it seems proper to me to suggest to the board that they may well distinguish between a liability imposed by law or already legally incurred, and some new and unusual liability for which legal provision has not been made. Liability for teachers' wages and other ordinary expenses of the schools are of the former class. The city is liable for such expenses under the law and without any new or affirmative action of the board, and the board need apprehend no personal or other liability from proceeding upon this assumption.

So I conclude that there has been no sufficient justification for determining to close the schools, and accordingly that the board has exceeded its authority; that it should forthwith rescind its action, open the schools as usual and go on in the ordinary way until something occurs to absolutely prevent their operation. If in the course of time, funds are not provided in the ordinary way for meeting the expenses, let legal claims be enforced by legal remedies. Attempt to cross streams only when they are reached and if bridges are then found to be gone, cross in some other way. If any bridges are now down it is more than likely that they will be repaired before the schools get there. In any event I am quite

certain that the people of Elmira will stand by the board of education in going on with the schools, even though they be obliged to meet unusual difficulties with unusual means. The greater their embarrassments, the more thoroughly will they be sustained. I am, yours very respectfully,

A. S. DRAPER,
Superintendent

CLOSING OF PUBLIC SCHOOLS

The law contemplates that public schools shall be open continuously (save during reasonable vacations).

Failure of corporate authorities to provide moneys required for the support of schools, no justification for the school authorities in closing same.

Liability incurred by the employment of teachers can not be evaded by closure of schools.

State of New York, Department of Public Instruction
Superintendent's Office, Albany, N. Y., August 26, 1891

To the Board of Education, Elmira, N. Y.:

Referring to an interview with Messrs Joslyn and Cooley on the 25th instant, in relation to certain resolutions adopted by your board on the 29th of July, determining to close the schools of the city of Elmira the next school year, in consequence of the failure of the common council of that city to issue a warrant for the collection of taxes for the support of the schools, I very respectfully advise you that my views upon the subject were very fully set forth in a communication to Mr E. J. Beardsley, superintendent of schools of the city of Elmira, on the 4th instant, which I will be glad to have the board consider as intended for its information and guidance. I have nothing of consequence to add to that communication other than that more reflection confirms the views therein expressed. It seems to me that the board erred in determining to close the schools. The law contemplates they shall be open continuously (save reasonable vacations), and undertakes to provide the means for maintenance and make certain that its purpose is not thwarted or overthrown. The board is to assume that the moneys for meeting expenses will be provided when actually needed. If the common council fails to perform its duty in the premises, the board of education can not help it. It should continue to perform its duty just the same. The city will become liable for the expenses and the same may be collected by due process of law. Even though the city be harassed with suits and saddled with costs and expenses, the board will not be responsible for it, for it will not be the cause of it. It will only perform the duty which the law imposes and which its members have sworn to perform. It can not properly do less than this. It may very properly use every reasonable means for removing the obstacle which clogs the machinery set up for collecting school taxes but the schools must proceed with their vital and beneficent work whether such efforts are successful or not. If the ordinary processes for raising school moneys are paralyzed, others

will have to be resorted to. If public liability is incurred, it will not be the work of the members of the board, but of the law which governs them and which will not permit its purposes to be overthrown. I entertain no doubt of the duty of the board in the premises. It is clear to me that it should forthwith rescind its action of July 29th and open the schools at the usual time.

I am, very respectfully

A. S. Draper,
Superintendent

3706

In the matter of the appeal of L. Z. Miller v. school district no. 39, town of Hector, county of Schuyler.

A school was closed for one week because of the prevalence or fear of an epidemic disease.
Held, That a teacher was entitled to pay for the time the school was so closed, within the term of her employment, the same as if school had been continued.
Decided August 24, 1888

Draper, *Superintendent*

The appellant was employed by the board of education of district no. 39, in the town of Hector, Schuyler county, to teach the school in said district for the term of sixteen weeks, commencing on the 26th day of September 1887, at three dollars per day, and entered upon his employment. Such employment afterward seems to have been continued by agreement of the parties up to the summer of 1888. During the week between the 15th and 22d days of November 1887, the school was closed because of the prevalence or the fear of an epidemic disease. The board has never paid the teacher for that week. The teacher has demanded pay and been refused, and brings this appeal for the purpose of determining his right to such compensation. The board admits the employment and admits that the school was closed at the time for the reason specified by the teacher, and also admits the demand for compensation for such week and their refusal to pay the same. They set forth two reasons in justification of such refusal: first, they say that the school was closed but not by order of the board of education; second, they say that they had settled with the appellant from time to time and that no claim was made for compensation for the week during which the school was closed until about the time of the close of the school for the year.

There is no force in the claim of the board that the school was closed without permission or action on the part of the board. It is clear, from the papers, that it was closed by the consent of all three members of the board, and indeed in accordance with their judgment and wish. If the business of the board was transacted in an irregular way, it certainly is not for them to take advantage of it. The second reason assigned by the board for refusing the claim of the teacher, has addressed itself to my mind much more seriously. It is clear that when in the midst of a term of employment the school is closed by reason of

circumstances for which the teacher is in no wise responsible and he continues ready to fulfill his agreement at all times, he is entitled to pay the same as though the school had been in operation. It is true that such claim ought to be asserted by the teacher promptly. He ought not to settle accounts with the board, receiving no pay for a portion of his time, and, at the same time disclosing no claim to it. I have carefully weighed what is said by the respective parties touching this point of the case. From it I conclude that there never was any conclusive settlement between the parties. The board paid the teacher, on account, wages from time to time; it is probable that they may have paid him all they understood they owed him; but I am unable to find that at any time the teacher did anything which must be held as a waiver of his claim. No receipts are produced and no proof is offered that he in any way acknowledged that he had received all that was due him. It is to be borne in mind also that the teacher was an employee of the board and that his employment was continued until the summer of 1888, and that he was in a position which might, although it ought not to, cause him to be less independent about the matter than he otherwise would. It is also shown that he made claim to this week's compensation upon the termination of his employment. It is clear that under the law he was entitled to pay for the week in question and that he never has been paid. The only question is, whether his course was such as to bar him from now asserting his right to the compensation in dispute. I am of the opinion that it would have been better for him to have made his claim more promptly, but I can not conclude that he has waived his rights in the premises.

I therefore sustain the appeal and direct the respondents to draw their order in settlement of one week's wages of the appellant, according to the terms of their agreement with him.

3973

In the matter of the appeal of Robert C. Roberts and others v. school district no. 9, town of Marcy, county of Oneida.

A school district meeting voted to close the district school. From such action an appeal is taken. The evidence shows that the school was not closed. *Held,* that the appeal was prematurely taken; that the action of the district was not controlling upon the trustee.
Decided April 21, 1891

Draper, *Superintendent*

This appeal is brought by three electors of school district no. 9, town of Marcy, county of Oneida, upon the following ground:

That, at a special meeting of the district, held February 24, 1891, the meeting voted to close the school in said district until the next annual meeting. They allege that they are parents of children of school age, residing in the district, and object to the closing of the school.

From the answer of the respondent, it appears that this action was taken by the district meeting, but that the school has not been closed and is still in session. It is also made to appear by the answer, although it is unnecessary to consider it upon this appeal, that there has been a very small attendance at the school held in the district, for some time past. At times, there has been no attendance by pupils, and the average daily attendance has not, during the past term, amounted to four.

This appeal has been taken prematurely. The action of the district meeting is not controlling upon the trustee. If I were to reverse the action of the meeting, it would in no way change the condition of affairs in the district.

I therefore dismiss the appeal.

3794

In the matter of the appeal of Silas C. Kimm v. the board of education of union free school district no. 1, of the town of Hermon, county of St Lawrence.

The law directs that schools be closed during the time a teachers institute is being held, and requires attendance at the institute of teachers without loss of pay.

Boards of education are not authorized to determine whether a teacher shall attend or not; they have no discretion in the matter.

A memorandum of hiring, which authorized a teacher to attend a teachers institute, provided the teacher would make up the time so spent at the end of a term; *held* an attempt to avoid the effect of a plain provision of law, namely, that teachers shall be paid for time spent in attendance at institutes, just as if school had been taught by them that week, and therefore void.

Decided July 29, 1889

De Coster & Newberry, attorneys for appellant
Worth Chamberlain, attorney for respondent

Draper, *Superintendent*

The appellant was employed to teach the school in the above-named district during the school year 1888–89. The memorandum of employment was as follows:

Hermon, N. Y., May 2, 1888

This is to certify that I have been empowered by the board of education of the Hermon school to employ S. C. Kimm to teach said school for one year of thirty-nine weeks, beginning on such a day in August of 1888, as the board may desire, with the usual vacations between terms. I hereby promise to pay him the sum of $800 for said year's term of service. But if, at the close of any term of school, it is found that he is not working for the interests of said school, we reserve the right to refuse to continue him in our service.

I also agree to allow him to attend a teachers institute which may be held in this commissioner district, provided that he will make up such time at end of the term during which said institute occurs.

S. C. Kimm
Teacher

C. H. Risley
President

The appellant taught thirty-nine weeks and also attended the teachers institute one week. He claims an extra week's pay therefor. His appeal is from a refusal to pay the same.

The board admit the contract, but contend that under it the teacher was to teach thirty-nine weeks and attend the institute one week, for $800. The board also claims that the teacher failed to perform his agreement in other particulars. They say he agreed to spend his time for four weeks, prior to the opening of the school, looking up pupils for the school, by which, I suppose they mean, he was to exert himself to induce nonresident pupils to attend the school, and also that he promised to hold a school exhibition to raise money for the benefit of the district, and that he failed to keep these promises. They claim the right to offset the loss which they allege they sustained through such failure against his claim for an extra week's wages.

It may be well doubted whether a contract with a teacher that he should spend time endeavoring to secure the attendance of nonresident pupils, and that he should hold an exhibition to raise money for the district could be upheld and enforced. But independent of that question, it is apparent to me that this claim of an offset is an afterthought on the part of the board. They have tendered him the balance of the year's salary without claiming any right to make a deduction for failure to fulfil his agreement, and it does not seem to me that their claim of that character, under the present circumstances, is entitled to much weight.

The paragraph in the memorandum of employment, concerning attendance upon the institute, shows a misconception of the law in that connection on the part of the board. In this memorandum, the president of the board says: "I also agree to allow him to attend a teachers institute which may be held in this commissioner district, provided that he will make up such time," etc. It is not for the board to allow a teacher to attend an institute. The law does that. The board can not require time spent in attendance upon an institute to be made up. The law directs that the schools shall be closed; that the teachers shall attend the institute, and shall be paid for their time in so doing. The board has no discretion in the matter, nor can it by any circumlocution avoid the payment of teachers' wages while attending the institute.

It is impossible for me to arrive at any other conclusion than that the board undertook to rid itself of all responsibility for the teacher's wages while he should attend the institute. The memorandum certifies that the employment was for thirty-nine weeks for $800. If the teacher attended the institute, the board would allow it, provided the week was made up. This is precisely what the statute forbids. There is an institute in every district every year. The district has no option in the matter. The law does not contemplate any making up of time spent in the institute. It does require that the district shall pay wages if the teacher attends the institute, precisely as though he had taught school.

I have considered the question whether the teacher did not bar himself from exacting an extra week's pay, by reason of the fact that he accepted this memorandum without raising any question about the provisions in reference to institutes. I am of the opinion that he came short of doing what he should have done at that time. He should have had a clear understanding, at once, about the institute matter. But I do not think he can be held to have waived his rights under the statute.

The appeal is therefore sustained, and the district directed to settle with the appellant for one extra week of service at the rate of $800 for thirty-nine weeks.

SCHOOL DISTRICTS—ALTERATION OF

The provision requiring three months' notice to trustees of an alteration in their school district is intended for their protection, and to that end is to be benignly construed.
Decided December 26, 1828

Flagg, *Superintendent*

In September 1827, Messrs Reuben Stearns and Nathaniel W. Ingraham were set off from district no. 10 in the town of Locke, and attached to district no. 9 in the same town. In November ensuing, Ingraham was elected a trustee of the latter district, and officiated in that capacity until November 1828. There was no evidence on record of the alteration above mentioned having been made with the consent of the trustees of district no. 10, or that any notice had been served on them by the commissioners; but they were notified of the intention of the commissioners to set off the two individuals referred to, and of the time and place of meeting for the purpose. In November 1828, a tax was voted in district no. 9 to build a schoolhouse, when a doubt was raised by one of them, whether they had been legally set off from no. 10. The facts were submitted to the Superintendent for his opinion.

Messrs Stearns and Ingraham petitioned the commissioners of common schools to be detached from district no. 10 to no. 9, and in September 1827, their petition was granted; and Ingraham was elected a trustee of no. 9, in which capacity he served until November 1828. The alteration of district no. 10 by attaching them to no. 9, appears to have been recorded in the usual manner under the old law. Whether the trustees of no. 10 were originally willing to gratify Messrs Stearns and Ingraham in their request to be annexed to no. 9 or not, and whether notice was served or not, can not after so long a time affect the relations of Messrs S. and I. with the trustees and inhabitants of no. 9. The provision requiring the consent of trustees to detach persons from their district, and holding them three months without such consent, was made for the benefit and protection of the trustees, to whose injury the alteration might operate. For instance, trustees might have made contracts and incurred responsibilities, which would operate oppressively, if some of the most wealthy were detached before they had time to collect the tax. In such cases the trustees are effectually protected by their veto upon the formation of the district for three months, in which time they can collect their tax. And to carry this intention into effect, the act should be benignly and favorably construed for the protection of the trustees. But in relation to Messrs Stearns and Ingraham, none of these reasons can avail them; they desired to be set to no. 9, and were gratified. The trustees of no. 10, from their silence in the matter, seem to have acquiesced; and as the trustees have not sought to retain Messrs S. and I., and more than a year has elapsed, they must be considered as having been legally attached to no. 9.

Town superintendents (school commissioners) have no authority to alter the boundaries of a school district, if the same have been established by this Department upon appeal, until after the lapse of three years from the time they were so established, without express permission of the State Superintendent.

Decided May 12, 1855

Rice, *Superintendent*

The appellants, in making their annual report, enumerated, among the children of their district, the five children of Mr William Raynor. In making his apportionment, the town superintendent deducted these children from the enumeration of district no. 22, on the ground that they and their father were residents of the adjoining district, no. 21. The trustees of the latter district answered the appeal.

It appears from the evidence that the farm of Mr Raynor was taken from district no. 22, some five or six years since, and annexed to district no. 21, by an order of the town superintendent, that officer not being aware that the line between the said districts had been established in 1830, by the State Superintendent, upon appeal.

It has been held that town superintendents have no power to alter the boundaries of a school district, if the same have been established by this Department, upon appeal, unless consent shall have been previously given by the State Superintendent for such alteration. This rule was established to prevent the decisions of the Department from being deprived of any practical effect, as might be the case, if immediately after the decision a new order could be made precisely or substantially similar to the one which has been set aside.

This reason fails, however, when lapse of time and a consequent change of circumstances may have made the reasons no longer applicable which controlled the decision. As this is a subject of regulation, it will hereafter be held that, after a lapse of three years from the time when the boundary of a district shall have been established by this Department, upon appeal, it shall no longer be requisite to apply for express permission of the State Superintendent to authorize a local officer to make an alteration of the same.

In the case under consideration, the appeal should be sustained, without reference to the above-mentioned objection. It is the duty of the town superintendent to apportion the public money according to the number of children in the several districts "as the same shall have appeared from the last annual reports of the trustees," and not otherwise. If he deems the report incorrect, it is proper for him to call upon the trustees to correct it, and if they refuse to do so, they may, perhaps, render themselves liable to the penalty imposed for wilfully signing a false report, with the intention of causing the town superintendent to apportion and pay to their district a larger sum than its just proportion of the school moneys of the town. The report, however, is conclusive until it shall be amended by the trustees, or the question be determined on appeal.

4917

In the matter of the appeal of Fred J. Saunders v. N. F. Benedict as school commissioner, third commissioner district, Onondaga county.

It is against the settled policy of this Department to allow real property to be transferred from a comparatively weak district to a stronger one when it is not clearly shown that it would give increased convenience to the persons occupying the transferred territory.

A trustee of a school district has no power, in the name of the district, to consent to an order for the alteration of school district territory which would take him out of the district of which he is trustee, and by its operation, vacate his office.

Decided December 19, 1900.

Dougherty & Miller, attorneys for appellant

Skinner, *Superintendent*

This is an appeal from an order made, August 17, 1900, by N. F. Benedict, as school commissioner, third commissioner district, Onondaga county, altering joint school district 13, Fabius, Onondaga county, and Truxton, Cortland county, and the consequent alteration of union school district 9, Fabius, Onondaga county. The appellant alleges, in substance, as the grounds for bringing his appeal, that such order was improvidently and improperly made in that it transfers territory from a weak to a strong district, and is an abuse of power on the part of the commissioner; that the order is irregular in that the territory set off is not described by metes and bounds; that said commissioner had no jurisdiction to make the order without the concurrence or knowledge of the school commissioner of the second commissioner district of Cortland county, such district 13 being a joint district located in said second commissioner district of Cortland county, and third commissioner district of Onondaga county, and said order having been made without the knowledge of, and without any notice to, the school commissioner of the second commissioner district of Cortland county, of the proceedings leading up to the making of such order, and without her concurrence in such order.

Commissioner Benedict has answered the appeal, to such answer the appellant has replied, and to such reply such commissioner has made a rejoinder.

Since the appeal herein was taken school commissioner Benedict applied to me for permission to amend his said order of August 17, 1900, by describing therein more definitely the territory affected by said order. Permission was given him to so amend such order, and November 14, 1900, such amended order was made by him, describing such territory by metes and bounds, and such order was filed in the office of the clerk of the town of Fabius, Onondaga county. A copy of such amended order was annexed to the answer made herein by such commissioner.

The following facts are established by the pleadings and proofs filed herein:

On August 17, 1900, and for many years prior thereto, there was a school district known as joint school district 13, Fabius, Onondaga county, and Truxton, Cortland county, and within the third commissioner district of Onondaga county and second commissioner district of Cortland county. The assessed valuation

of such district was $18,750, and there were residing therein eighteen children between the ages of 5 and 21 years. There was situated in said town of Fabius, union school district 9, having an assessed valuation of $200,100, and about one hundred and fifteen children between the ages of 5 and 21 years, residing therein. One J. M. Crandal was sole trustee of such joint school district 13, and resided with his wife, Helen C. Crandal, upon a tract of land consisting of about 228 acres in lots 34 and 35 of the town of Fabius, which land was owned by Elizabeth Rowley and Franklin B. Rowley, and assessed for school taxes at the sum of $3900. Said tract of land was occupied by Trustee Crandal and his wife, Helen C. Crandal, under lease thereof either to said trustee or his wife or to both of them. Trustee Crandal and his wife had residing with them four children of school age. On August 17, 1900, school commissioner Benedict, with the written consent of Trustee Crandal, and the president of the board of education of union school district 9, made the order appealed from herein, transferring said tract of land upon which such Trustee Crandal resided, from district 13, of which he was sole trustee, to union school district 9, town of Fabius, thereby taking Trustee Crandal out of district 13, and vacating his office of trustee.

It is in proof that the distance from the residence of Trustee Crandal and his wife to the schoolhouse in district 13 is from one mile to one and one-fourth miles, and that the distance from such residence of Trustee Crandal to the schoolhouse in union school district 9 is two miles.

It is against the settled policy of this Department to allow property to be transferred from a comparatively weak district to a stronger one when it is not clearly shown that it will give increased convenience to the persons occupying the transferred territory.

State Superintendent Ruggles, in decision 3419, dated May 5, 1885, held "that a trustee of a school district has no power, in the name of the district, to consent to an order for the alteration of school district territory *which will take him out of the district of which he is trustee, and by its operation, vacate his office.*" I concur in said decision of Superintendent Ruggles.

The appeal herein is sustained, and the order of School Commissioner Benedict, dated August 17, 1900, appealed from, and his amended order, dated November 14, 1900, are, and each of them is, hereby vacated and set aside.

3938

In the matter of the appeal of Alfred Ward and others v. J. Freeman Wells, school commissioner of Warren county.

An order of a school commissioner setting off lands from one district to another, and based upon the consent of a trustee whose lands upon which he resides, are set off, and the effect of which is to take him from the district of which he is trustee, and thus vacate his office. *Held* to be inoperative and void.

Order set aside.

Decided December 3, 1890

L. C. Goodrich, Esq., attorney for appellant

Draper, *Superintendent*

This appeal is brought by resident taxpayers of school districts nos. 5 and 7 of the town of Thurman, Warren county, from an order made and issued by J. Freeman Wells, school commissioner of Warren county, transferring lands from district no. 7 to district no. 5 aforesaid. The order was made upon the consent of the sole trustees of the districts affected, and bears date September 1, 1890. One objection raised by the appellants to the validity of the order, is a fatal one, and renders necessary no further investigation of the matters raised by the appeal.

It is clearly shown that the trustee of district no. 7, upon whose consent the order was made, was the owner of and resided upon land affected by the order, and transferred from the district in which he was trustee, to another.

Ruggles, Superintendent, in deciding appeal no. 3419, May 5, 1885, in which the same question arose, said:

"It is clear to my mind that the trustee of a school district has no power, in the name of the district, to consent to an order for the alteration of school district territory, which will take him out of the district of which he is trustee, and by its operation, vacate his office."

I concur in the opinion of my learned predecessor, and hold, in this case, accordingly.

The order appealed from is set aside, and the appeal sustained.

4903

In the matter of the appeal of Fanny E. Sawyer and others v. Everett A. Chick as school commissioner third commissioner district of Jefferson county.

This Department has never favored the alteration of school districts, in taking property from a comparatively weak district financially, and annexing it to a district financially strong.

Decided November 10, 1900

A. M. Leffingwell, attorney for appellants

Skinner, *Superintendent*

This appeal, while in form is taken by the appellants against Everett A. Chick as school commissioner of the third commissioner district of Jefferson county, is in fact an appeal from the action of a local board, consisting of School Commissioner Chick, A. A. Scott, supervisor, and Lee M. Whitney, clerk of the town of Henderson, taken on September 22, 1900, in vacating a preliminary order made by Commissioner Chick, dated September 15, 1900, to take effect on December 15, 1900, and filed on said September 15, 1900, in the office of the clerk of the town of Henderson, altering school districts 5 and 8, Henderson, by the transfer of certain real property described therein from district 5 to district 8.

An answer to such appeal has been made by the persons constituting such local board.

The following facts are established by the proofs filed herein:

A petition, in writing, dated September 11, 1900, signed by the appellants, was delivered to Commissioner Chick, requesting him to make an order altering the boundaries of school district 5 and school district 8, Henderson, Jefferson county, by the transfer of certain real property, described therein, and owned or occupied by the petitioners, from district 5 to district 8; that Commissioner Chick, on September 15, 1900, made a preliminary order of alteration, the trustee of district 5 not consenting thereto, of such districts 5 and 8, said order to take effect December 15, 1900, transferring the real property described therein and in said petition of the appellants, from said district 5 to district 8, which order was filed in the office of the clerk of the town of Henderson September 15, 1900; that on September 15, 1900, Commissioner Chick gave notice, in writing, to the trustee of each of districts 5 and 8, which districts were affected by his said preliminary order of alteration, of the said order of alteration so made by him, and notice that on the 22d day of September 1900 at 10 o'clock a. m., at the office of A. M. Leffingwell, in the village of Henderson, N. Y., he would attend and hear objections to the said preliminary order of alteration of such districts; that said trustees might request the supervisor and town clerk of the town in which their school districts lie to be associated with said school commissioner at such time and place for the purpose of confirming or vacating the said order; that on September 22, 1900, at the office of said Leffingwell, in the village of Henderson, Commissioner Chick attended and heard proofs and arguments in objection to, and proofs and arguments in favor of, said alteration of such school districts, and that at such place and time there were also present A. A. Scott, supervisor, and Lee M. Whitney, clerk of said town of Henderson, each of whom produced proof that he had been requested by the trustee of school district 5, situated in said town, to be associated with said school commissioner upon such hearing; that opportunity to be heard was then and there given to all persons who desired to present objections against or arguments in favor of such alterations, and after due deliberation the said local board rendered its decision that the said preliminary order of Commissioner Chick be vacated; that September 25, 1900, a record of said action of such local board was filed in the office of the clerk of said town of Henderson. It further appears that the number of children of school age residing in school district 8 is eighty-six, and the aggregate amount of property subject to taxation therein is $246,568; that the number of children of school age residing in school district 5 is seventeen, and the aggregate amount of property subject to taxation therein is $36,408; that the aggregate valuation of the real property sought to be transferred by said preliminary order, from district 5 to district 8 is $4100, and the aggregate number of children of school age residing upon such property is five; that the appellant, Fannie E. Sawyer, is the owner of a farm situated in district 5, assessed at $3000, but resides with her husband, Charles Sawyer, in the village of Henderson in district 8, and has no children; that the appellant, Alfred Wilson, resides upon the farm owned by Mrs Sawyer, under a lease which will expire March 1, 1901, and in the hearing before the local board, did not allege any expectation of remaining on such farm after said date,

and has three children, one of whom is 13 years old, one 17 years old and the third not as yet 5 years old; that the appellant Julia E. Penney owns real property assessed at $500 situated in district 5, upon which she resides with her husband Adolphus Penney, and they have two children of the ages respectively of 10 and 13 years; that the appellant, James Ellis, owns real property situated in district 5, assessed at $400, and has residing with him one child of the age of 17 years; that the schoolhouse in district 5 is nearer the residences respectively of the appellants herein who have children attending the school therein, than the schoolhouse in district 8; that the road over which such children are required to travel to attend school is a fairly well-traveled road and is not more obstructed by snow than ordinary country roads; that most of the travel between Sacket's Harbor and Henderson village is upon said road on which the schoolhouse in district 5 is located and any obstruction by reason of snow is more often greater between the residence of Penney and Henderson village than between the residence of Gilman near the schoolhouse in district 5; that the teacher employed in the school in district 5 is of sufficient learning and ability to teach any study that any child or children attending such school would wish to pursue; that the school in such district has been maintained for at least 160 days in each school year, and can be maintained for a longer period if the educational interests of the district require it.

This Department has never favored the alteration of school districts in taking property from a comparatively weak district financially, and annexing it to a district strong financially.

I am clearly of opinion, from the facts established herein, that the action of the local board in vacating the preliminary order made by Commissioner Chick, September 15, 1900, in the alteration of school districts 5 and 8, Henderson, Jefferson county, was a wise exercise of the power vested in said board, and should be affirmed by me.

The appeal herein is dismissed, and said decision of said local board is affirmed.

3693

In the matter of the appeal of R. W. Parks, trustee of school district no. 2; P. W. Wilbur, trustee of school district no. 3; Hugh Boyle, trustee of school district no. 7; H. B. Pike, trustee of school district no. 11, all of the town of Burke, in the county of Franklin, and others, v. James M. Wardner, school commissioner, and others.

A commissioner's order, taking territory from weak districts and annexing it to a strong district, will not be upheld unless it is clearly shown that such change is beneficial to patrons of schools, or that district boundaries would by the change be made more regular.

Failure of the supervisor and town clerk to affix their signatures to an order changing district boundaries, not fatal; they may affix their signatures at any time.

A public officer will not be allowed to impeach his own official act.

Decided June 8, 1888

Draper, *Superintendent*

This is an appeal from the action of the school commissioner of the first school commissioner district of Franklin county, in making an order, dated November 28, 1887, cutting off certain territory embraced in school districts nos. 2, 3, 7 and 11, in the town of Burke, and adding such territory to school district no. 16 of said town, and also from an affirmatory order made by the school commissioner in conjunction with the supervisor and town clerk of said town, made on the 17th day of December 1887.

The proceedings of the school commissioner and of the board, consisting of the school commissioner, the supervisor and the town clerk, seem to have been regularly taken and in the form and manner prescribed by statute. I observe that the affirmatory order is only signed by the school commissioner, when it should have been by the supervisor and town clerk as well; but I do not think the omission vital. It is not contended that they did not assent to the order, and their signatures could be attached at any time. I also notice a written statement by the town clerk, to the effect that he acted under the influence of the school commissioner and without much regard to the merits of the question involved. This statement is of no consequence whatever. An officer can not be allowed to impeach his own official act.

I come then to consider the advisability of the action appealed from. A full examination of all the papers and maps submitted leads me to doubt the advisability of it. The effect of it is to cut off from four districts, none of which is very strong, taxable property of considerable consequence to them, and to add the same to a district which, in valuation, is stronger than any of the four adversely affected. It seems that, before the change, the assessed valuation of taxable property in school district no. 2 was about $32,000, and about the same in school district no. 3, while in school district no. 7 it was $34,000, and in school district no. 11 it was less than $12,000. In district no. 16 (the one added to) it was $60,000 before the change. Inquiring as to the number of children of school age in the several districts before the change, I find that in no. 2 it was forty-seven, in no. 3 it was thirty-three, in no. 7 it was eighteen, and in no. 11 it was seventeen, while in no. 16 it was one hundred and thirteen. It is not contended that the alteration is made for the convenience of the persons affected thereby. It is not shown that it brings them any nearer a schoolhouse. The most, and about all, that can be said for it is that district no. 16 is stronger and more thickly settled; that it has establish a graded school; that it proposes to make still better schools, and that it needs the benefit of the added property in order to to enable it to do so; but it seems to me that this ought not to be done at the expense of making districts which can not afford it, poorer than they are against their protest. They say that they have endeavored to maintain good schools with suitable schoolhouses and through the employment of capable teachers. They show that they have, within a short time, improved their school property at some expense, and that they have been obliged to, and have taxed themselves to a reasonable extent, for the support of the schools. They insist that the opera-

tion of the orders appealed from would mainly be to increase taxation for school purposes in their districts, and lower it in the district added to, and it seems to me that their papers establish the fact. No person who is a resident of the territory taken from the four districts named, and added to no. 16, appears to sustain the order. An examination of the map seems to show that the effect of the order does not cure or remove irregularities in district boundaries. I do not see that the boundaries, after the change, would be any more regular, or that the districts would be in better form and shape than before it. A piece of the line of the Ogdensburgh and Lake Champlain Railroad Company runs through the town, and it seems to have been the purpose to bring a still larger portion of said road within district no. 16 than it had before. In short, the only result of the change which I can see, is to make one district, which is already reasonably strong in valuation, still stronger, and that at the expense of four districts which are as weak in that direction as school districts ought to be. It has been repeatedly held by this Department that that should not be done unless it was shown that there were other reasons for the change which were overpowering. If it could be shown that the advantages arising from the change would be sufficient to outweigh the disadvantages, the order could be upheld, but the papers before me fail to satisfy me of that fact in the present case. I think they establish the contrary.

I am therefore obliged to sustain the appeal, overrule the action of the commissioner, and of the board consisting of the school commissioner, supervisor and town clerk, and declare the orders appealed from to be of no force and effect.

3774

In the matter of the appeal of Lemon Thomson and John A. Dix v. William N. Harris, school commissioner of the second district of Saratoga county.

Experience has demonstrated that the affairs of districts which are formed of parts of two or more counties, are not, as a general rule, as smoothly administered as those which lie wholly within a county.

In a district in which the larger proportion of the children reside in one county and the schoolhouse is located in another, to reach which they are compelled to cross a river by a bridge which it is claimed is not in a safe condition; *ordered,* that the school commissioners, from whose refusal to join in a preliminary order dividing the district by the county line an appeal is taken, should make such preliminary order.

Decided March 23, 1889

Draper, *Superintendent*

This appeal is brought by residents, taxpayers and electors of joint school district no. 10 of the towns of Greenwich, Washington county, and Northumberland, Saratoga county, from the refusal of the respondent to join with Commissioner J. W. Barbur, of Washington county, in an order dissolving said district and detaching so much of the district situate in Washington county to district no. 17 in the same county.

From the pleadings it appears that the district is now divided by the Hudson river, and the Greenwich portion of the district is separated from the Northumberland portion by said river. Joint district no. 10 has but one trustee, and he has refused to consent to the alterations. The trustee of district no. 17 has consented, and Commissioner Joseph W. Barbur is ready to join in a preliminary order with the respondent, making the alteration desired by the appellants.

It has been found by experience that districts which are formed of parts of two or more counties, are not, as a general rule, as smoothly run as those which lie wholly within a county. In this case it appears that the schoolhouse of the joint district is located in Saratoga county, and that the larger proportion of the children of the district reside in Washington county, and in order to reach the schoolhouse are compelled to cross the river by a bridge which, the appellants allege, is not in a safe condition, but this is disputed by the respondent.

I have reached a conclusion in this matter, and it is not necessary for me to examine at this time very closely, into the merits of this particular case.

I have concluded to sustain the appeal, and hereby direct the respondent, Commissioner William N. Harris, to join with Commissioner Joseph W. Barbur in making a preliminary order, taking so much of the territory from joint district no. 10 as is situate in Washington county, and annexing the same to district no. 17 of the town of Greenwich in said county. The consent of the trustee of district no. 10, having been secured, the order must be made to take effect at least three months after the date of the order. The trustees may then call a meeting of the supervisors and town clerks of the towns, to be associated with the commissioners, and determine whether a confirmatory order shall be made or not. From the action of this local board, any person feeling aggrieved may take an appeal to this Department.

4909

In the matter of the appeal of A. Coleman Smith and Leonard S. Sherwood as trustees of school district 4, Ossining and Mount Pleasant, Westchester county v. Bertha E. H. Berbert as school commissioner second commissioner district of Westchester county.

The power to form, alter and dissolve school districts is given to school commissioners, under the provisions contained in title 6 of the Consolidated School Law of 1894, and the acts amendatory thereof, and such provisions must be strictly complied with.

The description of a district should be so complete and definite that a surveyor, at any future day, may be able to run its boundaries without reference to any other document than the order forming, altering or dissolving it.

A preliminary order, altering the boundaries of school districts is defective in not reciting the refusal of the trustee of any of the districts to consent thereto, and in directing that the order take effect *in less than* three months after the notice given by the commissioner of a time and place when he or she would attend and hear objections to such order.

The first imperative duty of a school commissioner after making and filing the preliminary order, is within 10 days thereafter to give at least a week's notice in writing to the assenting and dissenting trustees of the district to be affected, of a time and place named when he or she will hear objections to such order, and that the trustees may request the supervisor and the town clerk of the town or towns within which such district shall wholly or partly lie to be associated with the commissioner in such hearing. If such local board shall affirm such preliminary order the commissioner must then make and file a confirmatory order, the board uniting in the order; that such confirmatory order must recite the preliminary order and all proceedings taken thereafter, including the actions of the local board, and concluding with the final order of alteration made by the commissioner.

Decided November 30, 1900

Aug. Coleman Smith, attorney for appellants
Baldwin & Boston, attorneys for respondent

Skinner, *Superintendent*

This is an appeal from an order or orders, made by Bertha E. H. Berbert as school commissioner of the second commissioner district of Westchester county, altering the boundaries of school district 4, Ossining and Mount Pleasant, Westchester county, and the consequent alteration of school district 6, Ossining, Westchester county.

The ground alleged by the appellants for bringing their appeal is, that the proceedings taken, and the order or orders made by Commissioner Berbert, are not in accordance with the provisions contained in sections 2 and 3, and section 4 as amended by section 4, chapter 264 of the Laws of 1896, of title 6 of the Consolidated School Law of 1894, and the rulings of this Department.

School Commissioner Berbert has answered the appeal and to such answer the appellants have made a reply.

From the proofs filed herein, it appears that School Commissioner Berbert, on or about June 1, 1900, made an order, in writing, addressed to the trustees of school districts 4 and 6, Ossining, Westchester county, which order was to take effect August 30, 1900, making certain alterations, stated therein, of the boundaries of said district by the transfer of certain lands from district 4 to district 6; that said order was filed with the clerk of the town of Ossining, but at what date does not appear; that notice of such order came to Trustee Sherwood and Trustee Harris of school district 4, and Trustee Bayles of district 6; that on or about July 31, 1900, a protest to said order was made by the trustees of district 4 and filed with the clerk of the town of Ossining, upon the ground that the said order was in violation of sections 2, 3 and 4 of title 6 of the Consolidated School Law of 1894; that on or about August 9, 1900, the trustees of said districts 4 and 6 were notified by School Commissioner Berbert that she would hold a meeting August 15, 1900, at three o'clock p. m., at the office of the clerk of the town of Ossining in Sing Sing for the purpose of hearing arguments upon said order; that on said date, said commissioner, Trustee Sherwood of district 4 and Trustee Bayles of district 6, met at said office of the town clerk, and Trustee Sherwood

was heard in opposition and Trustee Bayles on behalf of such order; that thereupon Commissioner Berbert sustained said order.

Sections 2 and 3 of title 6, and section 4 of title 6 as amended by section 4 of chapter 264 of the Laws of 1896, of the Consolidated School Law of 1894, prescribe the method to be pursued by school commissioners in the alteration of school districts, in which no dissolution of a district is made.

This Department has uniformly ruled that under the provisions of section 2 of title 6, whenever a school commissioner decides to alter any school district or districts, he or she should first endeavor to obtain the consent of the trustees of the districts to be affected, that such consent must be in writing, and accurately state the alteration to which they consent. Having obtained such consent of all the trustees, the school commissioner next proceeds to draw and file the order. The order must recite that the consents had been given, and such written consents must be attached to, and made a part of, the order of proceeding.

Sections 3 and 4 prescribe the proceedings to be taken when the consent of the trustees *of all the districts affected is not obtained.* The proceedings are purely statutory, and any failure to follow the statute *strictly* will vitiate the order. Although the trustees of *all* the districts to be affected will not consent to the alteration, the school commissioner can make the order and file it with the clerk or clerks of the town or towns in which the districts affected are situated, which order is termed a *preliminary order.* Two things are required to be inserted in such order, namely, 1, the order must recite the refusal of the trustee or trustees of any district or districts to give his or their consent to such alteration; 2, the commissioner must direct that the order, as a whole, shall not take effect until a date fixed therein, which date shall not *be less than three months* after the notice required to be given in section 4 as amended. Such order should be promptly filed in the office of the clerk of the town in which the school districts to be affected thereby are situated.

Section 4, as amended, prescribes that *within 10 days* after making and filing such order, the school commissioner shall give *at least a week's notice in writing* to one or more of the trustees of the district to be affected by the proposed alterations, that at a special meeting, and at a named place within the town in which either of the districts to be affected lies, he or she will hear objections to such alterations. The trustees of any district to be affected by such order may request the supervisor and town clerk of the town or towns within which such districts shall wholly or partly lie, to be associated with the commissioner. Such notice must state therein the making of such order, giving the date thereof and when it was filed in the office of the town clerk or clerks, and *must give a copy of such order in full;* and in addition to giving the time and place in which the commissioner will attend to hear objections to such order, and to the proposed alterations, it must also state that such trustee may request the supervisor and town clerk of the town or towns within which such school district or districts do wholly or partly lie, to be associated with such commissioner at such time and place for the *purpose of affirming or vacating such order.*

Upon receipt of such written notice of the commissioner the trustees, if they decide to do so, may request, in writing, the supervisor and clerk of such town or towns to be associated with the commissioner at the time and place for hearing objections, and if such town officers attend at such time and place they should present such request, with proof of service, so as to establish their jurisdiction to act with the commissioner. The commissioner and such supervisor and town clerk, when requested, should attend at the place and hour named in such notice and organize what is known as a "local board." Such board has authority to adjourn from time to time as it may determine; but can not adjourn the time of meeting to any day later than three months after the date of the preliminary order. *Such board, whether it consists of the commissioner alone, or such commissioner and supervisor and town clerk,* may hear testimony and arguments for and against such proposed alterations, and when such proofs and arguments have been finished each member of said board has a vote upon the question as to whether such preliminary order of the commissioner shall be affirmed or vacated; and their decision is final unless appealed from. If they decide, by a majority vote, to vacate such order, the whole matter terminates with such decision, and a record of the action of the local board must be filed with the clerk of the town or towns in which the districts affected are situated. If, on the other hand, the board decides to affirm the order of the commissioner, it then becomes necessary for the commissioner *to make and file the final order or order of confirmation,* known as the "confirmatory order." Such board *does not* make the alteration, this the commissioner must do, the board uniting with him or her in the order, which order *must recite the first or preliminary order,* and *all proceedings taken thereafter, including the action of the local board, and concluding with the final order of alteration made by the commissioner.*

The confirmatory order is the one by which the alteration is made, and the first order is merely preliminary, *inchoate* and of no effect whatever until the same is duly affirmed by the local board.

Under the provisions of title 6 of the Consolidated School Law of 1894 and the uniform rulings of this Department, it is clear that the action, proceedings and orders of School Commissioner Berbert, relative to the alteration of school district 4, Ossining and Mount Pleasant, Westchester county, and the consequent alteration of school district 6, Ossining, Westchester county, were not duly and legally taken, and no alteration of such school districts has been duly and legally made; that the contention of the appellants, that the acts, proceedings and orders on the part of Commissioner Berbert, in the attempted alteration of said districts 4 and 6, were not in compliance with the provisions contained in sections 3 and 4 of title 6 of the Consolidated School Law, and the rulings of this Department, is fully sustained.

I decide that the alleged order made on June 1, 1900, to take effect August 30, 1900, is defective in not reciting the refusal of the trustees of district 4, to consent to such alteration; is defective in not describing the territory to be transferred by well known tracts, lot lines or metes and bounds; is defective in direct-

ing that the order take effect in less than three months after the notice required by section 4 of title 6; that no notice, as required by section 4 of title 6, was ever given to the trustees of said districts 4 and 6; that no notice of the time and place when such commissioner would attend and hear objections, and that the trustees of such districts might request the supervisor and town clerk of the towns of Ossining and Mount Pleasant to be associated with such commissioner, as required by said section 4, was ever given; that no confirmatory order was ever made as required by said section 4, and the rulings of this Department.

I further decide that said alleged order of June 1, 1900, and such alleged order of August 15, 1900, relating to the alteration of said school districts 4 and 6, are, and each of them is, void.

The appeal herein is sustained.

It is ordered that the alleged order of June 1, 1900, and the alleged order of August 15, 1900, and all proceedings alleged to have been taken at the office of the clerk of the town of Ossining, Westchester county, August 15, 1900, in relation to the alterations of said school district 4, Ossining and Mount Pleasant, and district 6, Ossining, Westchester county, be, and the same are, and each of them is, vacated and set aside.

3642

In the matter of the appeal of Lemuel K. Tinney v. J. Russell Parsons, jr, school commissioner of the first commissioner district of Rensselaer county, and Lewis N. S. Miller, school commissioner of the second commissioner district of said county.

Orders of school commissioners altering school districts, where the statutory proceeding has been observed, will not be disturbed by the Superintendent, unless it is shown by a clear preponderance of evidence that the action taken was unwise, adverse to the interests of education and decidedly against the convenience of the greater number of people affected thereby.

Decided November 9, 1887

Warren, Patterson & Gambell, attorneys for appellant
Thomas & Pattison, attorneys for respondents

Draper, *Superintendent*

On the 16th day of June 1887, the school commissioners of the first and second commissioner districts in Rensselaer county made an order dissolving joint district no. 11, of the towns of Brunswick, Grafton and Poestenkill, of said county, and divided said district into three portions. That portion lying in the town of Brunswick was annexed to district no. 3, of that town; that portion lying in the town of Grafton was annexed to district no. 7, of that town; and that portion lying in the town of Poestenkill was annexed to district no. 4, of that town. The appellant, being a resident and taxpayer of said district no. 11, and, feeling aggrieved at the order of the commissioners, brings an appeal therefrom to this Department.

In considering appeals of this nature, it is customary to inquire, first, whether the commissioners proceeded with regularity, and in the manner provided by the statutes. The proceeding is a statutory one, and the several steps provided by the statutes must be strictly followed. If it is found that the commissioners failed to comply with the requirements of the statutes, then their acts must necessarily be set aside. If it is found that they committed no error, it then becomes necessary to inquire whether the thing which they did was an advisable thing to do; whether it is calculated to promote the interests of education. Touching the propriety or advisability of an order, it is always assumed that the officer making it acted with sound discretion and good judgment; that he, being upon the ground and familiar with local circumstances, was the better able to determine intelligently as to the course which ought to be taken in the matter concerning which the order is made than the Superintendent can at his distance from the scene; and orders of this nature are commonly sustained and followed unless the appellant shows by clear preponderance of evidence that the action taken was unwise, not to the advantage of education, and decidedly against the interests of the greater number of people affected thereby.

There is no claim that the steps taken by the commissioners in this case were not regularly taken, and it must therefore at once be assumed that they followed the requirements of the statutes.

Now, touching the advisability or expediency of the order, I have arrived at the conclusion, after most carefully reading the papers submitted, that the appellant fails to show, in any such conclusive manner as is required to override the order, that the action taken was not advisable. I find that the order which is appealed from was made with the written consent of the trustees of all of the districts in which portions of the dissolved district were annexed, and with the consent of two of the three trustees of the dissolved district. This circumstance is certainly of great weight in determining the matter. It is not to be supposed that the order could work great injustice to residents of the dissolved district, or be prejudicial to the educational interests of the territory affected, and, at the same time, have the approval of all of these trustees. It is always desirable, also, that school districts shall lie wholly in a single town, and the order seems to have been made to bring this about. The school commissioner of the first commissioner district says that he visited the school in district no. 11 upon four different occasions, and each time found not to exceed five children in attendance. The district seems to have been a weak one, and there is everything to indicate that the children of the district will have the advantages of better schools, under the operation of the order, than they had before. It is true that they may, in one or two instances, be obliged to go further, in order to attend school, than at present, but these unfortunate cases ought not to be permitted to overthrow a proceeding taken evidently with great deliberation, and after carefully investigating and considering all the circumstances concerning the matter.

I am, therefore, led to dismiss the appeal.

4923

In the matter of the appeal of John Pettis as trustee of school district no. 10, Wilton, Saratoga county, v. John T. Rice as school commissioner, second commissioner district of Saratoga county.

This Department has uniformly held that the order of a school commissioner altering the boundaries of school districts should be sustained when on appeal it appears that the commissioner has acted in good faith and by the order has restored to a district territory which had been unintentionally and under a misapprehension of facts set off from such district.

Decided December 31, 1900

Frank Gick, attorney for appellant
William D. McNulty, attorney for respondent

Skinner, *Superintendent*

This is an appeal from the decision of a local board, confirming a preliminary order, dated September 27, 1900, to take effect January 21, 1901, made by John T. Rice as school commissioner of the second commissioner district of Saratoga county, altering the boundary of school district 10, Wilton, Saratoga county, and consequently altering the boundaries of school district 6, Northumberland, Saratoga county, in the transfer of a parcel of land, known as the Gifford farm from said district 10 to said district 6.

The appellant alleges several grounds for bringing his appeal.

School Commissioner Rice has filed an answer to the appeal.

From the facts established by the appeal and answer herein, Commissioner Rice in making his preliminary order, and the local board in confirming said order, acted in good faith and for the purpose of restoring to school district 6, Northumberland, Saratoga county, territory which had been unintentionally and under misapprehension of facts set off from said district 6, Northumberland, to district 10, Wilton, Saratoga county.

It is in proof that in July, 1899, the appellant herein was sole trustee of school district 10, Wilton, and a Mr Washburn was the sole trustee of school district 6, Northumberland; that the appellant, Pettis, was the owner of a parcel of land known as the Gifford farm, situated in school district 6, Northumberland, assessed for school purposes at the sum of $350; that a portion of the roadbed of the Delaware & Hudson Railroad Company lies in district 6, Northumberland and in 10, Wilton, a part of said roadbed being located upon said parcel of land known as the Gifford farm; that the appellant applied to Trustee Washburn for his consent that said Gifford farm be transferred from said district 6, Northumberland, to said district 10, Wilton, for the reason that it would be a convenience to the appellant; that on July 13, 1899, Commissioner Rice, upon the application of the appellant, and the written consent of the appellant as trustee of district 10, Wilton, and said Washburn as trustee of district 6, Northumberland, transferred the Gifford farm from district 6, Northumberland, to district 10, Wilton; that at the time said order was made, neither Commissioner Rice

nor Trustee Washburn knew that said order included the track of said railroad, located upon the land so transferred; that Trustee Washburn, having within a few days after the order of July 13, 1899, was made, learned that such order transferred from district 6, to district 10, property of said railroad of the assessed value of $6000, saw Commissioner Rice and informed him of the effect of such order, and his (Washburn's) ignorance of the fact that the transfer of the Gifford farm carried with it the property of said railroad, and requested said Rice to make an order setting back said Gifford farm in district 6 in order to correct the error and misapprehension of facts under which such order was made; that thereupon, and by reason of the misapprehension of facts on the part of Trustee Washburn and Commissioner Rice, said commissioner, July 28, 1899, made a preliminary order to take effect October 28, 1899, Trustee Pettis refusing his consent thereto, transferring said Gifford farm back to said district 6; that subsequently a hearing was had before a local board and a confirmatory order was made from which the appellant herein appealed to me, and on October 31, 1899, I made my decision, 4814, dismissing the appeal on the ground of irregularities in the confirmatory order and the filing thereof, and vacated said order; that September 27, 1900, Commissioner Rice made a preliminary order to take effect October 8, 1900, setting off from district 10, Wilton, to district 6, Northumberland, said parcel of land known as the Gifford farm, and on the same day gave notice thereof to the trustees of each of such districts; that October 8, 1900, at the schoolhouse in Gansevort, Saratoga county, he would hear objections to such order; that October 8 and 13, 1900, a hearing was had before a local board consisting of Commissioner Rice and the supervisors and town clerks of the towns of Northumberland and Wilton, the trustees of district 10, Wilton, and 6, Northumberland, being present, and the preliminary order of September 27, 1900, was affirmed, and a confirmatory order was made, signed and filed in the office of the clerk of each of said towns of Northumberland and Wilton, Saratoga county.

This Department has held that an order made by a school commissioner, setting off real property from one school district to another under a misapprehension of facts, will be vacated. See decision of Superintendent Weaver, May 20, 1869.

Superintendent Draper, in decision 3518, made August 18, 1886, held, that a commissioner's order, altering the boundaries of school districts should be sustained, when on appeal it appears that the commissioner has acted in good faith, and by the order has restored to a district territory which has been unintentionally and under a misapprehension of facts, set off from such district.

From the facts established it is clear that on July 13, 1899, the order made by Commissioner Rice, transferring the Gifford farm from district 6, Northumberland, to district 10, Wilton, was so made under a misapprehension of facts and mistake on the part of the commissioner and of Trustee Washburn of district 6, in consenting thereto.

It is in proof that on July 13, 1899, there were no children residing on the territory known as the Gifford farm; that the assessed valuation of the property

situated in district 10, Wilton, was $62,789; that there were twenty children of school age therein and one teacher employed; that the expense of maintaining a school therein for a school year was $321.06; that the assessed valuation of district 6, Northumberland, was $131,630, with sixty children of school age therein and two teachers employed; that the expense of maintaining a school for a school year was $670.28.

The appeal herein is dismissed, and the confirmatory order, appealed from herein, dated October 13, 1900, to take effect January 21, 1900, is hereby affirmed.

3518

Luther L. Ackerson, trustee of school district no. 6, town of Sterling, Cayuga county, N. Y., from an order of Josiah Gailey, school commissioner of the first commissioner district of Cayuga county, dated March 26, 1886, changing the boundaries of said district.

Commissioner's order altering the boundaries of a school district sustained, when on an appeal it appears that the commissioner has acted in good faith, and by the order has restored to a district territory which had been unintentionally and under a misapprehension of facts set off from such district.

Decided August 18, 1886

Draper, *Superintendent*

This is a proceeding by Luther L. Ackerson, trustee of school district no. 6 of the town of Sterling, Cayuga county, appealing from an order of Josiah Gailey, school commissioner of the first commissioner district in said county, altering the said district no. 6 by taking therefrom lands and annexing them to the adjoining district no. 17.

The commissioner's order bears date March 26, 1886.

The grounds of appeal are as follows:

1 That the lands in question were formerly a part of district no. 17, and were, by an order bearing date March 24, 1877, with the consent of the trustees of both districts affected, annexed to district no. 6.

2 That the property set over does not contain a dwelling house, and, therefore, the change does not bring any child of school age nearer to a public school building.

3 That district no. 17 was, before the granting of the order appealed from, already a stronger district than district no. 6, and that consequently the change weakens the weaker district.

4 The real objection seems to be that a portion of the Rome, Watertown and Ogdensburgh Railroad, which, for a number of years, had been taxed in district no. 6, will hereafter be taxable in district no. 17.

I have very carefully examined the pleadings and papers filed upon this appeal, and from such examination I find the facts to be·

That previous to the granting of an order by then School Commissioner Morehouse, some doubt and confusion had arisen as to the boundary line between districts nos. 6 and 17 in the town of Sterling. That an order was consented to by the trustees of districts nos. 6 and 17 and granted by the school commissioner taking certain farm lands claimed by district no. 17, and annexing them to district no. 6. That the present school commissioner at that time acted as an adviser to the trustees of district no. 17, and advised such trustees to consent. That neither the commissioner nor the trustee of district no. 17, nor the present commissioner intended to consent or advise that the lands covered by the tracks of the said railroad should be included in such transfer. That in describing the line between said districts nos. 6 and 17, the south side of the farm of one Jesse Carris was used, the commissioner and trustee of said district no. 17 supposing that to carry the line south of the railroad bed. But it appears that Carris had changed his south line by parting with a part of his farm on the south so that this south line was north instead of south of the track, and the effect of using his south line to divide the districts was to include the railroad in district no. 6 instead of district no. 17. This change was unknown to both commissioner and trustee. Upon the discovery of the error the present commissioner by the order appealed from has set back to the district from which it was so taken by misapprehension, the lands north of Carris's old south line. It is not claimed that any attempt was made to deceive the commissioner or the trustee of school district no. 17 at the time the original order was granted, but no mention of the change of the boundary of Carris's farm was made, and the commissioner and trustee of said district no. 17 were not informed of it, and the commissioner in describing the boundary of the districts was misled thereby.

From all the facts so found, I am led to the conclusion that when the order of March 27, 1877, was granted by the commissioner and consented to by the trustees of districts nos. 6 and 17, the commissioner and the trustee of school district no. 17 acted under a misapprehension of facts and did not intend to transfer the lands mentioned from district no. 17 to district no. 6.

A similar case came up on appeal to this Department in 1869, and Superintendent Weaver decided the order, made under misapprehension of facts, void and set the same aside.

But I have also considered the question of the relative strength of the districts and fail to discover that there is any great difference. Both are and will be sufficiently strong to support suitable schools and provide instruction for the number of children of school age in their respective districts. The commissioner having acted in good faith and in the absence of contrary proof, I shall hold with good judgment and in accord with the statute. I must, from all the facts presented to me on this appeal, overrule the appeal and sustain the order appealed from.

4314

In the matter of the appeal of John Greenan v. Stephen Pollard, school commissioner second commissioner district, Allegany county.

Where it appears that an order of a school commissioner, setting off a portion of one district and annexing such portion to another will give better school facilities and increased convenience to the persons occupying the transferred territory and, at the same time, leave the district from which such territory was taken sufficient resources with which to maintain a good and sufficient school therein, this Department can find no justification in setting aside the action of said officers.

Decided January 3, 1895

Crooker, *Superintendent*

This appeal is taken from the final order of the respondent, as school commissioner of the second commissioner district of Allegany county, made on June 30, 1894, in the alteration of the boundaries of school district no. 9, town of Wellsville, Allegany county, and the consequent alteration of the boundaries of school district no. 7, town of Wellsville, Allegany county, in taking "All that part of sublot 73, within great lot 31 of the Schermerhorn tract, in township 3, range 3–1, of Morris reserve, as lies south of the Erie Railway lands, being about 165 acres," and attaching the same to district no. 7, town of Wellsville; said order to take effect on October 1, 1894.

An answer has been made to the appeal, and to the answer a reply, and to the reply a rejoinder.

The following material facts are established:

That prior to the aforesaid order of the respondent, said part of sublot 73, consisting of about 165 acres of land, was situate within said school district no. 9, town of Wellsville; that one Nathan Williams resided upon said lot of land, having residing with him six children, four of whom are of school age; that the distance from the dwelling house of said Williams to the schoolhouse in district no. 9, by the nearest highway, is over three miles; that to attend the school in district no. 9, said children would be obliged to travel the same highway which leads to and past the schoolhouse in district no. 7, and that after reaching said schoolhouse they would be compelled to travel about one and three-fourth miles to reach the schoolhouse in district no. 9; that the schoolhouse in district no. 7 is about one and three-fourth miles from the residence of said Williams, and can be reached by the main traveled valley road leading from the village of Wellsville to the village of Andover; that there is no road, public or private, including log roads, leading from the dwelling house of said Williams, excepting the public highways, as shown upon the map annexed to the appeal herein, over which said children of Williams could reach the schoolhouse in district no. 9; that there is no road across said lot 73 from the residence of said Williams to said schoolhouse in district no. 9; that said Williams resides on what is known as Dyke's Creek, which is in a valley, and that the schoolhouse in said district no. 9 is situate on the uplands, and that running parallel with said creek is a high steep hill, higher than any other hill in the school district, over which hill the children of

Williams would have to go to attend at the schoolhouse in said district no. 9, unless they traveled the aforesaid highways; that much of the time during the school year said Williams has sent his children to school in the village of Andover for the reason that it was impossible for them to attend the school in said district no. 9.

It also appears that prior to June 15, 1894, the aggregate valuation of the property liable to taxation in said school district no. 9 was the sum of $34,237, and there were thirty-seven children of school age residing therein; that the assessed valuation of the land in said lot 73, owned by said Williams, was the sum of $1750; that the United Pipe Line runs over and across the said land of said Williams in said lot 73 and between the residence of said Williams and the highway in front of said residence, and hence in taking said lot 73 from said district no. 9 it was impracticable to do so without transferring the said pipe line therewith; that the assessed value of said pipe line was $1714; that aggregate value of the property set off by said order of respondent, was the sum of $3464, leaving said district no. 9 with property of the aggregate assessed valuation of $30,773.

It further appears that application was made by said Williams to the respondent to set off said lot 73 from said district no. 9 to said district no. 7, and that the respondent after careful investigation of the subject, on June 15, 1894, made a preliminary order for such alteration; that the appellant as trustee of said district no. 9, not consenting, on June 16, 1894, the respondent gave due notice, under the school law, to the trustees of both districts nos. 7 and 9, that on June 30, 1894, at 2 o'clock p. m., at the town clerk's office in Wellsville he would attend and hear objections to the proposed alterations; that the respondent attended at said time and place, when an opportunity to all persons who desired to be heard to present their objections was given, and no sufficient objection being given, the respondent, on June 30, 1894, made his confirmatory order, dated on that day, to take effect on October 1, 1894, and duly filed the same with the town clerk of the town of Wellsville.

There is no claim on the part of the appellant of any irregularity in the proceedings had and taken by the respondent.

The main ground upon which the appeal is taken appears to be: (1) that the children of Williams could reach the schoolhouse in district no. 9 by going across lots or on private or log roads; (2) that many children residing in the district are obliged to travel a greater distance to reach said schoolhouse than the children of Williams; (3) that by taking property from the district of the aggregate value of $3464, the financial condition of district no. 9 is materially weakened.

As to the first ground above stated the proofs clearly establish that it is almost impracticable for the children of Williams to reach the schoolhouse in district no. 9 other than by the public highways, by reason of the high ground and the absence of roads of any kind across lots. As to the second ground above stated it is equally clear that many children in said district reside at a greater dis-

tance by the public highways from said schoolhouse than do the children of Williams, but they have no such elevation to climb as the children of Williams, and there are private and log roads by which they can reach the said schoolhouse at a great saving of distance; that it also appears no application has been made by the parents of such children to the school commissioner to set them off from said district. As to the third ground stated above, school district no. 9 has an aggregate assessed valuation of $20,773, a sum amply sufficient to raise, without being burdensome, sufficient money to maintain a good and sufficient school in said district.

This Department has held that where it appears that an order of the school commissioner, setting off a portion of one district and uniting it to another, will give better school facilities and increased convenience to the persons occupying the transferred territory, and at the same time leave the district from which the transferred territory was taken sufficient resources with which to maintain a good and sufficient school, this Department can find no justification in setting aside the action of such officer.

In my opinion the respondent herein, in making the order appealed from, has wisely exercised the power and discretion vested in him by the school law, and that the school district no. 9 possesses sufficient resources with which to maintain a good and sufficient school therein.

The appeal herein is dismissed, and the order of School Commissioner Pollard, of June 30, 1894, is confirmed.

3705

In the matter of the appeal of Charles Cady, as trustee of school district no. 14, town of Hounsfield, Jefferson county v. S. W. Maxson and T. S. Gray, school commissioners of said county.

An order altering school districts will not be disturbed where the change was made to better accommodate patrons of the school and the change does not materially affect the size or the assessable valuation of the district from which a portion of territory has been cut off.

Decided August 22, 1888

Draper, *Superintendent*

By the order of the two commissioners of Jefferson county, made upon the 11th day of May 1888, a portion of district no. 9 of the town of Hounsfield was cut off and annexed to joint district no. 14 of the towns of Hounsfield and Watertown. Inasmuch as the trustees of the districts affected did not all consent to such order, notice was given that the commissioners would attend at the schoolhouse in district no. 9 of Hounsfield at 10 o'clock in the forenoon on the 24th day of May 1888, to hear objections thereto. At the time and place named the supervisor and town clerk of the town of Watertown and the town clerk of the town of Hounsfield were associated with the commissioners to hear

objections. After such hearing and after due deliberation, the board confirmed the order of the commissioners by a unanimous vote. This appeal is brought for the purpose of setting aside the orders making the alteration. Numerous objections are offered to the change by the appellants. It is claimed that the new boundary lines are not properly set forth; that the only house upon the territory affected is nearer the schoolhouse in district no. 9 than in district no. 14; that the change weakens the district from which the territory is taken. It is insisted with considerable energy that the descriptions of the boundary lines in the first order of the commissioners and the subsequent order of confirmation are not the same.

In answer, the commissioners insist that the descriptions of boundary lines are proper, except that they admit that there was a slight clerical error in the first order, which was corrected in the subsequent one. They say that more than thirty days elapsed after the making of the order before the appeal was taken; that no map accompanied the appeal; that the house upon the territory affected is only about two-thirds as far from the school in district no. 9 as it is from the one in no. 14, and that the road to district no. 9 is a main public highway, always open for travel, which is not the case as to the roads to no. 14. They show also that after the alterations the assessable valuation of property in no. 14 is $74,990, while in no. 9 it is $51,150.

I have carefully considered all that has been said by the parties on both sides. It seems to me that the commissioners were justified in the action which is appealed from. The only material question which is raised is as to the variation in the orders, but that is shown to have been a clerical error only, and one which misled nobody; and I do not deem it to be of sufficient moment to justify me in requiring the commissioners to retrace their steps and go through the proceedings again. It seems to be clear that the alteration is made for the benefit of one family in order to bring such family in closer proximity to a schoolhouse, and I see no reason why it could not be made for that purpose inasmuch as it does not materially affect the size or the assessable valuation of the district from which a portion of territory was cut off. I have determined to dismiss the appeal.

1893

In the matter of the appeal of Thomas G. Parsons and Mary B. Parsons v. William J. Barr, school commissioner of Genesee county.

The setting off of lands from one district to another will be ordered by the State Superintendent when the effect will be to give the occupants of such lands school advantages which they did not possess, and when a district will not be materially weakened by such transfer, nor the symmetry of the district lines be affected.

Decided July 24, 1890

Draper, *Superintendent*

Appellants are residents of school district no. 3, of the town of Batavia, Genesee county. The appellant, Mary B. Parsons, is the owner of real estate

in said district. The appellants are the parents of four children of school age, three of whom are over 15 years of age. All the children now attend and for some time past have attended the school in district no. 2, of the town of Batavia, where appellants are required to pay for their tuition. The appellants, whose property adjoins district no. 2, and from the map of the district before me would seem naturally to belong thereto, are desirous of being set off to district no. 2. They allege that district no. 3 has taxable property to the amount of $159,795, a sufficiently large amount of taxable property so that the district would not be materially weakened by the loss of appellants' land; that the road to be traveled to reach the school in district no. 2, is one leading to Batavia where appellants receive their mail and transact their business, while the road to the school in district no. 3 leads them away therefrom. That the school facilities in no. 3 are not adequate for children as far advanced as the appellants' children are, and that appellants are now doubly taxed for tuition, paying taxes in district no. 3, and for tuition in no. 2. It is also alleged that the school which appellants' children attend in district no. 2 is nearer to appellants' home and much easier reached. The respondent avers that the distance to district school no. 3 is about the same as to no. 2, and that a good school is usually maintained in district no. 3, and the instruction there given is sufficiently advanced for appellants' children. He alleges that the supervisor and town clerk oppose the change, and for these reasons he has declined to make the order.

I have reached a conclusion in this case with some hesitation. Ordinarily, the judgment of the local school authorities will be upheld, but I feel that in this case that the educational interests of district no 3 will not suffer, and that the symmetry of the district lines will not be affected by the transfer. The children do not attend in district no. 3, and that an unfair burden is imposed upon the appellants, is evident to me.

The appeal is sustained and the commissioner is hereby directed to make an order setting off the lands of the appellants as shown on the map filed with this appeal, from district no. 3, of the town of Batavia, to district no. 2, of the same town.

3669

In the matter of the appeal of Nathan Marsh, of school district no. 6, town of Conesus, Livingston county, v. R. Austin Kneeland, jr, school commissioner of the first district of Livingston county.

A school commissioner's refusal to make an order setting off land from one district to another in order that certain children residing on said land might be given school facilities which, at certain seasons of the year, they were denied, because of the condition of the roads leading to the schoolhouse, upon the ground that by the change a weak district would be injured, will not be upheld, when it appears that the district will not be materially weakened by the change, but will still have sufficient taxable property to maintain a good school.

Decided May 29, 1888

Draper, *Superintendent*

This is an appeal by a resident taxpayer of school district no. 6, town of Conesus, Livingston county, from the refusal of the school commissioner to set off and annex his lands to district no. 8 of said town.

The appellant alleges that the change sought for will enable him to send his children to school; that owing to the condition of the road leading from his residence to the schoolhouse in district no. 6 in the winter seasons and the fact that no persons reside on the road between his residence and the schoolhouse, and because the road is, consequently, not generally traveled, it becomes impassable, and, as his children are young, they are not able to attend the school; that the road leading to the schoolhouse in district no. 8 is largely traveled and kept open.

The commissioner answers and alleges that district no. 6 is relatively weaker than district no. 8 and that it would weaken materially a weak district to make the change.

It appears that each district contains a good schoolhouse and maintains a satisfactory school; that the number of children in each district is about the same; that the assessed valuation of district no. 6 is $65,200 and district no. 8, $87,450; that the appellant's property lies largely in district no. 8, but is taxed in district no. 6, he residing on that part of his property lying in district no. 6.

It can not be doubted that the change will be beneficial to the family of the appellant, and the district from which he would be taken would still be sufficiently strong to maintain a good school. I do not consider the objection urged by the commissioner sufficient to sustain his refusal to grant the order.

I have concluded to sustain the appeal and hereby direct R. Austin Kneeland, jr, school commissioner of the first district of Livingston county, to make an order, within thirty days from the date hereof, transferring the lands of the appellant lying in district no. 6, and abutting lands in district no. 8, to district no. 8 of the town of Conesus in the county of Livingston.

3813

In the matter of the appeal of Thomas O'Connell v. Eber S. Devine, school commissioner of the first district of Broome county.

A farm will be set off from district and annexed to another, when it will enable the occupant thereof, who has a large family of children of school age, to have school accommodations for his children, and the change will not materially reduce the amount of taxable property in a strong district.

Decided September 24, 1889

D. H. Carver, attorney for appellant

Draper, *Superintendent*

The appellant resided in school district no. 6, of the town of Conklin, in the county of Broome. He desires to have his farm annexed to school district

no. 4, of the town of Binghamton. The town of Conklin is in the first school commissioner district of Broome county, and the town of Binghamton is in the second commissioner district. Mr O'Connell shows that he has from time to time made application to Commissioner Devine to make the alteration, but that the commissioner has declined and refused to do so. This appeal is brought for the purpose of procuring a determination of the matter.

The appellant shows that he resides at a point which practically prevents his children from attending the school in his school district. His house is nearly three miles from the schoolhouse. The road is but little traveled, and during a considerable portion of the year is shown to be impassable. He has nine children. He has for several years sent his children, who were capable of attending school, to a school across the line in the state of Pennsylvania. He shows that, if he were annexed to school district no. 6, of the town of Binghamton, he could send his children to school in that district, the road being better and being more convenient for him because of the frequency with which he goes to the city of Binghamton on business errands. The school district in which he resides is a strong district. The assessable valuation is over $40,000. He presents the consent of the majority of the taxpayers in his district, and also of the trustees of both of the districts which would be affected by the change. He also presents a certificate from Commissioner James L. Lusk, of the second commissioner district of Broome county, saying that he thinks the change ought to be made.

The respondent has made no answer to the appeal, and the facts alleged by the appellant must, therefore, be assumed to be true. I have no hesitation in saying that, upon this showing of facts, the appellant seems to me to be clearly entitled to the relief he seeks.

The appeal is sustained and the respondent is directed to join with the other commissioner having jurisdiction in an order making the proposed alteration.

3795

In the matter of the appeal of J. A. Wright v. George Peckham, school commissioner of the second district of Cayuga county.

Territory may properly be detached from one district and annexed to an adjoining district, when it appears that it is in close proximity to the schoolhouse in the latter district and a very considerable distance from the schoolhouse in the former district, and there are children to be accommodated with school advantages, to whom the alteration is no inconsiderable matter, and the former school will be left sufficiently strong to maintain a satisfactory school.

Decided July 29, 1889

Draper, *Superintendent*

On the 1st day of April 1889, the respondent made an order detaching a certain portion of territory, including the residence of appellant, from district no. 5, of the town of Moravia, and annexing the same to district no. 1 of said town. Inasmuch as the consent of the trustee of district no. 5 to the alteration was not given, it was directed, pursuant to statute, that said order should not take effect for ninety days. Subsequently the commissioner heard objections to the order going into effect, at a time and place named by him, as required by statute, and on the 15th of April made a second order annulling the first. From this second order this appeal is taken.

It does not appear that either the supervisor or town clerk of the town of Moravia was associated with the commissioner in determining upon the advisability of the alteration.

District no. 1 is the village of Moravia, and the fact is undoubtedly, as claimed, that the school facilities are better there than in the outlying district no. 5. The residence of the appellant is nearer, by half, to the schoolhouse in no. 1 than that in no. 5. The walks are better and more passable. He has children to whom the advantages of getting to the school, in district no. 1, is no inconsiderable matter. It must be conceded, I think, that the appellant should be given the enhanced advantages of the school in the village, when he is in sight of the schoolhouse, and, indeed, so near, as he says, as to hear the opening exercises at his house, unless there is some insuperable reason why it should not be so. The only reason which can be advanced against the alteration is that it would weaken district no. 5. If the alteration is made, it would transfer property of the valuation of $6350 from no. 5 to no. 1, and leave an assessable valuation of over $70,000 in no. 5. There are fifty-nine children of school age in no. 5 at present, and the change would leave nearly fifty, as large a number as can well and advantageously be provided for in an ordinary common school district in the country. So I can not see that district no. 5 would be materially injured by the change. While there is wide disparagement in the strength of the two districts, it must be remembered that one is an ordinary school district, and the other a union free school district; and it may well be doubted if the former is not as well able to provide the school facilities which it does provide for its children, as the other is to provide such as it does provide for its children. This being so, I can not escape the conclusion that the first impression of the school commissioner was correct, and that this appellant should be transferred to the village district.

The appeal is sustained; the order of the school commissioner of date of April 15, 1889, is set aside and annulled, and the one of the date of April 1st is confirmed.

4534

In the matter of the appeal of E. A. Barton, sole trustee, school district no. 2, town of Elko, Cattaraugus county, from proceedings for the alteration of school districts nos. 2 and 3, town of Elko, Cattaraugus county.

The notice by school commissioners required to be given under section 4 of title 6 of the Consolidated School Law of 1894 of a time when and place where he or she will hear objections to a preliminary order for the alteration of school districts must be served personally upon the assenting and dissenting trustees, or left at his or their residence with some person of suitable age and discretion, and can not be served by mail.

The order of the local board affirming the preliminary order of the school commissioner must be made by the school commissioner, and signed by him or her and all the members of the local board must unite with the commissioner in such order.

Decided March 4, 1897

O. S. Vreeland, attorney for appellant

Skinner, *Superintendent*

This is an appeal from certain proceedings had and taken in the alteration of school districts nos. 2 and 3, town of Elko, Cattaraugus county. In August 1896, a petition, signed by certain residents of school district no. 3, town of Elko, Cattaraugus county and presented to the trustee of such district, requesting upon several grounds stated therein, that such district be extended by annexing thereto the whole of lot 8 (in district no. 2) which petition was presented to Martha Van Rensselaer, school commissioner of the second district of Cattaraugus county, by such trustee, together with his written consent to the alterations asked for in the petition. That subsequently, School Commissioner Van Rensselaer, the trustee of district no. 2, refusing to consent to such alterations, made a preliminary order making the alterations asked for, which order was to take effect January 27, 1897, and such order was filed in the office of the clerk of the town of Elko on October 9, 1896. That on October 10, 1896, the appellant herein received by mail a notice signed by School Commissioner Van Rensselaer, of which the following is a copy:

To the trustee of school district no. 2, town of Elko, county of Cattaraugus, N. Y.

Take notice that I, Martha Van Rensselaer, school commissioner of the second commissioner district of Cattaraugus county, New York, did on the day of October 1896, make an order altering districts nos. 2 and 3, town of Elko, as does appear from the order hereto attached, and that said order was filed in the town clerk's office on the day of October 1896.

You are also notified that on the 9th day of October 1896, at 10.30 o'clock, a. m., and at the town hall, Quaker Bridge, in the town of Elko, I will attend and hear objections to the foregoing order and to proposed alterations.

You are also notified that you may request the supervisor and town clerk of the towns or town in which your school district lies, to be associated with me at such time and place for the purpose of confirming or vacating said order.

MARTHA VAN RENSSELAER

School Commissioner, Second District, Cattaraugus County

That the appellant on October 10, 1896, went to Quaker Bridge, town of Elko, and saw the town clerk and was informed by him that no meeting pursuant to such notice was held on October 10, 1896; that no other notice was ever received by the appellant. That on October 27, 1896, at 10.30 a. m., School Commissioner Van Rensselaer attended at the town hall at Quaker Bridge, town of Elko, and at such place and time D. H. Andrews, supervisor of such town also attended at the request of the trustee of district no. 3, of such town, to be associated with such school commissioner upon such hearing, and opportunity being given to all persons who desired to be heard, a vote was taken upon confirming such preliminary order made by such school commissioner, and said Andrews, as supervisor, voted in favor of such confirmation, and said school commissioner voted against such confirmation, and thereupon such school commissioner made a confirmatory order, to take effect on January 27, 1897, which order was not signed by her associate in the local board, and such order was filed with the clerk of the town of Elko. That the appellant received a letter from School Commissioner Van Rensselaer, dated, October 31, 1896, informing him of the proceedings of the meeting of October 27, 1896, and of such confirmatory order and the filing thereof. That on or about December 26, 1896, the appellant brought his appeal herein.

School Commissioner Van Rensselaer, and Eben Seekins, trustee of district no. 3, have each answered the appeal.

Trustee Seekins alleges that the appeal herein was not taken within the time prescribed by the rules of practice of this Department relating to appeals. I decide that the appellant has rendered a satisfactory excuse for his delay in bringing his appeal.

It is admitted that the trustee of district no. 3, consented to the alterations of districts nos. 2 and 3, and that the trustee of district no. 2, refused his consent.

Section 4, title 6, of the Consolidated School Law of 1894, as amended, enacts among other things, that within ten days after making and filing a preliminary order for the alteration of school districts, the school commissioner shall give at least a week's notice in writing to one or more of the assenting and dissenting trustees of any district or districts to be affected by the proposed alterations; that at a specified time, and at a named place within the town in which either of the districts to be affected lies, such commissioner will hear the objections to the alteration, etc. The section does not provide that such notice shall be served on the trustees by mail, and in the absence of any such provision such notices must be served personally upon such trustees, and if any such trustee shall be absent from home, or can not after due diligence be found, then by leaving the notice at his or her residence with some person of suitable age and discretion, between six o'clock in the morning, and nine o'clock in the evening.

It is clear, from the proofs filed herein, that School Commissioner Van Rensselaer did not serve personally, or cause or attempt to serve personally, either of the trustees of said districts nos. 2 and 3 with the notice required by

section 4, above cited. On the contrary, it appears by an affidavit of such school commissioner, sworn to on November 5, 1896, that the service of such notice upon both such trustees was made by depositing, on October 8, 1896, in the post office at Randolph, Cattaraugus county, such notice inclosed in prepaid wrappers, directed respectively to E. A. Barton, Tunesassa, Cattaraugus county, N. Y., and E. Seekins, Elko, Cattaraugus county, N. Y.

I decide that no legal notice under the provisions of said section 4, title 6 of the school law was served upon the trustees of such districts nos. 2 and 3, or either of them by School Commissioner Van Rensselaer, of a meeting to hear objections to the preliminary order made by her on October 8, 1896, and the meeting held on October 27, 1896, at which she and Supervisor Andrews were present, was without authority of law.

Admitting, for the purpose of argument only, that School Commissioner Van Rensselaer had legal authority to give the notice required by such section 4 to such trustees, by mail, it clearly appears that the notice mailed by her to the appellant herein, was that she would attend at the town hall at Quaker Bridge on October 9, 1896, and not on October 27, 1896, to hear objections to such preliminary order made by her.

The appellant has annexed to his appeal the notice received by him by mail on October 10, 1896, a copy of which is hereinbefore set out in full. Such notice is typewritten with the exceptions that the day and month when she would attend, etc., are written 9th and "October," and her signature is written. The notice fails to show that any erasures or alterations have been made therein. The dates in October on which she made the preliminary order and on which said order was filed with the town clerk of the town of Elko, are left blank in such notice.

It is well settled that the first or preliminary order made in the alterations of school districts is but one step in the proceedings and is of no effect whatever until the same has been duly confirmed. That the first imperative duty of the school commissioner, after making and filing the preliminary order of alteration, is to give at least one week's notice in writing to the trustees of all the districts affected by such proposed alteration, and such notice must state that he or she has made an order of alteration, reciting such order, and that at a stated time and place within the town in which either of the districts to be affected lies, he or she will hear the objections to the alteration. When the local board decides to confirm the order of the commissioner, it becomes necessary for the commissioner to make and file the final order, or the order of alteration. The local board does not make the alteration. The commissioner must do this, the board uniting with him or her in the order.

The confirmatory order appealed from has the signature of School Commissioner Van Rensselaer, but does not have the signature of D. H. Andrews, supervisor of the town of Elko, who was associated with her in hearing objections to such alterations.

The appellant also alleges that Eben Seekins is not trustee of school district no. 3, town of Elko, for the reason that at the time of his election as trustee, on

the first Tuesday of August 1896, he was not, has not since been, nor was he at the time of bringing the appeal herein, a resident of such school district. It appears that at the annual school meeting held in said district on the first Tuesday of August 1896, said Seekins was, by the color or form of an election, elected trustee of the district, and ever since has been, and still is, acting as such trustee; that no appeal from such election upon the ground that he was not eligible to hold such office, or any other ground, has ever been taken to the State Superintendent of Public Instruction. Until an order shall be made by such State Superintendent that such election of Seekins was illegal or that he is ineligible to hold the office of trustee, he is deemed to be trustee de facto of said district, and as such, authorized to perform the duties of the office of trustee under the school law.

I find and decide that the appellant herein never received, in accordance with the provisions of section 4, title 6, of the school law, any notice that School Commissioner Van Rensselaer would attend at the town hall, Quaker Bridge, in the town of Elko, on the 27th day of October, 1896, at 10.30 a. m., to hear objections to the order made by her on October 8, 1896, altering school districts nos. 2 and 3, town of Elko; that no notice of a time and place at which she would attend to hear objections to such order was ever duly and legally given by her to the appellant herein; that all proceedings had and taken by such school commissioner relating to alterations of the districts subsequent to October 8, 1896, including the proceedings taken on October 27, 1896, and the alleged confirmatory order made therein, were, and are, and each of them was, and is, illegal and void, and should be vacated and set aside; that the appeal herein should be sustained.

The appeal herein is sustained.

It is ordered, That the order made by School Commissioner Van Rensselaer, dated October 8, 1896, altering school districts nos. 2 and 3, town of Elko, Cattaraugus county, and the proceedings had and taken by such school commissioner and Supervisor Andrews in relation to such alteration, on October 27, 1896, and the confirmatory order altering said districts, signed by such school commissioner and filed with the town clerk, of the town of Elko, Cattaraugus county, be, and the same hereby are, and each of them is, vacated and set aside.

4544

In the matter of the appeal of Fred W. Rickmyer and others v. Cora A. Davis, school commissioner, first commissioner district, Oneida county.

The description by a school commissioner in an order forming a new district or annexing territory to another district or districts should not be described "As a farm owned or occupied by A. B.," or, "As known as the Washington place," but should be described by great lot, tract or lot lines, or highways or well-known established monuments that survive the transfer of ownership in the land, so complete and definite that a surveyor at any future day may determine the boundaries of such territory without any reference to any other document than the order of the commissioner.

Decided March 25, 1897

Skinner, *Superintendent*

This appeal is taken from an order made on January 28, 1897, by School Commissioner Davis of the first commissioner district of Oneida county, dissolving school district no. 7, town of Floyd, Oneida county, and annexing the territory of the district so dissolved to other adjoining school districts in the towns of Floyd and Rome. The order recites that the annexation of the territory of such dissolved district to such other adjoining districts was with the consent of School Commissioner Harding of the third district of Oneida county; that said order was filed in the office of the clerk of the town of Floyd.

The appellants allege several grounds for bringing the appeal. School Commissioner Davis has answered the appeal and alleges that in her judgment it is for the best educational interests of the persons of school age residing in such district that the district be dissolved and its territory annexed to adjoining districts.

I do not deem it necessary for me to examine as to whether or not School Commissioner Davis has wisely exercised the power and authority given to her by the school law, to dissolve school district no. 7 of Floyd and annex its territory to other adjoining districts within her commissioner district, and acting with Commissioner Harding to annex other portions of its territory to adjoining school districts in the third commissioner district of Oneida county, as there is an objection to the validity of the order appealed from which appears to be fatal.

Commissioner Davis could have made an order dissolving school district no. 7 of Floyd, and then different orders annexing the territory of the dissolved district to adjoining districts within her commissioner district, and with Commissioner Harding made orders annexing the remaining territory to adjoining school districts within the third commissioner district.

She elected to make one order including therein the dissolution of school district no. 7 and annexing its territory to adjoining districts, thereby altering such districts.

In the order appealed from "all property of said dissolved district belonging to Messrs Moulton, Lawton, Vanderpool, Vanderhoof, Brown, Evans and Mrs Eunice Crumb" is annexed to district no. 1, Floyd; property known as the Walbran place to district no. 8, Floyd. Like descriptions are given of the property annexed to districts nos. 10 and 16, Rome; and all property occupied by Messrs Holtby, Pugh, Briggs and Rickmyer, to district no. 14, Rome.

This Department has uniformly held that in the description of territory forming a new district, or annexed to another district, the description should be so complete and definite that a surveyor, at any future day, may run its boundaries without reference to any other document than the order forming, altering or describing the territory. For this purpose the exterior lines should be defined by reference to natural monuments, marked trees, creeks, etc., or to township lines of historical notoriety, such as the lines of the great original subdivisions in great lots, tracts, or lots, or the course of highways. Where these fail, the courses

and distances as ascertained by the compass and chain should be given. Boundaries should be defined by known established monuments and marks that survive the transfer in the ownership of the soil. Boundaries by farms owned by persons named, or other transitory and perishable lines, however clearly understood at the time, are perpetually subject to change, and in a few years become vague and uncertain, as the memory of men and the title to their possessions pass away. Lines that coincide with farms that have afterwards been cut up into smaller lots, or consolidated with other farms, whereby the original boundaries have become obliterated, are a fruitful source of contentions, strifes and litigation in school districts.

The statements "of the farm now owned by, or the property of, or occupied by A. B." renders it very difficult to ascertain what territory was meant, as the ownership or occupation of land is continually shifting.

In the order appealed from "the property" belonging to Messrs Moulton etc., or known as the Walbran place, or occupied by Messrs Holtby, etc., is annexed, etc., whereas certain land or territory formerly forming a part of dissolved school district no. 7 of Floyd, was annexed to certain adjoining school districts. The Department has, therefore, acted upon the policy of setting aside the action of school commissioners in the alteration of districts where this principle of defining boundaries of territory annexed to districts by proper monuments and prominent landmarks is disregarded.

When school commissioners ascertain that school districts within their commissioner districts are weak financially, and weak in the total resident school population, and weak in the average attendance upon instruction, the dissolution of such weak districts and the annexation of the territory of the dissolved districts to adjoining districts will be approved.

In the orders made to carry into effect such dissolutions and alterations of school districts, care should be taken by school commissioners to define the territory annexed to the different districts by proper monuments and prominent landmarks.

The appeal herein is sustained.

It is ordered, That the order made by Cora A. Davis, school commissioner of the first commissioner district of Oneida county, on January 28, 1897, in which Selden L. Harding, school commissioner of the third district of Oneida county, joined, dissolving school district no. 7, town of Floyd, Oneida county, and annexing the territory of the dissolved district to school districts nos. 1 and 8, town of Floyd, and nos. 10, 14 and 16, town of Rome, Oneida county, be, and the same is, hereby vacated and set aside.

4427

In the matter of the appeal of George W. Wilson, trustee, school district no. 5, town of Lumberland, Sullivan county, from decision of local board in the matter of the alterations of school districts nos. 1 and 5, town of Lumberland, Sullivan county.

The alteration of school districts, solely for the purpose of equalizing valuations in districts affected, is against public policy, and will not be sustained by this Department. Such purpose of equalization of values may be an element for consideration, but should not be the controlling one.

Decided March 3, 1896

Skinner, *Superintendent*

John Z. Twichell, school commissioner of the first commissioner district of Sullivan county, on November 22, 1895, made an order upon the consent of the trustee of school district no. 5, but without the consent of the trustee of school district no 1, town of Lumberland, Sullivan county, altering the boundaries of said district no. 5 so as to include all the real estate of lot 36 lying south of the foot of the tow path of the Delaware and Hudson canal; and altering the boundaries of said district no. 1 so as to take out of said district that part of lot 36 north of the foot of the tow path of said canal and which order was to take effect on March 2, 1896. That on December 28, 1895, a local board composed of Commissioner Twichell and Supervisor Smith of the town of Lumberland (the clerk of said town, being the trustee of said district no. 5, not sitting), after hearing all persons desiring to be heard in relation to said order rendered its decision, vacating said order of Commissioner Twichell. From said decision of said local board the appellant in the above-entitled matter, as trustee of district no. 5 and on behalf of said district, has taken an appeal.

It appears that the aggregate amount of taxable property in district no. 5 is $5885 and the amount raised therein for school purposes the present school year is $157, the tax rate being 2.67 per cent; that the aggregate amount of taxable property in district no. 1, other than the Delaware and Hudson canal, is $5490, and the valuation of such canal company within the district is $54,101.60, making the total valuation $59,590.60; that the amount raised therein for school purposes for the school year of 1894–95 is $625, the tax rate being .010488.

It further appears that school district no. 1 was formed by an order made February 18, 1850, by the then town superintendents of schools fixing the boundaries thereof, which order was recorded in the office of the town clerk of said town on March 23, 1850; that the said boundaries had not been changed up to November 22, 1895.

It is admitted by the parties to this appeal that the alteration of said districts, as described in said order of Commissioner Twichell, so far as the inhabitants of district no. 5 were concerned, was solely for the purpose of increasing the amount of taxable property in the district by including within its boundaries a section of said Delaware and Hudson canal. It appears that three and nineteen-twentieths miles of said canal is within said district no. 1 and the order of Com-

missioner Twichell would take about three-quarters of a mile of said canal from district no. 1 of the valuation of $10,000 and annex it to district no. 5. It is not claimed that said order was made for the convenience or benefit of the residents of the territory affected, nor would it enlarge their school privileges.

The decision of the local board vacating the order of Commissioner Twichell was based upon the decision of Superintendent Draper in appeal no. 3534, on November 13, 1886.

The facts in appeal no. 3534 appear to have been that in district no. 5, Poughkeepsie, there were about two and one-half miles of the New York Central Railroad, and no portion thereof in district no. 1; that the order therein appealed from cut off territory containing about three-quarters of a mile of said railroad from no. 5 and annexed it to no. 1; that the fact was undisguised that the object of the order was solely to increase the valuation of property in district no. 1. Superintendent Draper in his decision said: "In any event, I am not prepared to give sanction to the proposition that school districts should be changed only for the purpose of equalizing valuations. Perhaps it may properly be an element for consideration, but it should not be the controlling one. If districts are to be altered whenever, and only because one has more valuable property than another, the result would be a constant struggle for the annexation of such property, and the people and the school system would be endlessly involved in controversy in consequence of it. This is against public policy, and as it is the essential, if not the only, ground upon which the change here in question was made, it can not be sustained."

I concur in the views stated by Superintendent Draper. Altering school districts only for the purpose of equalizing valuations is not sustained by this Department; it may be an element for consideration, but it should not be the controlling one.

The appeal herein is dismissed and the decision of the local board affirmed.

4453

In the matter of the appeal of John Fisher, William Madden, Michael J. Jackson, Joseph Silk and Walter F. Jeffers, individually and as trustees of and composing the board of education of union free school district no. 1, town of East Chester, Westchester county, v. Walter S. Allerton, school commissioner, first commissioner district, Westchester county. Charles Dusenberry, jr, and others v. Walter S. Allerton, school commissioner, etc.

A school commissioner has no jurisdiction to alter a school district until the trustees thereof have been asked and have given, or refused to give, their consent; a preliminary order altering or dividing the school district or erecting a new district, is simply a step in the proceeding. It is the confirmatory order by which the district is altered or divided or the new district is erected. School commissioners have no power to alter or divide school districts upon which there is an outstanding bonded indebtedness.

Decided June 8, 1896

Herbert D. Lent, attorney for appellants

Skinner, *Superintendent*

The two above-entitled appeals are taken from an order made by Walter S. Allerton, school commissioner, first school commissioner district of Westchester county, altering or dividing union free school district no. 1, town of East Chester, Westchester county, by taking certain territory therefrom and forming a new school district to be known as district no. 3, town of East Chester, Westchester county.

The two appeals being from the same order, they are consolidated and are examined and decided as one appeal.

The principal ground upon which said appeals are brought is, that at the time of making the said order, altering or dividing said union free school district no. 1, town of East Chester, said district had a bonded indebtedness outstanding.

The following facts are established by the proofs filed herein:

That at the annual school meeting in said union free school district no. 1, East Chester, held on August 6, 1895, a resolution was duly adopted to raise by tax the sum of $25,000 for the purpose of purchasing a schoolhouse site and erecting a schoolhouse thereon, and that said tax be levied and collected by instalments; that the board of education of said district, pursuant to the provisions of the school law, gave public notice that bonds for said $25,000 would be sold on January 27, 1896, said bonds to bear interest from March 1, 1896, and to be delivered on or about that date; that on January 27, 1896, the Bank of Mount Vernon submitted to said board of education a bid for said bonds; that by reason of an injunction granted by the Supreme Court restraining the sale of said bonds no action was taken by said board of education upon bids received for said bonds until February 10, 1896 (said injunction having been vacated on February 7, 1896), when said board notified said bank that its bid had been accepted and said bonds awarded to it, and that said bonds would be delivered to said bank on or about March 1, 1896; that on March 4, 1896, said board of education delivered said bonds amounting to $25,000 to said Bank of Mount Vernon, and received from said bank therefor the sum of $25,400, being the face thereof and the premium thereon; that on or about February 10 a petition was presented to the respondent, School Commissioner Allerton, asking him to alter or divide said union free school district no. 1 by taking therefrom certain territory and erecting said territory into a new school district; that on February 13, 1896, said Commissioner Allerton wrote to the president of the board of education of said union free school district no. 1, informing him of the filing of said petition and asking if the trustees would consent to the erection of the proposed new district, and on March 4, 1896, said Allerton received a letter from said board dated March 2, 1896, informing him that said board had refused to give its consent; that on March 6, 1896, said Commissioner Allerton made a preliminary order erecting said new school district, to be known as district no. 3, East Chester, to be composed of territory theretofore contained in said union free school district no. 1, and reciting therein that the trustees of said district did not consent to said order, and which order was filed with the town clerk of the town of East Chester;

that on March 14, 1896, said Allerton gave notice in writing to the trustees of said district no. 1, East Chester, that on March 25, 1896, at 8 o'clock in the evening he would attend at the office of the town clerk of the town of East Chester, at Tuckahoe, to hear objections to the erection of said new school district; that in pursuance of said notice the said Allerton did attend at the time and place stated in said notice, and due opportunity was given to all persons who desired to be heard to present their objections, and all such persons were heard, the principal objection as stated being that said union free school district no. 1, East Chester, could not be legally altered or divided, as there was upon said district an outstanding bonded indebtedness; that afterward said Commissioner Allerton decided to confirm said preliminary order made by him on March 6, 1896, and made his confirmatory order dated March 25, 1896, erecting said new school district out of territory theretofore contained in said district no. 1, thereby consequently altering and dividing said district no. 1, which confirmatory order was to take effect on June 10, 1896, and which order was filed with the town clerk of the town of East Chester on March 31, 1896.

Section 30 of article 5, title 8, of the Consolidated School Law of 1894, among other things, enacts "And the school commissioner having jurisdiction may alter any union free school district whose limits do not correspond with those of any incorporated village or city, in the manner provided by title 6 of this act, but no such district shall be altered or divided upon which there is an outstanding bonded indebtedness."

In section 6, title 6, of said Consolidated School Law of 1894, it is enacted: "He (school commissioner) may alter the boundaries of any union free school district whose limits do not correspond with those of any city or incorporated village, in like manner as alterations of common school districts may be made as herein provided; but no school district shall be altered or divided which has any bonded indebtedness outstanding."

The application to Commissioner Allerton to alter or divide said district no. 1 by taking therefrom certain territory and erecting said territory into a new school district, was made about February 10, 1896, but it was not until March 4, 1896, that he was informed by the trustees of said district no. 1 that they refused their consent to such alteration of their district.

This Department has held that a school commissioner has no jurisdiction to alter a school district until the trustees thereof have been asked and have given, or refused to give their consent. Commissioner Allerton, therefore, had no jurisdiction to make any order in the premises until March 4, 1896, and it appears he did not make any order until March 6, 1896.

It is clear that on March 4, 1896, there was upon said union free school district no. 1, East Chester, an outstanding bonded indebtedness, and that said district had a bonded indebtedness outstanding of $25,000, and, therefore, under the provisions of the school law, said Commissioner Allerton was forbidden to alter or divide said district.

The preliminary order of March 6, 1896, did not alter or divide said district or erect a new district, but was inchoate, simply a step in the proceeding, and

of no effect whatever until the same was confirmed by his action, or that of the local board, if the supervisor and town clerk were associated with the commissioner upon the hearing of objections, at the request of the trustees of district no. 1, under the provisions of the school law.

It was the confirmatory order of March 25, 1896, which, by its terms, was not to take effect until June 10, 1896; that said alteration or division of said district, and the erection of the new district, could be made and become operative, and on and since March 4, 1896, said union free school district no. 1, East Chester, had and has a bonded indebtedness outstanding.

As the provisions of the school law prohibited the alteration or division of said school district, I have not deemed it necessary to consider any other question presented by the appeals herein.

The appeals are sustained.

It is ordered, That the preliminary order made by Walter S. Allerton, school commissioner, on March 6, 1896, and the confirmatory order made by him on March 25, 1896, altering and dividing union free school district no. 1, town of East Chester, Westchester county, and the erection of a new school district, to be known as school district no. 3, town of East Chester, Westchester county, out of territory heretofore contained in said union free school district no. 1, are, and each of them is, hereby vacated and set aside.

3512

William Morrison, as sole trustee of school district no. 1, towns of Stockport and Greenport, Columbia county, N. Y., from an order of the school commissioners of Columbia county, and an order affirming the same, altering school districts no. 1, Stockport and Greenport, and no. 2, Stockport.

Alteration of school districts is a purely statutory proceeding. Provisions of title 6, chapter 555, Laws of 1864, must be strictly followed.

When a school district lies within two commissioner districts, one commissioner can not alter or divide it.

Town officers are not authorized to proceed to hear objections to the alteration of a school district lying in two commissioner districts, or to make any order in the premises unless both commissioners attend.

The preliminary order for the formation of a new district, in case the trustees refuse to consent thereto, provided for in section 3, title 6 of the Consolidated School Act, is *inchoate* and of no effect, until confirmed by the order provided for in section 4.

Decided July 24, 1886

Draper, *Superintendent*

This is a proceeding by William Morrison, sole trustee of school district no. 1, Stockport and Greenport, Columbia county, N. Y., appealing from an order made by the school commissioners of Columbia county on the 26th day of January 1886, altering school districts no. 1, Stockport and Greenport, and no. 2,

Stockport, by taking a part of the territory of the former district and adding it to the latter, and from the order of the local board confirming such order on the 8th day of February 1886.

The objections raised to the proceedings appealed from are:

1 That the confirmatory order is void for the reason that the school commissioner of the first commissioner district did not unite in the same.

2 That the local board was without jurisdiction for the reason that the supervisor and town clerk of Greenport had not been requested to participate in the proceedings thereof by the trustees of district no. 1.

3 That great wrong and injustice will be done district no. 1, by the alteration.

The facts relating to the procedure are as follows: On the 26th day of January 1886, Oliver W. Hallenbeck, school commissioner, of the first commissioner district of Columbia county, and Peter Silvernail, school commissioner of the second commissioner district, duly made and filed their order altering school districts no. 1, Stockport and Greenport, and no. 2, Stockport, by taking part of the territory of no. 1 and adding it to no. 2. The trustee of district no. 2, John P. Van Buren, duly consented to said alteration, and the trustee of district no. 1, William Morrison, dissented, as recited in the order. It appears that district no. 2 lies wholly in the second commissioner district of the county, and district no. 1 partly in the second and partly in the first commissioner district. The trustee of district no. 1 not consenting to the alteration, the order was made to take effect not until the 15th of May 1886. Copies of the commissioners' order, and of the assent and dissent of the trustees of the respective districts were filed in the town clerks' offices of the towns of Stockport and Greenport on the 27th day of January 1886. On the 29th day of January 1886, notice was served by the commissioners on the trustees of both districts, that on the 8th day of February 1886, at 10.30, a. m., at Kittle's Hall, in Stockport, they intended to make a final order for the alteration of said school districts.

The trustees of school district no. 2 notified the supervisor and town clerk of Stockport of the intention of the commissioners, and requested them to be associated with the commissioners at such time and place. The trustee of school district no. 1 did not request the supervisor and town clerk of Greenport to be associated with the commissioner. It further appears that on the 8th day of February 1886, at 10.30, a. m., and at Kittle's Hall, in Stockport, pursuant to the notices aforesaid, the commissioner of the second commissioner district of the county, and the supervisor and town clerks of Stockport and Greenport met and made an order affirming the original order. This order was duly filed in the proper town clerks' offices.

The alteration of school districts is a purely statutory proceeding, and the provisions of title 6, chapter 555, Laws of 1864, must be strictly followed.

In the case before me, the first objection urged to the proceeding is, that the commissioner of the first commissioner district did not unite in the confirmatory order made February 8, 1886, and it becomes necessary to examine

the question as to whether it was necessary for both commissioners to unite in this order.

The sections under which this alteration was made are 3 and 4 of title 6 of the act referred to, and read as follows:

"§ 3 If the trustees of any such district refuse to consent, he may make and file with the town clerk his order making the alteration, but reciting the refusal, and directing that the order shall not take effect as to the dissenting district or districts until a day therein to be named, and not less than three months after the notice in the next section mentioned.

"§ 4 Within ten days after making and filing such order he shall give at least a week's notice, in writing, to one or more of the assenting and dissenting trustees of any district or districts to be affected by the proposed alterations, that at a specified time and a named place within the town in which either of the districts to be affected lies, he will hear the objections to the alterations. The trustees of any district to be affected by such order may request the supervisor and town clerk of the town or towns within which such district or districts shall wholly or partly lie to be associated with the commissioner. At the time and place mentioned in the notice the commissioner or commissioners, with the supervisor and town clerks if they shall attend and act, shall hear and decide the matter; and the decision shall be final, unless duly appealed from. Such decision must either confirm or vacate the order of the commissioner, and must be filed with and recorded by the town clerk of the town or towns in which the district or districts affected shall lie."

I must examine first what jurisdiction, in respect to territory, commissioners have. Section 1 of this title reads, "it shall be the duty of each school commissioner in respect to the territory within his district:

1 To divide it, so far as practicable, into a convenient number of school districts, and alter the same as herein provided."

The significance of subdivision 1 of section 1 can readily be seen.

The jurisdiction of a school commissioner to alter districts is thereby extended only over the territory of his own commissioner district. But school districts frequently lie in two or more school commissioner districts, and, in such cases, the jurisdiction of one commissioner not extending over the whole territory, section 6 of the same title provides, that "the commissioners within whose districts any such school district lies, or a majority of them, may alter or dissolve it."

School district no. 1, Stockport and Greenport, lies within two school commissioner districts. For this reason one commissioner can not alter or divide it, but under the authority in section 6 "the commissioners, or a majority of them," may make any alteration or dissolution thereof. One not being a majority of two, it will require the concurrent action of both commissioners to make an alteration of this district. This presents the question as to when or by which order the alteration takes effect. A long line of decisions upon this point, in

which the effect of the two orders, provided for in cases similar to the one here, are ably discussed, strengthens me in the conclusion that the preliminary order provided for in section 3 is *inchoate* and of no effect whatever until the same has been duly confirmed as provided for in section 4. If, after making the first or preliminary order, no further proceeding is taken, the alteration is not affected. "The commissioner or the commissioners, with the supervisors and town clerks, if they shall attend, shall hear and decide the matter." "Such decision must either confirm or vacate the order of the commissioner." This language of the statute, and the construction that must be placed upon it is, that when a preliminary order for the alteration of a school district has been made, and the time fixed for the hearing of objections thereto, the commissioner, if the districts affected by the order lie in one commissioner district, or the commissioners, when the districts are located in two or more commissioner districts, shall hear and decide the matter and enter an order vacating or confirming the preliminary order. The commissioner "shall attend," the statute says. The attendance of the supervisors and town clerks is provided for, so that their respective towns may have a voice in the decision of the matter, but the statute does not say they "shall attend."

The absence of the town officers from the board will not in any way prevent the commissioner or commissioners from acting, or invalidate the proceedings taken by the commissioners at the time fixed for the hearing of the objections, otherwise regular. But if the commissioners do not attend, the town officers are not authorized by law to make any order in the premises, and the preliminary order must fall. In this case the school commissioner of the first commissioner district did not attend the meeting on the 8th of February 1886, for the purpose of hearing objections, and did not unite with the other commissioner in the confirmatory order. The confirmatory order is the one by which the alteration of the districts is affected, and the first order, merely preliminary, being in fact but one step in the procedure for the alteration, and if not followed by the subsequent statutory requirements, it is void.

The direction of the statute, the "commissioner shall attend," was not complied with.

The school commissioner of the second commissioner district had no authority under the statute to make an order altering a school district lying wholly or partly in another commissioner district. The failure of the commissioner of the first district to unite in the confirmatory order renders the proceedings irregular, and the orders appealed from must be set aside.

The disposition of the foregoing questions makes it unnecessary to examine the other objections raised by the appellants.

The appeal is sustained, and the order appealed from hereby vacated and set aside.

3635

In the matter of the appeal of John C. Keller and Willis Baldwin, trustees of school district no. 2, town of Hunter, in the county of Greene, v. Henry B. Whitcomb, school commissioner of the first commissioner district of Greene county.

The power given to a school commissioner to divide a school district is purely statutory, and the commissioner must follow the provisions of the statutes literally and fully.

Order vacated because of failure to do so.

The advisability of dividing a village into two districts, with two small schools, instead of continuing as one district with a good-sized school, questioned and disapproved.

Decided September 19, 1887

Clarence E. Bloodgood, Esq., attorney for appellant
Hallock, Jennings & Chase, attorneys for respondent

Draper, *Superintendent*

This is an appeal by the trustees of district no. 2 of the town of Hunter, Greene county, from an order made by the respondent upon the 19th day of October 1886, and also from an order made by said commissioner on the 19th day of November 1886, confirming the first mentioned order, by which orders a portion of said district no. 2 was set off and constituted a separate school district, to be known as district no. 11.

The appellants claim that the proceedings of the commissioner were irregular, and that, whether they were or not, the order appealed from is inadvisable as being against the best interests of education in the locality.

It is claimed that the proceedings were irregular, in that the first order was made without the consent of the trustees of the district affected, and that no such notice as the statute requires was given that the commissioner would hear objections, at a specified time and place, to the alterations made in the order.

The notice given was as follows:

To the Trustees of District No. 2, in the Town of Hunter, Greene County, N. Y.:

Take notice that I intend, on the 8th day of November next, at two o'clock in the afternoon of that day, at the residence of Samuel S. Mulford, in the town of Hunter, Greene county, New York, to make an order for the alteration of school district no. 2, in the town of Hunter, aforesaid, by cutting off a portion of the same and forming a new school district, to be known as district no. 11, of said town.

The portion of said district no. 2, so to be cut off and to form said new district, is bounded and described as follows, viz: Bounded on the north by the north lines of lots nos. 2, 3, 4, 5 and 6, in great lot no. 24, west part of the Hardenburgh patent; east by the west line of the east half of said great lot no. 24, Hardenburgh patent; south by the height of lands next south of the Schoharie kill, and west by a line drawn parallel with said lot lines and crossing the highway running through the village of Hunter at the division line between the lands of Wm. F. Greene and the lands occupied by William A. Douglass — excepting therefrom the house and lands on lot no. 5 of said great lot no. 24, west part of

Hardenburgh patent, formerly occupied by Michael Sax; also excepting therefrom the farm and lands on the easterly side thereof, now occupied by Samuel Brown.

You are therefore requested to meet without delay and to adopt a resolution consenting to the above proposed alteration, in which case you will please furnish me at the same time and place above mentioned with a copy thereof, certified under the hands of a majority of you, or to adopt a resolution applying to the supervisor and town clerk of Hunter aforesaid to be associated with me at the time and place above mentioned in determining on the propriety of such proposed alteration.

In the latter case you will please transmit copies of such resolution, certified under the hand of a majority of you, to the supervisor and town clerk without delay, together with a notice of the time and place above stated at which such alteration will be made by me in case of their nonattendance.

Dated *October 10, 1886.*

HENRY B. WHITCOMB
School Commissioner

Section 4 of title 7 of the Consolidated School Act provides that "Within ten days after making and filing such order, he (the commissioner) shall give at least a week's notice, in writing, to one or more of the assenting and dissenting trustees of any district or districts to be affected by the proposed alterations, that at a specified time and at a place named within the town in which either of the districts to be affected lies, he will hear the objections to the alterations."

It has always been held that the alteration of school districts can only be effected by a strict construction of, and a rigid adherence to, all of the requirements of the statutes relating to the subject. The several steps indicated in the statutes must be taken with care before the alteration can be effected. For obvious reasons this ought to be so. The individual rights and interests which are involved in proceedings to alter school districts are too numerous and too important to be lightly dealt with. The courts have uniformly held that when power to affect property is conferred upon those who have no personal interest in it, such power can be exercised only in the precise manner specified in the law or instrument conferring the power. This rule has always been rigidly adhered to by this Department in considering appeals from orders altering the boundaries of school districts.

Now, applying these general principles to the present case, we find that the statute requires the commissioner to give notice of a time and place, when and where he will hear objections to the alteration. The gist and purpose of the requirement is that the trustee and other persons objecting to this change shall be clearly and plainly notified, in writing, of a time and place when they may have a public opportunity to interpose their objections.

The statute likewise guarantees them the right of having the matter determined only after such opportunity shall have been afforded them. If this requirement and this right were only technical, they would have to be complied with and protected; but it seems to me they are not technical. The law confers

upon the objectors a substantial right to an exact and specific notice of their rights in the premises, and sound public policy requires that the requirement should be literally and fully observed. In my judgment, the notice given by the commissioner in this case, does not meet the requirement of the statute. The notice starts out with the declaration that, upon a day specified, "I intend to make an order for the alteration." The law provides that the commissioner shall first hear any objections offered, and then decide what he ought to do. It is true that subsequently the notice contains the request that the trustees shall adopt a resolution consenting to the alteration or applying to the supervisor and town clerk to be associated with the commissioner "in determining upon the propriety of such proposed alteration." But it nowhere informs them of their right to present their objections directly to him or to a board consisting of himself, the supervisor and the town clerk. I think the omission is fatal.

The contention of the respondents that the appellants were not injured or misled by the defect in the notice, can not be sustained. They may have been. The fact that the commissioner followed the form of notice laid down for his guidance in the Code of Public Instruction will go a long way towards exculpating him from any charge of blundering, but it will not make the notice a sufficient one. In the later editions of the Code the form of notice had not been changed as it should have been, to conform with the changes in the statute.

The conclusions above set forth, of course, render it necessary to sustain the appeal and set aside the orders appealed from. But the desire was expressed by both of the able counsel who appeared upon the argument that, in any event, the decision should not be allowed to turn solely upon the question raised as to the regularity of the proceedings, for the reason that, if the order was set aside, only because of an irregular proceeding, the ground would have to be all gone over again in order to get a decision of the case upon the merits, and that time, trouble and expense would be saved by a determination of the case upon its merits now. In view of this I listened to exhaustive arguments, in which all that could well be said upon the merits of the case was ably presented.

It appears that prior to 1880 the territory comprising district no. 2 constituted three school districts, which were joined in one district by the then school commissioner. It seems to be generally agreed that the consolidation would have been generally approved if the schoolhouse for the combined district had been located nearer to the center of the village of Hunter. The alteration now proposed makes the division line to run nearly through the center of the village. It would seem to be an arbitrary division. Why it should be run just there it is difficult to determine. The advisability, in an educational point of view, of dividing a single village into two school districts, is doubtful. Experience shows that better results are obtained in large schools where opportunity is afforded for suitably grading the pupils, than in a small one where all ages and classes have to be gathered into the same room. It seems also that in 1882 application was made to the school commissioner to make the precise alteration from the order making which an appeal is now taken, and that from his refusal

to do so an appeal was taken to this Department and that the Superintendent (Gilmour) overruled the appeal. In view of these facts, reasons more weighty than those now advanced would have to be presented, and a substantial unanimity of desire on the part of the people of the district affected would have to be shown, before I should feel justified in sustaining the suggested division.

The appeal is sustained and the orders appealed from are set aside and declared void and of no effect.

3620

In the matter of charges against Charles F. White.

The order of a school commissioner dividing a large school district will be sustained when it appears that the proceedings were regular and that injustice has not been clearly shown, or that the action is manifestly against the educational interest of the district. Trustees are not bound to call a special meeting for the consideration of the question of dividing a district. Such a meeting would have been entirely proper, but this is a matter the responsibility for which rests with the trustees and the school commissioner.

Neither malfeasance in office nor immoral character being shown, the trustees will not be removed from their offices.

Decided July 16, 1887

Albert W. Seaman, Esq., attorney for respondent

Draper, *Superintendent*

The matter first above entitled is an appeal from the order of the respondent made on the 22d day of April 1887, dividing school district no. 2, of the town of Newtown, and setting off a portion of said district into a new school district, to be known as district no. 12.

A very rancorous controversy has been going on in district no. 2 of the town of Newtown for a long time, which has been brought before this Department at numerous times and in a variety of forms.

At the annual school meeting in the district, held August 31, 1886, action was initiated looking to the construction of a new schoolhouse. At subsequent special meetings this step was determined upon, and a new site was selected for the purpose. The supervisor of the town refused to consent to the change of site, and was overruled by the Department upon an appeal taken by W. H. Proctor and others. Agreements were made for the purchase of a new site. Then a movement was started looking to the division of the district. The board of trustees is divided in opinion as to the advisability of such action. At a meeting of the board held on the 11th day of April 1887, a petition was received from Joseph B. Denton and others, asking the board to consent to a division of the district. Two of the three members voted to give such consent; the third voted against it. Taking this consent as the basis of his action, the school commissioner made his order dividing the district on the 22d day of April, from which order this appeal is taken.

An appeal is also pending from the neglect or refusal of the board of trustees to call a special meeting of the district to consider the matter of dividing the district, and charges are also pending against Trustees George W. Smith and Charles F. White, upon which it is asked that they be removed from office.

The voluminous papers bearing upon all of these proceedings have been examined with care, and extended arguments of the various counsel representing the different interests have been heard.

The most important of all of the proceedings is the appeal from the order of the commissioner dividing the district. It was made upon the consent of a majority of the board of trustees of the district. No irregularity in the proceedings is shown. It is objected that the consent of the board preceded the order of the commissioner, but this was clearly right. The commissioner could not have made the order he did except after such consent had been given. It is objected also that there was no "deliberation" in the board at the time of the action giving consent was taken. All of the members were present, and there was apparently as deliberate procedure as the heated circumstances would allow. It is not shown that all of the provisions of law governing the procedure were not strictly observed. It, therefore, is only left for me to determine whether the order appealed from was advisable.

It is the practice of this Department to sustain the orders of school commissioners, altering school districts, where their proceedings are regular, unless the action taken is shown to be clearly unjust to some interest which may be involved, or is manifestly against the educational interests of the locality.

It appears that the assessed valuation of district no. 2 before division was about $445,000. The assessed valuation in the two districts, after division, is respectively $260,000 and $184,000. One hundred and fifteen children of school age reside in the territory which has been set off. The fact, which is shown in the papers, that less than twenty of this number have heretofore attended the public school, seems best explained on the ground that school facilities have been either inadequate or inaccessible. The district is accumulating in population. By common consent added school accommodations are needed. A new schoolhouse upon a new site is to be erected. The site selected is some distance, though not great, farther from the proposed new district than the one heretofore occupied. It seems doubtful if the pupils of the old district could long be accommodated in one building. It likewise seems impracticable for all of the electors in so large a district to meet and transact business intelligently in a school meeting. These difficulties will increase and multiply.

In view of these considerations, it is impossible to say that the commissioner did not exercise his discretion wisely in making the order appealed from. It is certainly not shown to my satisfaction that he did not, and I am, therefore, unable to sustain the appeal.

Desiring to dispose of all matters pending before the Department relating to this district, I also dismiss the appeal from the refusal of the board of trustees to call a special meeting of the district to consider the question of division,

and I dismiss the charges against Trustees Smith and White. It would have been entirely proper, and perhaps advisable, for the board to have called a meeting for the consideration of the matter. But it was a matter, the responsibility of which the law placed upon the trustees, and they had the legal right to follow their own judgment and act accordingly. No allegations are made against Messrs Smith and White which would justify their removal from office. No immoral character or malfeasance in office is shown. They have had part in the general conflict of opinion in the district, and perhaps have been headstrong in carrying out their opinions, but probably no more so than very many others have been or would have been in their places.

The several above-entitled appeals and charges are therefore dismissed.

5440

In the matter of the appeal of Alfred G. Lewis from the dissolution and annexation of school district no. 8, town of Geneva, Ontario county.

Alteration of boundaries of district; desires of taxpayers not alone conclusive. Where an appeal is brought from an order dissolving a school district and annexing the territory thereof to another district, the fact that the appellant is the owner of a considerable portion of the territory annexed will not control the decision of the appeal, if it appears that the people of the district have profited educationally by the order.

Order modified so as to conform to wishes of residents. Where a district is dissolved and its territory annexed to a union free school district and it appears that the residents of the district living outside of the city desire to retain the school district organization and those residing within the city desire to be annexed to the union free school district, comprising the greater portion of such city, the order should be modified so as to provide for the maintenance of a district outside of the city.

Decided February 28, 1910

G. M. B. Hawley, attorney for appellants

Draper, *Commissioner*

The appellant, Alfred G. Lewis, owns a large tract of land located outside of the city of Geneva, in former school district no. 8, town of Geneva, county of Ontario. He paid more than one-quarter of the school taxes in such district, being assessed for school purposes in the sum of $56,270. He complains of an order granted by W. A. Ingalls, school commissioner of Ontario county, dissolving such district no. 8, town of Geneva, and annexing the territory thereof to union free school district no. 1, town of Geneva. The latter district comprises nearly all of the city of Geneva, although its boundaries are not coterminous with those of the city.

It is clear that Commissioner Ingalls acted in good faith in making this order. It is probably true that a considerable portion of the district would be benefited by annexation to the union free school district. The educational interests of certain parts of district no. 8 situated within the city limits would doubtless be

promoted by such annexation. The school commissioner, acting under the advice of the Department, directed the trustee of the district to call a special district meeting to vote upon a proposition of raising money to build a larger schoolhouse, or to have the district dissolved and annexed to school district no. 1. Such a meeting was held October 11, 1909, and thirty votes were cast upon the question of dissolution and annexation, of which twenty-four were favorable and six opposed. The trustee of the district gave his consent to the action, and the board of education of district no. 1 also consented. The order dissolving the district and annexing its territory to union free school district no. 1 was entered October 23d, to take effect October 25, 1909.

The appellant insists that a large number of the qualified electors were not personally served with notices of the special meeting called to consider this question. The notices were served on all the qualified electors so far as known to the clerk of the district. It is apparent that a number received no notice, but the failure was not intentional nor was fraud shown on the part of the clerk. The meeting was legally held and was sufficient to give the school commissioner the required information as to the sentiment of the district in respect to annexation. After this meeting those living outside of the city proposed that the order of dissolution and annexation be set aside and a new order be granted dividing the district at the city line, and establishing a new district out of that part of the old district which was situated outside of the city. This proposition was not voted upon at the special meeting. The appellant caused petitions to be circulated among the taxpayers of the former district for the purpose of ascertaining what the district thought about this method of settling the controversy. It is apparent that the greater part of these taxpayers desire a division of the district, and the annexation of that part within the city to district no. 1. The appellant asks that the order be annulled and that the school commissioner be directed to issue an orded dividing the district in accordance with this petition.

The fact that the appellant is the largest taxpayer of the district, owning a considerable portion of the territory thereof, should not control the decision of this appeal. It will be his duty, as well as that of every other taxpayer, to pay what is required for the most advantageous advancement of the educational interests of the community. The petition asking the annulment of the order appealed from is signed by taxpayers and does not seem to have been presented to those electors who have children in attendance at school, or who rent taxable property within the district. The opinions of such persons are entitled to the same consideration as are the opinions of those who pay taxes. An appeal based solely upon the assertion that the appellant's financial interests are adversely affected by the act complained of, will receive little attention, especially if it appears that the district has profited educationally by such act. Notwithstanding this defect, it clearly appears that nearly all of those living in the former district, outside of the city, are favorable to the establishment of a new district out of that territory; it also seems that a majority of those within the city are willing to be annexed to the city.

The question of the effect of the annulment of this order and a subsequent division along the line suggested, upon the educational prosperity of the community, must be first considered. The assessed valuation of that part of district no. 8, lying without the city limits, is $99,750, and of that within the city limits is $85,904. There are at least sixteen pupils living within that part of the district outside of the city who have been attending the school in such district since its annexation to the city district. It is evident therefore that that part of former district no. 8 is strong enough financially and in number of pupils to maintain a thoroughly efficient elementary school. The educational strength of this community will not be lessened by the maintenance of a small school, with a competent teacher, under a trustee who is reasonably desirous of promoting the educational welfare of his own and his neighbors' children.

It would not be just to disregard the wishes of those living outside the city and within the confines of the former district, if such wishes may be carried out without seriously affecting the interests of the school or of the community. It is therefore incumbent upon me to sustain the appeal. The school commissioner should make a new order annexing to union free school district no. 1 all that part of district no. 8 which lies within the city of Geneva and altering the boundaries of district no. 8 so as to include only so much of its territory as lies outside of such city. The board of education of union free school district no. 1 was made a party to this appeal. The board did not answer, so that it may be assumed that they have acquiesced in the relief sought. The board will therefore doubtless agree to the annexation of that part of district no. 8 which lies within the city limits.

In sustaining this appeal the fact should be emphasized that the Commissioner of Education has not been influenced by the argument that the order appealed from has imposed an added burden of taxation for school purposes upon the taxpayers of the district. The tax of $6.78 per thousand is not too much to pay for the privileges of a school system such as that maintained by the city of Geneva. The taxpayers and patrons of the school, living in district no. 8 outside the city, desire to run their own school. The privilege will be granted them, but with the distinct understanding that liberal appropriations must be made for repairs and alterations, apparatus and equipment, and teacher's salary. The appellant and others who have joined with him in the petition will be held personally accountable for the maintenance of a first-class school in this district. If there be any failure in this regard the school commissioner will be directed to issue an order dissolving the district and annexing it to union free school district no. 1.

The appeal is sustained.

It is hereby ordered, That the order executed by Willis A. Ingalls, school commissioner of the first school commissioner district, county of Ontario, dissolving school district no. 8, town of Geneva, and annexing its territory to union free school district no. 1, town of Geneva, which order was dated October 23, 1909, and filed in the office of the town clerk of such town on October 25, 1909, is hereby revoked and set aside.

It is hereby ordered, That the order executed by Willis A. Ingalls, forthwith take such action as may be required under article 2 of the Education Law to alter the boundaries of said school district no. 8, town of Geneva, and union free school district no. 1, so that all of that part of such district no. 8, as lies within the limits of the city of Geneva, shall be annexed to, and become a part of, union free school district no. 1.

5354

In the matter of the appeal of Benjamin F. Milks from the action of School Commissioner J. D. Jones of the second school commissioner district of Allegany county in making orders dissolving school district no. 6, town of Amity, and annexing portions thereof to school districts no. 1, town of Scio, and no. 5, town of Amity

The fact that certain residents of a district will be somewhat farther removed from a schoolhouse though still within a reasonable distance of one as such distances are usually determined in rural districts should not be regarded as sufficient ground to defeat the plan to give a community affected the school facilities which would follow from the action complained of.

Decided October 3, 1907

D. D. Dickson, attorney for appellant
Jesse L. Grantier, attorney for respondent

Draper, *Commissioner*

On June 15, 1907, John D. Jones, school commissioner of the second school commissioner district of Allegany county, made an order dissolving school district no. 6, town of Amity. On the same date he also made concurrent orders annexing the northern portion of such district to district no. 5, Amity, and the southern portion of such district to district no. 1, Scio. This appeal is brought by Benjamin E. Milks who was trustee of school district no. 6, Amity, at the time the school commissioner made the order of dissolution. It appears that there had been considerable discussion previous to the issuance of these orders in relation to the annexation of the whole of district no. 6 to district no. 1. To this proposition the residents of district no. 6 appeared to have been unanimously opposed. It appears that every resident voter of the district petitioned the school commissioner in opposition to such annexation.

The commissioner did not make an order annexing the whole of such district to district no. 1, Scio. He dissolved the district and annexed one portion to the district north of no. 6 and the other portion to the district south of it. There is nothing in the pleadings to show the exact attitude of the residents of no. 6 upon the orders which the school commissioner did make. No meeting of the voters of the district appears to have been held. The trustee was not directed by vote of the district to bring this proceeding. He undoubtedly represents the

views of a majority of the voters of the district upon such questions. While there is nothing in the pleadings showing a specific declaration of the voters of the district upon the orders made the pleadings do seem to indicate that a decisive majority of the inhabitants of the district is opposed to such orders.

During the school year ending July 31, 1907, the number of pupils attending school in district no. 6 was only eleven. Two of these moved from the district during the year. The average attendance last year was less than eight. It appears that the number of pupils in attendance at school from such district and the average attendance thereof will be still less this year. The district must therefore be regarded as numerically weak.

The school commissioner's rearrangement of the territory of this district has been such as to place all children within a reasonable walking distance of a schoolhouse. None of the children will be required to walk more than two miles to attend school. The distance for many of these children will be much less. The highways are good hard roads and on which there is much travel. It is not shown that the orders complained of will operate as a hardship upon any of the children of the district.

The prime object which the school commissioner had in mind when he made these orders was to establish a strong central school at Scio. The appeal of Melvin H. Pendleton from the dissolution of district no. 2, Scio, is closely related to this proceeding. The hamlet of Scio is located in the northwest corner of district no. 1. The schoolhouse of no. 1 is located in the hamlet of Scio. District no. 2, Scio, and district no. 6, Amity, join no. 1, Scio. These two districts also extend to within a short distance of the schoolhouse in district no. 1. District no. 1 has a new modern schoolhouse with proper equipment. It has the facilities to accommodate all the children of the territory annexed by the order in question. The school is properly graded, the teachers employed therein are superior to those that are generally employed in rural schools. None of the rooms will be overcrowded. The educational needs of the community will be greatly promoted by the establishment of this strong central school through the consolidation of the districts in question. Sufficient property and sufficient pupils will be joined to enable the district to maintain an academic department. The school commissioner was justified in making these orders to effect the results desired provided that thereby he did not impose an injustice or a hardship upon residents of the districts affected and even if a majority of the voters of such districts were opposed to such orders. The fact that two families will be somewhat farther removed from a schoolhouse though still within a reasonable distance of one, as such distances are usually determined in rural districts, should not be regarded sufficient ground to defeat the plan to give the community affected the school facilities which should follow from the action complained of. The inconvenience which any of the residents of these districts may suffer from the standpoint of distance to a schoolhouse will be overcome by the better school facilities which will be afforded. The school commissioner should be sustained herein.

The appeal herein is dismissed.

5341

In the matter of the appeal of John Van Dusen et al. from the decision rendered by D. F. Hiler, school commissioner of the first school commissioner district of Steuben county in relation to the alteration of the boundaries of school districts nos. 13 and 5, town of Bath, Steuben county.

When it appears that a portion of a school district should be annexed to an adjoining village district in order to afford the residents of such portion of the district proper school facilities, and such action may be taken and still leave the district with sufficient property and sufficient children to maintain a good school, and the trustees of the districts affected give their written consent to such alterations, the school commissioner should make an order accordingly.

Decided September 26, 1907

Thomas Shannon & Clarence Willis, attorneys for appellants

Draper, *Commissioner*

On September 17, 1906, 27 residents of school district no. 13, town of Bath, Steuben county, petitioned D. F. Hiler, school commissioner of the first school commissioner district of Steuben county, to so alter the boundaries of said district as to transfer therefrom the property owned by petitioners and situated therein to union free school district no. 5, town of Bath. Attached to such petition was the written consent of the trustee of school district no. 13 and the written consent of the board of education of union free school district no. 5. The school commissioner had the authority therefore to make the order at once and without giving a hearing upon the question.

It appears from the moving papers that the school commissioner did not render a decision on such petition until July 29, 1907. No explanation is given for a delay, by the school commissioner, of more than ten months in passing upon this important question.

School district no. 5 is a union free school district maintaining a graded school including an academic department and is within the incorporated village of Bath. The territory which petitioners desired transferred is also within the said village. Good sidewalks are maintained from that section of the village to the schoolhouse. It also appears that public conveyances go from this section of the village by the schoolhouse and return several times during the day. Children could therefore find a means of conveyance on stormy days. Although residents of district no. 13 the children from this portion of the village generally attend the school in district no. 5 and pay the regular rates of tuition. The owners of property must also pay their taxes for school purposes in district no. 13. District no. 13 is a rural district in a farming region. The schoolhouse is about two thirds of a mile outside of the corporation limits. There are no sidewalks and the roads are generally drifted in winter. It also appears that in going to the schoolhouse in district no. 5 the children may cross the railroad tracks at a guarded crossing, but that in going over the tracks on the way to and from school in district no. 13 they are required to use a crossing which is unguarded.

It appears that all the interests of the residents of this section of the district are associated with the interests of district no. 5.

Under all the circumstances it appears that the logical place for the territory in question is in school district no. 5. The property might be transferred and still leave district no. 13 with an assessed valuation of $95,000.

The school commissioner has declined to file an answer to this proceeding and it must therefore be determined on the moving papers. In view of the fact that the trustee of district no. 13 gave his written consent to the alteration proposed and the district still possesses sufficient property to maintain a good school, I do not understand why the school commissioner is unwilling to make the order. It appears clear that he erred in not making such order. Petitioners are entitled to relief prayed for.

The appeal herein is sustained.

It is ordered, That D. F. Hiler, school commissioner of the first school commissioner district of the county of Steuben shall without unnecessary delay, make an order altering the boundaries of school district no. 13, Bath, and the consequent alteration of school district no. 5, Bath, so as to effect the transfer of territory from said district no. 13 to said district no. 5 as requested in the petition filed with him on the 17th day of September 1906, and signed by John Scott and 26 other residents of said district no. 13, Bath.

4376

In the matter of the appeal of George Wolcott and others v. Ella Gale, school commissioner, second commissioner district of Tompkins county.

Where a school district has a board of three trustees and an application is made to such trustees for their consent in writing to the alteration of their district, such trustees must meet and act as a board upon such application, and the fact of such meeting being held and consent given, should be set forth in the written consent signed by them, presented to the school commissioner. It appearing that no such meeting of the trustees was held, but the consent of two of such trustees was obtained at different times, and is not the act of the board; *held*, that the school commissioner obtained no jurisdiction to act in altering the boundaries of the school districts and such order must be vacated.

Decided September 27, 1895

C. R. Walcott, attorney for appellants

Skinner, *Superintendent*

Some time between June 24 and July 17, 1895, Ella Gale, as school commissioner of the second commissioner district of Tompkins county, made an order, without being dated, but which by its terms was to take effect on July 17, 1895, and which order purported to have been made upon the consent in writing of the trustees of school district no. 9, town of Dryden, and no. 12, town of Caroline, county of Tompkins, altering the boundaries of said district no. 12 of

Caroline, by setting off a certain farm belonging to one H. P. Banfield from said district, and annexing said farm to said district no. 9, thereby altering the boundaries of said district no. 9. That said order was filed in the office of the clerk of said town of Caroline on July 27, 1895.

On August 30, 1895, an appeal by George Wolcott and others from said order of Commissioner Gale was filed in this Department and on August 31, 1895, an answer by F. D. Snyder, trustee of said district no. 9, town of Dryden, to said appeal was filed.

The grounds stated in said appeal why said order of Commissioner Gale should be vacated are substantially as follows: That said order was not dated and by its terms was to take effect ten days prior to the time said order was filed with the clerk of the town of Caroline; that no valid consent to the said alteration of school district no. 12, town of Caroline, was given by the trustee of said district; that said order does not sufficiently set forth the boundaries of said school districts no. 12 of Caroline and no. 9 of Dryden as altered by said school commissioner.

The facts established by the papers filed herein are as follows: That on and prior to June 24, 1895, there was situate in the town of Caroline, Tompkins county, a school district known and designated as district no. 12 of said town, having three trustees, and that there was also situate in the town of Dryden in said county a school district known and designated as district no. 9, of said town having one trustee; that one H. P. Banfield was a resident of said town of Dryden and said school district no. 9 of said town; that said Banfield was also the owner of a farm of about eighty acres situate in lot no. 93, town of Dryden and in said school district no. 12, Caroline; that said farm does not adjoin the farm or premises on which said Banfield resides; that said farm of eighty acres was leased by said H. P. Banfield to his son who resides thereon; that said H. P. Banfield had no children of school age residing with him, and that his said son had but one child residing with him, which child is of the age of three years; that said H. P. Banfield applied to the trustees of said school district no. 12, Caroline, individually and not as a board, for their consent that the boundaries of said district be altered by the taking of said farm of eighty acres from said school district and annexing the same to said district no. 9 of Dryden, and obtained the signature of Messrs Denman and Graham, two of said trustees to the consent annexed to said order of Commissioner Gale and referred to in said order, and Wolcott the third trustee, verbally refused to sign such consent; that said consent was signed by Mr Snyder, the sole trustee of said district no. 9 of Dryden; that said consent was on or about June 24, 1895, presented to and left with said School Commissioner Gale, who subsequently made the order appealed from, transferring said farm from said school district no. 12, Caroline, and annexing said farm to said school district no. 9, Dryden; that said order is not dated but that it is stated therein that said order should take effect on July 17, 1895; that said order does not define and describe the boundaries of said district no. 12, of Caroline, as altered, nor of the boundaries of said district

no. 9, Dryden, as altered, which district boundaries became altered in consequence of the alteration of the boundaries of district no. 12, of Caroline, by the transfer of said farm therefrom and the annexation of the farm to district no. 9, of Dryden; that the boundary lines of said farm of eighty acres are not sufficiently or definitely set forth in said order by well known established monuments or marks, but by lands owned by different persons.

Under the provisions of title 6, of the Consolidated School Law of 1894, chapter 556 of the Laws of 1894, the school commissioners have power, with the written consent of the trustees of all the districts to be affected thereby, to alter any school district within their respective commissioner districts by an order, and fixing a day in said order when such alteration shall take effect.

This Department has uniformly held that where a school district has a board of three trustees and an application is made to such trustees for their consent in writing to the alteration of their district, such trustees must meet as a board and act as a board upon such application, and the fact of such meeting being held and the consent given should be set forth in the written consent signed by them, presented to the school commissioner.

It is clear that in the application made by said Banfield to the trustees of said district no. 12, town of Caroline, for their consent to said alteration of said district, no meeting of the said board of trustees was held to act upon such application, nor was any consent to such alteration given at any meeting of said board, nor does any notice of any such meeting and consent appear upon the consent presented to said school commissioner or in the proceedings taken relative to such alteration, but on the contrary it appears that the consent of said two trustees of said district no. 12, Caroline, was obtained at different times and was not the act of the said trustees as a board convened for that purpose.

I find and decide that upon the consent as thus obtained from the trustees of said district no. 12, town of Caroline, Commissioner Gale obtained no jurisdiction to act or make the order of July 1895, from which this appeal is taken.

In the disposition of this appeal it is not necessary for me to pass upon the other questions raised by the papers presented.

The appeal herein is sustained and the said order of Ella Gale, school commissioner of the second commissioner district of Tompkins county, is vacated and set aside.

4363

In the matter of the appeal of F. H. Brennan, and others, v. Julia K. West, school commissioner, Richmond county.

Under the provisions of section 6, title 6 of the Consolidated School Law of 1894, no school district shall be altered or divided which has any bonded indebtedness outstanding. This Department has uniformly held that any change, however slight, in the existing boundaries of a school district makes it a change or alteration of such district. An

order of a school commissioner, transferring a portion of the territory of the district not having any bonded indebtedness outstanding to a district having a bonded indebtedness outstanding, is an alteration of said district and prohibited by the school law.

Decided August 1, 1895

Jared Sanford, of counsel for appellants
W. H. H. Ely, attorney for respondents except Mrs West
Julia K. West, respondent in person

Skinner, *Superintendent*

On or about March 16, 1895, Mrs Julia K. West, school commissioner of Richmond county, made an order entitled, "In the matter of the alteration of school district no. 3, of the town of Southfield, Richmond county, and the consequent alteration of school district no. 6, of the town of Southfield, Richmond county," whereby she, upon the consent in writing, as alleged in said order, of the trustees of said school district, altered the boundaries of said districts as in said order set forth, and which said order was to take effect immediately; and which said order, with the papers accompanying the same, were duly filed in the office of the clerk of the town of Southfield, Richmond county. From said order of School Commissioner West, F. H. Brennan, Charles A. Smith and John Smith, qualified voters of school district no. 3, of Southfield; and John P. Purcell and William E. Hounslow, qualified voters in that portion of said district no. 3, of Southfield, set off by said order into school district no. 6, of Southfield; and D. J. Tyson, a taxpayer in both of said school districts, nos. 3 and 6, of Southfield, have appealed.

In support of the appeal herein a protest of thirty-six of the fifty-seven qualified voters residing in that portion of district no. 3, set off into district no. 6, against said order, is filed herein.

It appears from the proofs presented herein that in and by said order of Commissioner West, a strip of land, forming part of school district no. 3, of Southfield, was set off into school district no. 6, of Southfield, and that by said order the track and roadbed of the Staten Island Railroad is made the boundary line between said districts. The appellants allege several grounds upon which their appeal is taken; the principal ones being, that at the time of making the order by Commissioner West, school district no. 6, of Southfield, had a bonded indebtedness outstanding, and that school district no. 3, of Southfield had "virtually" a bonded indebtedness outstanding, and therefore, under the provisions of section 6, of title 6, of the Consolidated School Law of 1894, neither of said school districts could be altered or divided so long as such bonded indebtedness was outstanding.

It is conceded by the appellants and respondents herein that on March 16, 1895, when the aforesaid order of Commissioner West was made, altering the boundaries of both of school districts nos. 3 and 6, of Southfield, said school district no. 6, of Southfield, had a bonded indebtedness outstanding of $4500.

In relation to the allegations contained in the appeal herein that school district no. 3, of Southfield, had, on March 15, 1895, "virtually" a bonded indebtedness outstanding of $6500, the proofs presented herein establish the following facts: That at a special meeting of said district no. 3, of Southfield, duly called and held on May 26, 1894, the following resolution was duly and legally adopted, namely: "That we build a new schoolhouse on the lot selected, and that we bond the district for $6500, to be paid by tax upon the taxable property of the district in ten equal annual instalments, the last instalment to become due and payable within ten years, for the purpose of building a schoolhouse and furnishing the same"; that at a special meeting of the voters of said district, duly called and held on June 30, 1894, the following preamble and resolution were duly and legally adopted, namely: "That whereas at a special meeting of this school district, held May 26, 1894, a resolution was passed, That we build a new schoolhouse on the lot selected and that we bond the district for $6500, to be paid by tax upon the taxable property of the district in ten equal instalments, the last instalment to become due and payable within ten years for the purpose of building a schoolhouse and furnishing the same; and whereas the said bonds have not been issued, and whereas the new law going into effect this day extends the time limit within which the bonds must be made due and payable to twenty years, it is resolved that the time limit of the bonds for $6500, voted by this district at the special school meeting, held May 26, 1894, be extended to twenty years, and that said bonds be paid by tax upon the taxable property of the district in twenty equal instalments, the last instalment to become due and payable within twenty years from the date of said meeting of May 26, 1894"; that on July 14, 1894, Commissioner West, pursuant to the provisions of section 17, article 2, title 7, of the Consolidated School Law of 1894, in writing, approved of the levying by the trustees of said district of said sum of $6500, for the purpose of building a new schoolhouse for said district; that the trustees of said district advertised for proposals from persons who would loan said district said sum of $6500, and take or purchase said bonds at the lowest rate of interest and not below par; that on July 16, 1894, the firm of Edward C. Jones & Co., brokers, 80 Broadway, New York City, offered to give par for said bonds, the same to bear interest at the rate of 6 per cent, subject to proof of legality of their issue; that on or about July 17, 1894, two of the residents and taxpayers of said school district commenced an action in the Supreme Court of the State against the then trustees of said district to enjoin and restrain the consummation of the issue and sale by the trustees of said district of said bonds, and the issue and sale of said bonds were postponed until the hearing and determination of said action; that at the request of the plaintiffs in said action the trial thereof was postponed from time to time until a term of said court, held in and for Richmond county, on the first Monday of May 1895, when the complaint in said action was dismissed with costs; that no bonds for said $6500 or any part thereof have ever been executed, issued or delivered by the trustees of said school district no. 3, nor any sum of money received by said trustees or said district thereon.

The words "bonded indebtedness outstanding" of school districts as contained in section 6, title 6, of the Consolidated School Law of 1894, means an indebtedness of a district covered by bonds duly made and delivered, for which the district has received the amount of money expressed in said bonds, and that such bonds are not paid.

In my opinion the trustees of said school district no. 3, of Southfield, have the legal authority, under and pursuant to the action had and taken by the qualified voters of said district at the special meetings of May 26 and June 30, 1894, to borrow the sum of $6500 for the building and furnishing of a schoolhouse for said district, and to issue bonds payable in twenty equal annual instalments, the last payment to be made on May 26, 1914, or to issue said bonds and sell the same at the best price they can obtain therefor, and to levy annually a tax for the bond and interest becoming due and to pay the annual interest upon the bonds outstanding; but in my opinion, upon the proofs presented herein, on March 15, 1894, said school district did not have any bonded indebtedness outstanding within the meaning of the provisions of the Consolidated School Law.

The questions presented in this appeal for my decision are, first, had School Commissioner West the legal power and authority, under the provisions of the Consolidated School Law of 1894, chapter 556 of the Laws of 1894, to make the order, dated March 16, 1895, from which order the appeal herein is taken; and, second, if said commissioner had such power and authority, has there been a proper exercise thereof.

Prior to June 30, 1894, there were no provisions of the school law forbidding the altering or dividing of school districts, having a bonded indebtedness outstanding, but this Department had uniformly held that any school district having a bonded indebtedness outstanding should neither be altered nor divided so long as such indebtedness remains outstanding. By section 6 of title 6 of said Consolidated School Law of 1894, chapter 556 of the Laws of 1894, that became operative on June 30, 1894, it was enacted, "but no school district shall be altered or divided, which has any bonded indebtedness outstanding."

It is clear that since June 30, 1894, neither School Commissioner West nor any school commissioner in this State, has had any legal power or authority whatever to alter or divide any school district which has any bonded indebtedness outstanding; but on the contrary, every school commissioner in the State is forbidden to make any alteration or division of any school district having any such indebtedness outstanding.

This Department has uniformly held that any change, however slight, in the existing boundaries of a school district, makes it a case of alteration.

Admitting for the purpose of argument solely, that school district no. 3, of Southfield, on March 16, 1895, had neither "virtually" nor actually, any bonded indebtedness outstanding, it is conceded that school district no. 6, of Southfield, had, at the date aforesaid, a bonded indebtedness of $4500 outstanding.

It is clear, by the order of Commissioner West of March 16, 1895 (if she had the legal authority to make said order), a portion of the territory forming

part of said district no. 3, is taken from said district and added to said district no. 6, and the boundaries of district no. 6 are altered thereby as surely as the boundaries of district no. 3 were altered.

I find and decide, therefore, That School Commissioner West had no legal power or authority to make said order of March 16, 1895, but on the contrary, as such school commissioner, she was forbidden and prohibited from making said order; that the appeal herein from said order must be sustained, and said order held to be illegal and void.

The appeal herein is sustained.

It is ordered, That the order made by Julia K. West, school commissioner of Richmond county, bearing date March 16, 1895, which order by its terms was to take effect immediately; and which order was duly filed in the office of the clerk of the town of Southfield, Richmond county; and in and by which said order the boundaries of school district no. 3, of the town of Southfield, Richmond county, and school district no. 6, of the town of Southfield, Richmond county, were altered, and each of said districts was altered, as in said order set forth, be, and the said order is, hereby vacated and set aside, as wholly illegal and void; and that all and every act and proceeding had and taken by said School Commissioner West, relating to said school districts nos. 3 and 6, since March 16, 1895, upon the assumption that said order of alteration was legal and valid, be, and is, and are vacated and set aside as void.

4013

In the matter of the appeal of Robert Sagendorph and Charles Dingman v. Orville Drumm, school commissioner of the second commissioner district of the county of Columbia.

Appeal from the refusal of a school commissioner to divide a district recently bonded to pay for a new school building, and annex a part to a district in which there is a good school building. *Overruled,* commissioner's action sustained.

Decided October 13, 1891

Andrews & Longley and J. L. Crandall, attorneys for appellants
Hon. A. H. Farrar, attorney for the respondent

Draper, *Superintendent*

The appellants are residents of the southern portion of school district no. 1, of the towns of Stuyvesant and Stockport, in the county of Columbia. The school site in said district has recently been changed to a point farther north than that formerly occupied. A new schoolhouse has been erected upon the new site, and bonds have been issued to meet the expenses thereof. The appellants claim that this practically deprives them of school facilities in district no. 1, and they ask that the southern portion of the district be cut off and annexed to district no. 3, of the town of Stockport. The trustee of one of the districts

affected has given his consent to such change, but not so in the case of the trustee of the other district. The school commissioner has declined to make the provisional order contemplated by the statutes, and from his refusal this appeal is taken.

I have given the papers careful examination, and have heard able counsel at length. I conclude that two or three families having children to send to school are farther removed from the schoolhouse in their district than before the change in site. Even before the change of site, they were farther from the schoolhouse than is desirable. I am not certain but that they ought to have some relief. It might be well to create a new school district out of parts of the two districts under consideration, but I do not feel justified in overruling the school commissioner upon the issue here presented. He is to be sustained unless it is clearly shown that his refusal to make the change requested operates very unjustly to parties aggrieved, or is manifestly opposed to the educational interests of the territory affected. The burden is upon the appellants to show this, and they do now show it to my satisfaction. The appellants would not be very much nearer a schoolhouse after the alteration they desire, than they are now. If the change were made, the shape of school district no. 3 would be irregular in the extreme. Again, it was held by Ruggles, Superintendent, in decision no. 3315, rendered December 10, 1883, that a district under bonds should not in equity be divided until the bonds were paid. I should not be willing to apply this rule in all cases. I think it may be said that, after a district has issued bonds for the erection of a schoolhouse, a portion of it should not be cut off and attached to a district in which there is a good schoolhouse, with the effect of permitting the residents of the detached portion to escape their share of taxation for the improved school facilities. It was undoubtedly this that Superintendent Ruggles meant; but that would not be the case where a new school district was erected involving the necessity of building a new schoolhouse. The present case, however, seems to come entirely within the rule laid down in the decision of Judge Ruggles referred to, and I am not able to see that there are any special circumstances sufficient to make it an exception to that rule.

Upon the whole, I conclude that the appeal must be dismissed, and it is so ordered.

4384

In the matter of the appeal of A. V. Van Liew, trustee, school district no. 13, town of Ulysses, Tompkins county, from action of local board, vacating order of Charles Van Marter, school commissioner, first commissioner district of Tompkins county, dated March 23, 1895, altering school districts no. 13 and no 15, town of Ulysses, Tompkins county.

It appearing by the proofs presented to the local board that no valid reason existed for the alteration of the school districts made by the preliminary order of the school commissioner; *held,* that the action of said board in vacating their order was proper.

Decided October 3, 1895

Skinner, *Superintendent*

A petition signed by the appellant in the above-entitled matter and R. R. Updike as sole trustee of school district no. 15, town of Ulysses, and dated December 11, 1894, was presented to Charles Van Marter, school commissioner of the first commissioner district of Tompkins county, asking that the boundaries of district no. 13, of Ulysses, be altered, by transferring a certain farm known as the Ralph Updike farm, then owned by one W. C. Van Liew and situate in school district no. 15, of Ulysses, from said district and annexing the same to school district no. 13 of Ulysses, and consequently altering the boundaries of district no. 15; that on February 1, 1895, no action having been taken by said school commissioner, said Updike as trustee of the district, withdrew his consent to said alterations of said districts; that on or about February 6, 1895, another petition, signed by the appellant herein, and twenty-four residents of said district no. 13, Ulysses, was presented to said commissioner requesting him to alter said district as aforesaid, that said school commissioner made an order dated March 23, 1895, altering the boundaries of said school districts nos. 13 and 15, by transferring said farm of W. C. Van Liew from district no. 13 and annexing it to district no. 15, which order by its terms was to take effect on August 1, 1895; that said commissioner gave notice, under the provisions of the school law, that on May 4, 1895, at the schoolhouse in district no. 15, he would hear objections to said order of March 23, 1895, and on said day said commissioner attended at said schoolhouse, and at the request in writing of said Updike, as trustee of school district no. 15, the supervisor and town clerk of the town of Ulysses, were associated with the school commissioner in the hearing of objections to said order; that said board, after hearing objections, voted to vacate said order of said commissioner; that on May 30, 1895, the appellant herein appealed from the action and decision of said local board.

An answer to said appeal by Robert R. Updike, trustee of said district no. 15, has been filed.

The appellant herein contends that said Updike, as trustee of school district no. 15, having consented in writing to the proposed alteration of the district of which he was trustee, he can not legally withdraw said consent. Such contention is not tenable. The consent of Updike was withdrawn before any action had been taken by the school commissioner under the petition of December 11, 1894, and before the petition of February 6, 1895, was presented to him.

The consent or refusal to consent to the alteration of said districts by the trustees of said districts did not give jurisdiction to the school commissioner. Under the school law school commissioners have power to alter school districts with or without the consent of the trustees of the districts to be affected. If the trustees consent the school commissioner may make an order, making such alterations, to take effect on a day named, which order will be final, unless appealed from; but when said trustees of said districts or of any one of said districts to be affected refuse consent the school commissioner may make a preliminary order making such alterations; which order shall not take effect

until a day named therein, and not less than three months after the date of the order, and he must give notice of a time and place at which he will hear objections to said alterations. At the time and place of such hearing, upon the written request of the trustees of any of the districts affected the supervisor and town clerk of the town or towns in which said districts are situated, may be associated with the school commissioner, thus forming a local board, to hear objections to said alterations. Said board must either confirm or vacate said preliminary order. If such preliminary order is confirmed a confirmatory order must be drawn and signed by the members of said board, which confirmatory order makes the alterations and not the preliminary order which is inchoate. If the local board vacates the preliminary order the whole proceedings fall.

The papers herein do not show that any proofs were presented to said local board establishing any valid reason why such alterations should be made, nor that there is any valid reason why said farm should be transferred from district no. 15 to district no. 13.

It is not shown that there are any children of school age residing on said farm. It is shown that the owner of said farm does not reside thereon, but lives with his father, and that he has no children, and that he lets the farm. The distance from said farm to the schoolhouse in no. 15 is substantially the same as to the schoolhouse in district no. 13, or at most but twenty rods farther.

If the object of the alteration proposed is for the purpose of equalizing assessments, I would state that the altering of districts for that purpose only has not been sanctioned by this Department; that may be an element for consideration, but should not be the controlling one.

The appeal herein is dismissed, and the action of said local board, vacating said preliminary order of School Commissioner Van Marter, of March 23, 1895, is confirmed.

4353

In the matter of the appeal of William R. DuMond and Lincoln Butler from decision of local board vacating order of Frank L. Ostrander, school commissioner, first commissioner district of Delaware county, altering boundaries of school district no. 6, town of Colchester, Delaware county.

Where it is shown that an order of a school commissioner, altering the boundaries of school districts, is not for the best educational interests of the district affected thereby, the action of the local board in vacating said order will be confirmed.

Decided May 6, 1895

F. W. Hartman, attorney for appellant

Skinner, *Superintendent*

On or about November 3, 1894, Frank L. Ostrander, school commissioner of the first commissioner district of Delaware county, made a preliminary order,

with the consent of the trustee of school district no. 20, town of Colchester, Delaware county, the trustee of school district no. 6, town of Colchester, Delaware county, dissenting, altering the boundaries of school districts nos. 6 and 20 by setting off from district no. 20 into district no. 6 five parcels of land and including in district no. 6 lots 361 and 362 and a "gore" lot west of lot 361, which said lots had never been embraced in any school district in said town of Colchester; that said order was to take effect on February 5, 1895; that said Commissioner Ostrander gave to the said assenting and dissenting trustees due notice under title 6 of the Consolidated School Law of 1894; that on November 20, 1894, at a time and place within said town of Colchester, specified in said notice, he would hear objections to the said alterations of the boundaries of said school districts; that the trustee of said district no. 6 requested that the supervisor and town clerk of the town of Colchester be associated with said commissioner; that on said November 20, 1894, at the time and place specified in said notice the said local board, consisting of said commissioner and the supervisor and town clerk of said town, duly organized and proceeded to hear objections to said alteration; that the trustee of district no. 6 appeared in person and by counsel, in opposition to said order of said commissioner, and the appellant, Du Mond, herein, appeared in support of said order; that after hearing the proofs and testimony presented and the arguments of counsel said local board adjourned to meet at the office of the town clerk of the town of Colchester at Downsville on December 18, 1894, at 10 o'clock in the forenoon; that said local board met pursuant to said adjournment and after due deliberation, voted to vacate said preliminary order of Commissioner Ostrander of November 3, 1894.

From said action and decision of the said local board the appeal in the above-entitled matter has been brought.

An answer, by the persons composing said local board, has been made to the appeal, and to said answer the appellants herein have filed a reply.

The papers and proof filed herein by the appellants and respondents contain statements relating to former appeals from orders made by school commissioners, and to an order made by Commissioner Ostrander since this appeal was taken that are not material to the question at issue raised by the appeal herein.

The question for my decision in this appeal is, whether or not, upon the facts established and admitted at the hearing had before the local board in December 1894, said board wisely exercised the power and authority it had to vacate the preliminary order made by Commissioner Ostrander on November 3, 1894.

It appears that the appellants herein reside on lot no. 361 in the town of Colchester, Delaware county, located in what is known as "Pelner Hollow"; that on the east side of Pelner Hollow, extending north from the county line between the counties of Sullivan and Delaware, there is a hilly or mountainous range of land covered with forest, across lots 369, 370, 359 into 347, and westerly across lots 348 and 339 into school district no. 20, town of Colchester, and thence south, beginning in the southerly portion of 340 and across lots 341 and 342 in

said district no. 20 and lots 343, 344 and 345 in district no. 14, town of Colchester; that there is a public highway commencing northerly of the schoolhouse in district no. 20, which extends in southerly direction through said district no. 20 and across district no. 14, and near the schoolhouse in said district, down to said county line of Sullivan and Delaware counties; that commencing in the aforesaid highway on lot 340 in district no. 20 there is another public highway running east across said lot 340, through the opening of said range of hills on the westerly side of said Pelner Hollow, and thence southeasterly across lots 339 and part of lot 348 in district no. 20, and thence south across lots 348, 360, 361 and 368 down to the public highway running northeasterly and southwesterly in Sullivan county, between the county line of Sullivan and Delaware counties and the Beaverkill river; that there is a public highway commencing at a point in the said public highway in Sullivan county north of the Beaverkill river easterly of the east line of lot 133 extended, running north to, and beyond, the schoolhouse in district no. 6, town of Colchester. It further appears that it is impracticable for the children of the appellants herein, or other children residing in said Pelner Hollow, to reach the schoolhouse in said district no. 6 on account of the hill range extending as aforesaid along the easterly side of said Pelner Hollow except by the public highway down said Pelner Hollow to the said highway northerly of the Beaverkill river, and thence on and up the said road to said schoolhouse, a distance of about five miles. It was conceded by the appellant, Du Mond, upon the hearing before said local board, that if the lots in Pelner Hollow were annexed to district no. 6 that a branch school must be maintained in Pelner Hollow for the accommodation of the persons of school age residing in that locality.

It also appears that about the year 1886 it was assumed that the land in Pelner Hollow was within the boundaries of said school district no. 6, and a branch school of said district was established therein, in a building erected by the inhabitants of said Hollow, which building and the land upon which it was located was conveyed to said district so long as the same was used by said district for school purposes, and when not so used, should revert to the grantor or grantors; that in the year 1892 one Shaver, then trustee of said district no. 6, refused to maintain said branch school, and an appeal from his decision was taken to the State Superintendent of Public Instruction, who dismissed the appeal upon the ground that the records of the formation of said district failed to establish that the appellant in said appeal was a resident of said district, or that the building in which said branch school was maintained was within said district.

It further appears that since 1892 said district no. 6 has not maintained a branch school in said Pelner Hollow, or in the building which, so as aforesaid with the land on which it is situate, was conveyed to said district; that said building is a small building, badly dilapidated, situate upon a small, rough and stony site, said site and building being worth about $25.

It further appears that the aggregate assessed valuation of the real and personal estate within said district no. 6 is $16,690; that the aggregate assessed valuation of the real and personal estate of Pelner Hollow, annexed by the preliminary order of Commissioner Ostrander to district no. 6, is about $2170.

It having been conceded that if the said preliminary order of Commissioner Ostrander was confirmed that said district no. 6 would be required to establish and maintain a branch school in Pelner Hollow for the persons of school age residing in that locality, I am of the opinion that the building in that locality in which the branch school was maintained between 1888 and 1892, assuming that district no. 6 has the legal right to use such building, is inadequate to properly accommodate the pupils in said locality, and that said district would be required to erect and furnish a new building for such branch school; and that the expense of erecting and furnishing such building and maintaining such branch school, would be burdensome upon said district.

Commissioner Ostrander in his answer to the appeal herein alleges: that in making said preliminary order he did not intend that it should be considered as his final conclusion that that was the proper disposition of the matter; that he was not then fully acquainted with all of the facts and circumstances relating thereto, but desired a full hearing; that after the hearing before the local board, and a consideration of the arguments and evidence presented he became satisfied that the preliminary order did not dispose of the matter in the best way, and that he believes the action of the local board in vacating said order was right.

Upon the facts established herein, I find and decide, that the decision of said local board, in vacating said preliminary order of Commissioner Ostrander of November 3, 1894, altering the boundaries of school districts nos. 6 and 20, town of Colchester, Delaware county, was a wise exercise of the power and authority vested in said board; that the decision of said local board is confirmed, and the appeal herein should be dismissed.

Appeal dismissed.

3918

In the matter of the appeal of John Decker v. John J. Kenney, school commissioner of Richmond county.

The territory of a school district which has been established by a special act, a provision of which reads, "that the territory . . . shall constitute a separate school district . . . " can only be altered by legislation. *Held,* that an order of a school commissioner assuming to alter such a district, can not be upheld.

Decided October 30, 1890

Robert J. Scherer, Esq., attorney for appellant

Draper, *Superintendent*

This is an appeal from the order of the school commissioner, made on the 26th day of May 1890, cutting off a portion of the territory of the Port Richmond

union school district and annexing the same to school district no. 9, of the town of Northfield. Section 1 of chapter 363 of the Laws of 1875 reads as follows:

"§ 1 From and after the passage of this act, the territory now known as union free school district no. 6, in the town of Northfield, county of Richmond, shall constitute a separate school district to be known as the Port Richmond union free school district."

It seems clear to my mind that, in view of the fact that the Legislature has, by a special act, determined that the territory embraced within the Port Richmond union free school district, shall constitute a separate school district, the commissioner was powerless to change the same. It is unnecessary for me to consider the reasons which actuated the commissioner, or to make any investigation into the merits of the case. The district could be altered only by the Legislature.

The appeal is sustained, and the order of the school commissioner is set aside and declared to be void and of no effect.

3534

Harvey B. Van Dyne, trustee of school district no. 5 of the town of Poughkeepsie, Dutchess county, N. Y., v. Albert P. Smith, school commissioner of the second commissioner district of Dutchess county.

Consent of trustees of one district affected by a commissioner's order changing school districts not material when the trustees of the other district refuse consent. Such consent only becomes material when there is to be no subsequent meeting for hearing objections.

A commissioner who failed to file a confirmatory order made by himself, together with the supervisor and town clerk, for nearly a month after the same was made, was derelict in duty; but such negligence held not to be fatal to the proceedings.

Failure to give proper notice of the meeting to hear objections would be waived by the appearance at the meeting, without objection, of all the parties entitled to notice.

Altering districts only for the purpose of equalizing valuations not sanctioned by the Department, may be an element for consideration, but should not be the controlling one.

Decided November 13, 1886

Draper, *Superintendent*

This is an appeal from an order of Albert P. Smith as school commissioner of the second commissioner district of Dutchess county, made on the 6th day of August 1886, and also from an order of said commissioner dated the 14th day of August 1886, made to confirm the first mentioned order, which orders set off a portion of school district no. 5, in the town of Poughkeepsie, and attached the same to school district no. 1 of said town. The papers in the case are very voluminous. From them it is gathered that there has been considerable local controversy over the matter for a long time. District no. 1 seems to have been desirous of gaining more territory for the purpose of increasing its taxable property, and particularly seems to have been anxious to bring within its limits, a

piece of the line of the New York Central and Hudson River Railroad. The order of the commissioner effects this by cutting some three-quarters of a mile of said road from district no. 5 and adding it to district no. 1. This is stoutly resisted by district no. 5. It is said that the change will be inconvenient to the people living in the territory which is set off from one district to the other, and they protest very earnestly against it. Two subjects are properly matters of inquiry, namely:

1 Whether the commissioner has acted regularly, and pursuant to the provisions of the statute; and

2 Whether in case the proceedings are regular, it was an advisable thing to do.

The appellant urges numerous irregularities in the proceedings, the leading ones of which are:

a That the trustees of district no. 1 did not consent, in writing, to the order of April 6th prior to the time when the order was made.

b That the orders, notices etc., were not filed in the clerk's office until the 4th of September after the making of the orders.

c That the commissioner proceeded to hear objections on the 14th day of August without proof of service of notice on the trustees.

d That the commissioner made no written decision or order on the 14th of August.

I do not think there is sufficient force to these objections to require that the orders should, because of them, be set aside. It is probably true that the trustees of district no. 1 did not make a written consent to the commissioner's order prior to the 6th of August. They severally swear that they consented in fact, however, but I do not think that material. The consent of the trustees of the district affected is only material to the validity of the commissioner's order changing districts where there is no objection on the part of either of the districts affected, and where there is to be no subsequent meeting for hearing objections. In this case the trustee of district no. 5 objected from the first, and that fact was recited in the order of August 6th. In view of the fact that there was no general assent to the commissioner's order, and of the necessity for a future hearing by the commissioner so that the opposing parties might have an opportunity to state their objections, it is difficult to see any necessity of consent, written or unwritten, on the part of the trustees.

That he determined at the time of the hearing of August 14th to confirm his former order seems to be beyond question. All accounts agree upon the fact that he announced his purpose so to do to the end that the matter might be taken upon appeal to this Department, if the opposing parties should so desire.

I think the commissioner was exceedingly derelict in not filing the papers in the clerk's office before the 4th of September, but can not think that such negligence should be held fatal to the proceedings.

There would not seem to be much force in the objection that the commissioner proceeded to hear objections on the 14th of August without proof of service of notice on the trustees in view of the fact that the trustees of both

of the districts affected were present at such hearing, and participated in it, and that the record fails to disclose that they raised any objections of that nature at that time.

It is claimed by the appellant that the order of the commissioner affects school district no. 4. This is denied by the respondent, and inasmuch as no resident of that district appears in the case, and as the papers fail to establish the claim satisfactorily, it can not be sustained.

I now come to the consideration of the question whether the order was advisable.

District no. 5 had within its limits about two and one-half miles of the line of the New York Central and Hudson River Railroad. District no. 1 contained no portion of the road. The order appealed from cuts off territory containing about three-fourths of a mile of the road from district no. 5, and annexes it to no. 1. The fact is undisguised that it was the object of the order to accomplish just this thing. No other purpose was advanced in support of it. It is reasoned that the railroad company is a large taxpayer, and that district no. 1 is poor, while district no. 5 is well-to-do. Substantially the only ground advanced by the respondent's answer in support of the propriety of the order is, that it was to help a weak district. It is not pretended to have been made for the convenience or benefit of residents of the territory affected. It will not enlarge their school privileges. They feel it to be very unjust to them, and protest against it with all their strength. To carry the order into operation will be to disturb present relations and force them into new ones, which they do not desire. It would not be at all strange if the ill feeling which would be brought into district no. 1 by the annexation would do it more harm than the added taxable property would do it good. In any event, I am not prepared to give sanction to the proposition that school districts should be changed only for the purpose of equalizing valuations. Perhaps it may properly be an element for consideration, but it should not be the controlling one. If districts are to be altered whenever, and only because one has more valuable property than another, the result would be a constant struggle for the annexation of such property, and the people and the school system would be endlessly involved in controversy in consequence of it.

This is against public policy, and as it is the essential, if not the only, ground upon which the change here in question was made, it can not be sustained.

The appeal is sustained and the orders of August 6th and 14th, 1886, are set aside and declared to be of no effect.

3646

In the matter of the appeal of Sophie Kellogg, Mary Rose and George I. Rose, appellants, v. school district no. 2, of the town of West Bloomfield, Ontario county.

The district meeting refused to adopt a motion authorizing the trustees to consent to an alteration of the district so as to transfer certain lands from one district to another,

from which refusal an appeal is taken. *Held,* that this appeal is not the proper remedy. Application must first be made to the school commissioner. He can act without consent. From his determination an appeal will lie.

Decided December 1, 1887

George I. Rose, Esq., attorney for appellant

Draper, *Superintendent*

The appellants above named are owners of certain real estate located in district no. 2, of the town of West Bloomfield, Ontario county. For various reasons, which they indicate, they desire that the division line between district no. 2 and district no. 5, of said town, should be so changed as to bring their lands within district no. 5. At the last annual meeting in district no. 2, it was moved that the district authorize the trustee to give his consent to such change. The meeting refused to adopt the motion. From such refusal, this appeal is taken.

I shall not consider the question as to whether the desire of the appellants should be granted. I can not properly do so before an application has been made to the school commissioner having jurisdiction, for the alteration. The law provides a way for changing the boundaries of school districts without the consent of the trustees of the districts affected. The appellants must, at least, make an effort to accomplish their desire through the action of the school commissioner, before they can present the question to the State Department. An appeal would lie from the refusal of the commissioner to consent.

The appeal is dismissed.

3800

In the matter of the appeal of Joseph Horning and Roger McDermott v. Henry A. Soule, school commissioner of the first district of Cattaraugus county.

It is not essential to the validity of proceedings to alter a school district that the trustees should either, in words give or refuse consent to the alteration. If they consent in writing the commissioner can take one course; if consent is not given, though no formal refusal is made, he can proceed in another way.

Decided July 30, 1889

G. M. Rider, attorney for respondent

Draper, *Superintendent*

The appellant, Joseph Horning, is sole trustee of district no. 3, of the town of Ellicottville, Cattaraugus county, and the appellant, Roger McDermott, is sole trustee of district no. 6, of the same town. The appeal is from an order of the school commissioner, made on the 7th day of February 1889, forming a new school district out of portions of the two districts which the appellants represent, together with a portion of district no. 10, of the town of Franklinville, and also from an order by the commissioner and town clerk confirming the first mentioned order.

The appellants claim that they were not consulted by the commissioner as to the advisability of the alteration, and had no knowledge of it until the order of the commissioner had actually been made. They also contend that if the alteration is made it will leave their own districts too weak to be self-supporting.

Parties resident in the proposed new district answer and sustain the claim of the commissioner. It is admitted that no application has been made to the appellants for their consent to the order of the commissioner, but it is said that the reason of this is that the matter had been discussed in the neighborhood for a year; that the commissioner made a similar order nine months ago, and gave notice of a time and place to hear objections, but failed to prosecute the proceeding to a conclusion, and it accordingly failed because of the serious and long illness of the commissioner, and that each of the appellants had openly and repeatedly asserted that they would never consent to the alteration. This would seem a reasonable explanation of the seeming slight. But as a matter of law it is not essential to the validity of the proceedings that consent of the trustees of the territory affected should be asked and refused, in words, before the commissioner can proceed. The trustees might postpone action indefinitely by neither saying they would or would not, if that were the case. It is sufficient that they do not consent.

I have given what the appellants have to say concerning the circumstances in which their districts will be left after alteration very careful consideration. One of the districts will be left sufficiently strong, beyond doubt or question, so far as valuation is concerned. The other is not as strong in that regard as it would be well. But other circumstances are to be considered. The educational advantages of the adjacent territory are to be taken into account. The commissioner seems to have acted deliberately. The matter has been under discussion a long time. The appellants do not make out a case sufficiently strong to satisfy me that the order of the commissioner should be overthrown.

The appeal, therefore, must be dismissed.

3862

In the matter of the appeal of Thomas Riley, Calvin Sherman and Cyrus C. Terwilliger, as trustees of school district no. 16, of the town of Rochester, Ulster county v. E. D. Lounsbury and others, trustees of school district no. 1, of the town of Wawarsing, Ulster county.

Appeal to compel the district from which a part was set off and constituted separate, to comply with an alleged agreement or understanding to pay a proportionate share of the value of the district property remaining in the old district, to the newly created district. *Held,* that the Department has no jurisdiction in the premises. The advisability of detaching from a school district having an assessed valuation of $58,000, a portion which has a valuation of but $6000, and constituting the same a separate district, questioned.

Decided March 5, 1890

L. B. Haskin, attorney for appellants

Skinner, *Superintendent*

It seems that by an order of the school commissioner of the third school commissioner district of Ulster county, made upon the consent of the trustees of the territory affected on or about the 16th day of December 1889, a portion of the latter district was set off and made to constitute the district first named. The division left the schoolhouse and all its appurtenances in the old district. The appellants claim that there was an understanding and agreement to the effect that the old district should pay to the new one its proportionate share of the value of the school property. The appellants have demanded this share from the respondents. The respondents deny this agreement and refuse to comply with it, although they admit that there was an understanding and promise that the old district should pay to the new one the sum of $75 as soon as they should open a school of their own.

The amount in dispute between two districts is not great, but to a district having an assessable valuation of but $6000, as is the fact in the present case, it is of considerable consequence. This appeal is brought for the purpose of compelling the old district to settle with the new one, according to the appellants' understanding of what the agreement was. The circumstances of the new district seem to be somewhat hard. I can not help questioning the advisability of detaching from a school district having an assessable valuation of $58,000, a portion of which has a valuation of but $6000.

It is admitted that the school facilities in the district as formerly constituted were good. It owned a good schoolhouse and site and had a graded school, which was liberally supported. It is said, however, that the portion detached was set off in consequence of the fact that the residents thereof were unwilling to pay their share of the expenses of maintaining such a school, and preferred to become a separate district in consequence. This being so, they have little ground for complaint, although that fact would hardly be sufficient ground upon which to support the action of the school commissioner; but he was upon the ground, knew all the facts, and was better able to judge of the propriety of his action than I am here. I do not think it necessary to determine whether or not there was an agreement concerning the division of the school property, or, if there was such an agreement, what its terms were. I am clearly of the opinion that the appellants can not procure the fulfilment of such an agreement by an appeal to the Department. I think it may well be doubted whether they can do so by any proceeding; but I know of no authority of law which would support the Department in requiring a district to carry out such a promise.

This is not an appeal from any action of a district meeting or district officer. It is not shown that the district, or its officers, has either violated any law or failed to comply with any legal requirement. This being so, I think the appeal must fail.

The appellants incidentally ask that, in the apportionment of State school moneys for the present year, they may be given their share. So far as the Department of Public Instruction is concerned, the apportionment for the present

year has already been completed and promulgated. So far as the apportionment by the school commissioners of the county of Ulster is concerned, the district fails to show the facts which would entitle it to an allotment.

For the foregoing considerations, the appeal must be dismissed.

3792

In the matter of the appeal of Lemon Thomson and others, residents of joint school district no. 10, towns of Greenwich, Washington county, and Northumberland, Saratoga county, from the action of the local board of said joint district, in refusing to ratify a commissioner's order, bearing date April 8, 1889, for the alteration of said district and the consequent alteration of district no. 17, town of Greenwich.

In a joint school district, by a decision previously made, the school commissioners having jurisdiction were directed to make a preliminary order for a division of the district by the county line, so that each part would come under the jurisdiction of a single commissioner. The preliminary order having been made, but the consent of the trustees of all of the districts affected thereby not having been obtained, the order was made to take effect at a future day, and the local board, consisting of commissioners, supervisors and town clerks, was convened for the purpose of determining whether the preliminary order should be confirmed or not. The local board refused to confirm the order. For the reasons which induced a former decision directing the preliminary order in this matter, the commissioners are directed to confirm by a final order the change as proposed by the preliminary order.

Decided July 13, 1889

Draper, *Superintendent*

This is an appeal by resident taxpayers of joint school district no. 10, of the towns of Greenwich, county of Washington, and Northumberland, county of Saratoga, from the action of the local board in refusing to confirm a preliminary order made by the commissioners having jurisdiction for a division of the district, and the annexation of a part to an adjoining district. The appellants are residents of that portion of the joint district situate in Washington county. The land is divided from that portion of the district lying in Saratoga county by the Hudson river.

Commissioner Joseph W. Barbur has jurisdiction in Washington county, and Commissioner William N. Harris in Saratoga county. The schoolhouse in the joint district is located in the Saratoga portion of the district. A majority of the children of the district reside in Washington county, and in order to attend the public school of their district, are compelled to cross the river by a long bridge which is used for canal purposes. The bridge is not properly guarded with sufficient side railings, and in consequence of the bridge being used by canal boatmen, the children are often subjected to annoyance and forced to hear low and obscene language, too often indulged in by some persons employed on the canal.

At the meeting of the local board, held as provided by statute, there were present the school commissioners, the supervisor and town clerk of each of the towns in which the districts are situated. The vote upon the question of confirming the preliminary order of the commissioners resulted in a tie, the members of the board residing in Washington county voting in favor of the order and consequent alteration, and those residing in Saratoga county voting in opposition thereto.

It is a rule of this Department not to interfere in a proceeding of this nature where commissioners of a joint district do not agree upon an alteration, unless the propriety of the case is clearly manifest and where a refusal to do so would necessarily work injustice. By the alteration proposed the part of the district situated in Saratoga county would not be so weakened, either in the number of children of school age or in taxable property, as to prevent the maintenance of a satisfactory school. The fact that a majority of the children of the joint district are now compelled to cross the river by the bridge above referred to, in order to reach the schoolhouse, carries considerable weight in my mind that the alteration should be made. It further appears that by the annexation of that part of the joint district situate in Washington county to an adjoining district in the same county, which is now without a school building, the same having been destroyed by fire, and the proposition that if the order is allowed, a new site will be selected which will be easily accessible to the children of the district, and upon which a new school building is to be erected, would seem to render this an opportune time for the change to be made.

In view of these facts, and that the allegations of the appellant have not been controverted, I must sustain the appeal, and hereby direct School Commissioner William N. Harris, of the second district of Saratoga county, to join in an order with Commissioner J. W. Barbur of the first district of Washington county, making a final order for the change as proposed by the preliminary order, and cause the same to be filed and recorded by the town clerks of the towns in which the districts affected lie.

3516

John Armstrong v. John J. Callanan, school commissioner of the first commissioner district of Albany county.

Commissioner's order declining to set off a taxpayer from one school district to another for the reason that such taxpayer supposed when he purchased lands he was included in the district he asked to be attached to, sustained.

Decided September 28, 1886

Draper, *Superintendent*

This is an appeal by John Armstrong, an inhabitant and taxpayer of joint district no. 3 of the town of Coeymans, Albany county, and New Baltimore, Greene county, from the action of School Commissioner John J. Callanan of the

first commissioner district of Albany county, refusing to set off said appellant to an adjoining district.

The grounds stated by the appellant for desiring to be set off are as follows:

1 That a railroad is operated through district no. 3, and between the property of appellant and the schoolhouse, and that it is extremely dangerous for school children to cross and recross the tracks of the railroad company because of the frequent passage of trains of cars.

2 That the lands of appellant are rendered less valuable by reason of the same being included in district no. 3; that prospective tenants will not hire appellant's lands if it is discovered that the lands are included in district no. 3, and separated from the schoolhouse by the railroad tracks.

The facts are:

That appellant's lands are near the eastern boundary of district no. 3; that a railroad is now and for several years has been operated through the district very near appellant's lands; that appellant supposed when he bought the lands, that he was included in district no. 1, which is composed of land wholly east of said railroad land; that appellant has two children, each 16 years of age; that the railroad company protects persons passing at the crossing by gates and signals; that appellant's children are often seen about the depot of the company near the crossing, and that they cross the tracks to and fro when not attending the school.

The district to which the appellant seeks to be set off is possessed of a very large amount of taxable property, while district no. 3 is much weaker. Other taxpayers are similarly situated in district no. 3, and object to any change in the boundary of the district. District no. 3 has a good school and an excellent teacher, and the school has been conducted with good results.

Although the appellant's counsel has been repeatedly notified to perfect his appeal by furnishing a map and list of taxable inhabitants necessary for a complete understanding of the case, he has neglected to do so, and I am compelled to consider the case without the aid and information such map and list would afford me.

The question is, Did Commissioner Callanan exercise proper discretion in refusing the request made to him by appellant?

From the facts found, I am of the opinion that he did. But, moreover, had he granted the order changing the district, it would have been void without the concurrence of the commissioner of the adjoining commissioner district of Greene county, who has jurisdiction, together with Commissioner Callanan, in district no. 3, of which land in Greene county forms a part; and even with the concurrent action of the commissioners granting the alteration, the consent of a majority of a board composed of the commissioners acting with the supervisors and clerks of the adjoining towns might be requisite, for the reason that the trustee of district no. 3 declined to consent to the proposed alteration.

The appeal is overruled, and the action of the commissioner is sustained.

5252

In the matter of the appeal of William McLaughlin, Michael McGinn and John T. Wright as trustees of school district no. 19, town of Skaneateles, N. Y., from the decision of J. J. Jewell, school commissioner of the second commissioner district of the county of Onondaga, and H. T. Morrison, school commissioner of the first commissioner district of Cayuga county and others, in affirming an order made by said commissioners in altering school district no. 19 of the town of Skaneateles.

A preliminary order changing the boundaries of a joint school district may be made when the territory transferred lies wholly in one school commissioner district by the school commissioner of the district in which such territory lies.

The confirmatory order in such case must be a joint order by the commissioners in whose district the school districts affected lie.

Decided April 10, 1905

C. R. Milford, attorney for appellants
Johnson & Fuggle, attorneys for respondents

Draper, *Commissioner*

On November 15, 1905, School Commissioner Jewell of the second commissioner district of Onondaga county, and School Commissioner Morrison of the first commissioner district of Cayuga county, made a preliminary order altering the boundaries of school district no. 11, town of Skaneateles, Onondaga county, and town of Sennett, Cayuga county, by transferring a portion of the territory of said district no. 11, to school district no. 19, Skaneateles. School district no. 11 is a joint district. That part of such district which was in the town of Skaneateles was in School Commissioner Jewell's district and that part of such district which was in the town of Sennett was in School Commissioner Morrison's district. The trustees of joint district no. 11 consented in writing to such alteration. The trustees of district no. 19, Skaneateles, refused to consent. The trustees of said district no. 19 appeal from the action of the school commissioners in transferring the territory in question from district no. 11 to district no. 19.

Appellants allege that the proceedings by which the order was made were not conducted as the law requires and that the order is therefore void. It is claimed that the leading defects in such proceedings are as follows:

1 That School Commissioner Morrison had not jurisdiction and could not legally join Commissioner Jewell in making the order.

2 That the supervisor and town clerk of the town of Skaneateles were illegally associated with the local board which heard objections to the preliminary order of the commissioners.

3 That the order was not filed with the town clerks of the towns in which such districts are located as the law directs.

The legal objections raised by appellants are not sound.

Joint district no. 11 is partly in the town of Skaneateles and partly in the town of Sennett. District no. 19 is wholly in the town of Skaneateles. That

part of no. 11 which was transferred to no. 19 is also wholly in the town of Skaneateles. Appellants claim that since the territory transferred and the district to which it was attached were wholly in School Commissioner Jewell's district that Commissioner Morrison could not legally join in making the order. This claim is based on the provisions of subdivision 2 of section 1, title 6 of the Consolidated School Law which reads as follows:

In conjunction with the commissioner or commissioners of an adjoining school commissioner district or districts, to set off joint districts composed of adjoining parts of their respective districts, *and separately to institute proceedings to alter the same in respect to the territory within his own district.*

This Department has held since the above subdivision was amended in 1895 that the preliminary order in such proceedings may be made when the *territory transferred* lies wholly in one commissioner district, by the school commissioner of the district in which such territory lies. In this case Commissioner Jewell could have made the preliminary order. The ruling has always been however that the order affirming a preliminary order must be a joint order by the commissioners in whose district the school districts affected lie. It was therefore necessary that in this case Commissioner Jewell and Commissioner Morrison should jointly make the affirming order. (*See* decision no. 4449.) The fact that the preliminary order was a joint order does not invalidate it. The object of the preliminary order is to bring the question of the wisdom of making the proposed changes before the local board, for which provision is made by section 4 of title 6, for review and determination.

Section 7 of title 6 of the Consolidated School Law provides as follows:

Whenever it may become necessary or convenient to form a school district out of parcels of two or more school commissioner districts, the commissioners of such districts, or a majority of them, may form such district; and the commissioners within whose districts any such school district lies, or a majority of them, may alter or dissolve it.

Under this provision of law the commissioners had authority to jointly make the preliminary order. District no. 11 was a joint district and none of the territory of that district could be transferred to any other district except upon the joint order of the two school commissioners in whose districts said school district no. 11 was located. The order in this respect was therefore legal.

Appellants claim that the supervisor and town clerk of the town of Sennett were not lawfully requested to join the local board which was to hear objections to the preliminary order and that such officers had no authority to act with such local board. Respondents claim such officers were properly requested to be associated with the local board and while the proof on this point is not clear the burden to show that such request was not properly made is upon appellants and they have not affirmatively sustained their contention. Appellants also raise the question of jurisdiction of the town clerk and supervisor of Sennett to act in the proceeding on the same ground on which they challenged the right of Commissioner Morrison to join in the proceedings. District no. 11 was partly in the

town of Sennett. The law provides that "the trustees of any district to be affected by such order may request the supervisor and town clerk of the town or towns within which such district or districts shall wholly or partly lie, to be associated with the commissioner." District no. 11 was therefore entitled to be represented on the local board by the supervisor and town clerk of the town of Sennett and such officers possessed the lawful right to be associated with the local board and participate in its deliberations.

I think the pleadings clearly show that the orders were properly and legally made and filed as the law directs. The further question to be determined is whether or not the school commissioners and the majority of the local board exercised an improper and unwise discretion in making the order. Two school commissioners in making the order certify that the children of school age residing within the territory transferred are unable to attend school regularly because of the great distance they are required to travel to attend school in no. 11 and often because of the impassable condition of the roads. They also certify that these children may receive proper and regular school privileges by being transferred to district no. 19. It also appears that inspectors of this Department have recommended that such action should be taken. No unjust burden is imposed upon district no. 19 by this action. The pleadings show that district no. 19 has a good modern school building with a seating capacity of eighty-six and the average attendance of pupils in that district during the past year was fifty. The number of pupils of school age in the territory transferred is only fifteen and it is not probable that all of these will attend school. District no. 19 will therefore be able to accord school privileges to the additional pupils in that district caused by the transferring of the territory in question without any material additional expense or without any apparent embarrassment. The action of the local board in affirming the preliminary order of the commissioners is sustained.

The appeal herein is dismissed.

SCHOOL DISTRICTS—BOUNDARIES

Where inhabitants have been properly set off from one district to another, and the town clerk has omitted to record the order, they will be regarded as inhabitants of the district to which they have been annexed after it has been acquiesced in for five years.
Decided May 12, 1854

Rice, *Superintendent*

This is an appeal from the proceedings of a special meeting held on the 28th of March last, authorizing the trustees to levy a tax on the district to defray the expense of moving the schoolhouse to the new site, or to let the job of moving the same to the lowest bidder.

The appellants, in support of the appeal, allege that seven persons, who attended the meeting and voted, were not inhabitants of and legal voters in said district, having been annexed in 1839 to joint district no. 1, Blenheim and Fulton, and there being no record in the town clerk's office of either of said towns of their subsequent transfer, either to district no. 5 or any other district.

In reply to this allegation, the affidavits of the town superintendents of Fulton and Blenheim for the year 1849 are produced, showing that the individuals referred to and their property were, in the spring of that year, transferred by them from joint district no. 1 to district no. 5, and that the order made by them to that effect was transmitted or delivered to the town clerks of their respective towns for record. It also appears, from the affidavit of the appellants, that, from that period to the present, the persons so transferred have acted in and been regarded as inhabitants of district no 5, and their children enumerated therein. Under these circumstances, and after an acquiescence of five years, the proof of such transfer must be regarded as sufficient, notwithstanding the omission of the town clerks to record the same.

4241

In the matter of the appeal of board of education of union free school district no. 1, Nunda, Livingston county, v. A. B. Dunn, school commissioner, second commissioner district, Livingston county.

Where an appeal is taken from an order of a school commissioner defining the location of a farm, as regards the boundaries of certain school districts, on the ground that the order makes an alteration in school districts, the burden is upon the appellants to establish their contention by preponderance of proof. Such appeal must be brought within thirty days from date of the order or a sufficient excuse must appear in the appeal for the delay.
Decided April 25, 1894

Crooker, *Superintendent*

This appeal is taken from the order of A. B. Dunn, school commissioner of the second commissioner district of Livingston county, made July 3, 1893, decid-

ing that a farm of one William Craig, consisting of 112 acres of land, situate in the town of Portage, Livingston county, was situated and formed a part of school district no. 3 of said town of Portage.

The appellant alleges as ground of the appeal that the said order sets off said farm from union free school district no. 1 of Nunda to district no. 8 of Portage and that such order was made without the consent of the appellant.

The appeal is supported by a number of affidavits of persons relative to the location of said farm in school districts as the affiants understood and recollect. An answer has been interposed by the respondent and is supported by affidavits of persons relative to the location of said farm.

The respondent denies that he has set off said farm as alleged in the appeal herein, and alleges that said order simply decides a dispute in regard to the location of said farm, as regards the boundaries of certain school districts.

It is admitted that the farm lies in the town of Portage, and that the records of said town were entirely destroyed by fire many years ago, and that the records of school district no. 16, of Nunda, the district in which the appellant claims said farm was situate at the time of the consolidation of certain school districts into union free school district no. 1, of Nunda, by the establishment of a union free school therefor and therein, of which no. 16 was one, are lost and can not be found.

The respondent, before answering the appeal herein, made a preliminary objection to the appeal, namely: that the said appeal was not taken within thirty days from the time the appellant had notice of the order appealed from, and no reason is stated in the appeal for the delay, as required by rule 4 of the rules of this Department relative to appeals. It appears that the order appealed from was dated July 3, 1893, and on August 22, 1893, a copy of said order, with the certificate of the town clerk of the town of Portage attached, to the effect that the same was a true and correct copy of the original then on file in his said office, was served upon Clarence L. Cuddeback, a member and the secretary of the board of education, appellant; that the appeal herein was served upon the respondent on October 25, 1893; that said appeal was not received at the Department until November 1, 1893.

I am of the opinion that such preliminary objection is well taken and the appeal herein should be dismissed.

Upon the question, in which school district the said Craig farm properly belongs, after a careful examination of all the proofs and papers presented, I have come to the conclusion, and do find and decide:

That school district no. 2, town of Portage, known as the "Oakland district," many years ago included within its boundaries the territory bounded on the north by the Orton road, on the east by the town line between the towns of Portage and Nunda, and within which was that parcel of land now known as the Craig farm; that about the year 1840 school district no. 18 of the town of Portage was formed and the territory in said district no. 2 of Portage, lying south of Orton road and west of the town line, between the towns of Portage and Nunda, including the parcel of land known now as the "Craig farm" was

embraced within the boundaries of and formed a part of said district no. 18; that in the renumbering of the school districts in the town of Portage said district became, and now is, district no. 8 of said town; that there is no proof that said Craig farm so as aforesaid within the district known as no. 18 and now no. 8 of Portage, was ever set off from said district; that for many years prior to the year 1876 there was a school district in the town of Nunda known as district no. 16, but there is no proof that any portion of the town of Portage was embraced within, or formed a part of said district, nor that said district was ever known as district no. 16 of Nunda and Portage; that said district no. 16 of Nunda became a part of union free school district no. 1 of Nunda, but there is no proof that at the time said district so became part of said union free school district the said Craig farm was situate within or formed a part of said district; that said Craig farm is not now, nor ever has been, situate within the boundaries of nor formed a part of said union free school district no. 1 of Nunda; that the order or decision of Commissioner Dunn, appealed from, is not an alteration of the boundaries of any school district either in the town of Portage or Nunda, but simply decides in what school district said Craig farm is situate.

The burden of proof is upon the appellant to establish the appeal herein and in this the appellant has failed and the appeal should be dismissed upon that ground.

The appeal herein is dismissed.

4246

In the matter of the appeal of Rector Seymour, sole trustee of school district no. 11, towns of Walton and Tompkins, Delaware county, v. E. E. Conlon, school commissioner, first commissioner district, Delaware county.

Where a school commissioner makes an order defining the boundaries of a school district, when in fact the order is an alteration of the school district and other school districts adjoining, and that fact being established upon an appeal from said order, said order should be vacated and set aside.

Decided May 8, 1894

Marvins & Hanford, attorneys for appellant

Crooker, *Superintendent*

This is an appeal from the order of E. E. Conlon, school commissioner of the first commissioner district of Delaware county, made September 14, 1893, defining the boundaries of school district no. 11, towns of Walton and Tompkins, Delaware county.

The contention of the appellant is that the boundaries of said school district are well defined and known, as shown by the records in the office of the town clerks of the towns of Walton and Tompkins, and if any persons are ignorant of such boundaries they are at fault in not carefully consulting such records, and

that the order appealed from is in fact an alteration of said school district and other school districts adjoining.

The respondent contends that by his order he has simply defined the boundaries of said district.

An appeal is pending before me of Abijah S. Wakeman and others, claiming to be residents of such school district, from the action and decision of the appellant in this appeal, in refusing to continue or establish a branch school at Wakeman Brook, claimed by the appellants therein, to be within the bounds of such district.

My decision in the appeal herein will be decisive of the question raised by the respondent Seymour in the appeal brought by Wakeman and others, namely, whether the appellants, Wakeman and others, are residents of such district or not.

The parties in each of the above-mentioned appeals have stipulated that I may consider both appeals upon the proofs and papers presented in each.

The papers presented in the two appeals are very voluminous, and have been carefully examined and considered. From such examination and consideration it appears that the only lands about which the contention herein has arisen are those lying north of the Delaware river and situate in what is known as the Wakeman Brook locality.

By the certified copy of the records in the office of the town clerk of the town of Walton, presented in this appeal, it appears that by an order made by the school commissioners of the town of Walton on April 27, 1829, the several school districts in said town were located. In said order district no. 6 of said town, is defined, "From the lower line of no. 5, down on both sides of the river (Delaware), to the lower line of John Barlow's farm, including the wild land on both sides of the river to the town line." The words, "including the wild land on both sides of the river to the town line," were inserted in said order on December 20, 1831, and such alteration became legal and valid from said date. From and after said December 20, 1831, the lower line of district no. 6 of Walton has been and still is the lower line of John Barlow's farm, including land on both sides of the river to the town line between the towns of Walton and Tompkins, and the lower line of the John Barlow farm is the town line between Walton and Tompkins, and the line on the west side of the river between lots 207 and 208, Rapelyea Patent, starts from the river opposite the lower line of the Barlow farm and runs directly to the town line of Tompkins near the middle of lot 177 of the Rapelyea Patent. That on April 27, 1829, and December 20, 1831, there was a school district, comprising within its boundaries, land situate in each of said towns of Walton and Tompkins, known as joint district no. 7, and by said order of April 27, 1829, that part of said district situate in the town of Walton was described and defined as follows: "From the lower line of district no. 6 on both sides of the river (Delaware) to the town line." That said "joint district" no. 7 was afterward renumbered and known as "joint" district no. 11. By an order made by D. W. Nichols, town superintendent of schools of the town

of Tompkins, in 1849, on file in the office of the town clerk of said town, that portion of said "joint" district no. 11, Tompkins and Walton, situate in the town of Tompkins, is described and defined as beginning on the Delaware river at the north corner of lot subdivision 1, northeast division of grand division 1, Hardenburgh Patent (this point was at the Barlow lower line, town line, on the east side of the river); thence southeast to the town line of Hancock, etc., including in said boundaries all of grand division 1, southeast half of subdivision 2 and southeast half of northwest division of grand division 3, Hardenburgh Patent, and lots 194, 195, 196, 197, 198, 199 and 200, Rapelyea Patent. That said order, although not dated, was entered in said town clerk's office with other orders between February and May 9, 1849. That there is no order on file or on record in said town clerk's office of the town of Tompkins altering or changing the boundaries of said district no. 11 of Walton and Tompkins, north or west of the Delaware river, except an order, dated July 6, 1885, wherein lots 194, 195, 196, 197, 198, 199 and 200, in the Rapelyea Patent, were set off into district no. 25, town of Tompkins, except the order of Commissioner Conlon, from which this appeal is taken.

I am clearly of the opinion that, from the copies of the records of the towns of Walton and Tompkins presented in this appeal, the boundaries of said school district no. 11, towns of Tompkins and Walton, are clearly and definitely described and defined, and while said boundaries may be in dispute by persons who have not examined such records carefully, such boundaries are not indefinite, but on the contrary are definite and certain.

The order of Commissioner Conlon, of September 14, 1893, while expressly stating that no alterations of boundaries of said district no. 11 is intended to be made, but the present boundaries of such district are to be more clearly defined, is in fact an alteration of said district and of other districts adjoining no. 11, namely, districts nos. 6, 10, 12 and 25, and such alterations have not been made in accordance with the provisions of title 6 of the Consolidated School Law of 1864 and the amendments thereof.

It seems from the proofs presented herein that the following named lots of land included by the said order of Commissioner Conlon as being within the boundaries of said district no. 11, Walton and Tompkins, lying north and west of the Delaware river, namely, lots nos. 165, 174, 208, 209, 210, 212 and 214, in the town of Walton, and lots nos. 164, 173, 176, 177 and 180, in the town of Tompkins, were never part of said district no. 11, Walton and Tompkins, but that said lots nos. 165, 174, 208, 209, 210, 212 and 214, in the town of Walton, are within district no. 6 of Walton, and lot no. 164, town of Tompkins, is within district no. 10 of Tompkins; lots nos. 173, 176, 177 and 180, town of Tompkins, are within district no. 12 of Tompkins.

Sundry affidavits have been filed by the respondent, stating, in effect, that some of the above-named lots of land have been assessed in district no. 11 of Walton and Tompkins, and the taxes so assessed have been paid, and that so far as the affiants had knowledge they supposed said lots were in district no. 11.

Where the records of the boundaries of school districts are lost or destroyed, or the description of the boundaries of districts are indefinite and uncertain, resort may be had to such class of testimony to determine such boundaries; but where the records are in existence, and are definite and certain, such class of evidence is of doubtful value. Trustees of school districts are not infallible, and in many instances are negligent and careless in taking proper means to ascertain the boundaries of their respective districts.

From the proofs presented in this appeal I am of the opinion that the appeal herein should be sustained, and the said order of Commissioner Conlon be vacated and set aside.

Appeal sustained.

It is ordered, That the order of E. E. Conlon, school commissioner of the first commissioner district of Delaware county, purporting to define the boundaries of school district no. 11, towns of Walton and Tompkins, Delaware county, dated September 14, 1893, be, and the same is, hereby vacated and set aside.

4388

In the matter of the appeal of Perez Dimmick, trustee of school district no. 10, town of Middletown, Delaware county, v. Hugh Adair, school commissioner, second commissioner district, Delaware county.

An order made by a school commissioner to amend the boundaries of a school district or to make an amended record of the boundary, where said order does not alter the boundaries of the district; such order will be sustained upon appeal.

Decided October 8, 1895

F. M. Andrus, attorney for appellant

C. Hull, attorney for respondent

Skinner, *Superintendent*

Hugh Adair, as school commissioner of the second commissioner district of Delaware county, on June 28, 1895, made an order, under the provisions contained in subdivision 2, section 13, title 5, of the Consolidated School Law of 1894, reciting that having examined the record in the town clerk's office of the town of Middletown, Delaware county, and finding that the record of the boundary between school districts nos. 22 and 10 therein is both defective and indefinite, and having learned that said boundaries are in dispute, and directing that the record of said boundary line between said districts be amended so as to read, as in said order stated. That said order also stated that it is not intended to alter any boundary line between said districts, but only to amend said defective and indefinite record of said boundary, and settle the dispute as to said boundary.

Said commissioner had authority, without the previous consent of the trustees of said districts, to make said order, provided said order did not alter the boundaries of said districts.

Perez Dimmick as trustee of school district no. 10, of Middletown, has appealed from said order of Commissioner Adair, upon the grounds, as alleged by him therein, that said order alters the boundaries between said districts nos. 10 and 22 and sets off portions of land from district no. 10 into district no. 22.

School Commissioner Adair has filed an answer to said appeal, and the appellant herein has filed a reply to said answer.

From a careful examination and consideration of the papers filed herein the following facts appear to be established:

Messrs Slocum and Stone, as commissioners of common schools in said town of Middletown, by an order made and signed by them on October 22, 1842, and which order was recorded on October 27, 1842, in the office of the clerk of said town, established the boundaries of school district no. 22 of said town as follows: Resolved that district no. 22 shall be bounded on the easterly by the county line of Delaware and Ulster; on the west by the easterly line of James Tait; on the north and south by the height of land to the place of beginning; that Messrs O'Connor, Stone and Slocum, as such commissioners of common schools in said town, signed a paper on April 4, 1843, and which paper was recorded on the same day in the office of the clerk of said town stating, "we, the commissioners of the common schools, have this day resolved that Hiram D. Wood be set back in district no. 10 as heretofore has been"; that at different times since 1842 the boundary line between districts no. 10 and 22 (being the westerly boundary of no. 22, as stated in said order of Messrs Slocum and Stone of October 22, 1842) has been in dispute, and especially in the year 1887, when several actions were brought in the courts and appeals taken to this Department arising out of the controversies as to said boundary line; that in said 1887 a careful search was made in the office of the clerk of said town of Middletown for the records relative to the organization and alteration of the school districts in said town, but no such records could be found, but in a search among the records in a building in which such clerk's office had theretofore been kept a book was found containing the records relative to the school districts of said town, commencing with the reorganization of the districts made April 30, 1825, and containing such records down to and including the year 1850; that said record book was examined by said Commissioner Adair, in which he found said order of Messrs Slocum and Stone establishing said district no. 22 under date of October 22, 1842, but found no other order or orders relative to said district or its boundaries unless the resolution under date of April 4, 1843, relating to Hiram D. Wood can be deemed an alteration of the boundaries of said district; that said record book was then (in May or June 1895), in fair condition, considering its age and use, some of the leaves therein being misplaced.

The appellant herein alleges that on or about October 24, 1848, one Florus Searle was a town superintendent of schools in said town of Middletown and as such made an order relative to the boundaries of school district no. 10, of said town, and has annexed a copy of said alleged order to his appeal; that

said appellant alleges that by said alleged order of Searle a portion of school district no. 22 was annexed to school district no. 10.

It also appears that on the record book of school district no. 10 for the years 1847, 1848 and 1849, at the back part of said book, and not in any proceedings of said district recorded as occurring in 1848, is recorded in the handwriting of one Grant, a former clerk of said district, but now deceased, a copy of said alleged order of said Searle, with the date of October 24, 1848, but without the signature of said Searle and without any certificate.

It is conceded that at the examination by Commissioner Adair of said old record book in the office of the clerk of the town of Middletown, relating to school districts in said town, from April 30, 1823, and including the year 1850, there was no record of the alleged order made by said Searle on October 24, 1848; but it is alleged by the appellant that such an order was recorded in said book when found and examined in 1887. In support of this contention the appellant has presented the affidavit of Alexander Sliter, who stated that in 1887 he was collector of said school district no. 10 and with one David Hammond examined said town record book and found therein the said order made by Searle, signed and attested by him, and that he (Sliter) compared the same with record of said order in district records of school district no. 10, and found them alike; also, affidavit of David Hammond to the same effect. Annexed to the answer of Adair is an affidavit of said Hammond in which he states that in his affidavit annexed to the appeal in his statement that he found in a book the boundaries describing district no. 10 the same as are annexed to the appeal (copy of alleged order of Searle) he "meant the district book of district no. 10." That to said answer herein is annexed the affidavit of C. Hull, the attorney who examined said town record book in 1887, in which he alleges that he made a careful search in said record book at that time and knows that no such record (alleged order of Searle of October 24, 1848) was in it.

It is clear to me from the proofs herein that no order of said Searle as town superintendent, made on October 24, 1848, was recorded in said town records relating to school districts either in 1887, when examined by Sliter, Hammond and Hull, nor in 1895, when examined by Commissioner Adair.

The burden is upon the appellant herein to sustain his appeal by a preponderance of proof, and he has failed to establish by such proof that any order was ever made by said Searle as town superintendent on October 24, 1848, and filed with the town clerk of the town of Middletown, in relation to the boundaries of said school district no. 10 of said town. He has also failed to establish that one Florus Searle was a town superintendent of schools in said town in 1848. No copy of any order made by any school commissioner or town superintendent organizing said district no. 10 or making any alteration in the boundaries of said district subsequent to the organization is produced herein.

Under the laws in operation when the office of town superintendent of common schools existed such superintendents had power to form, alter and dissolve school districts and were required to describe and number such districts, and

to deliver the description and number thereof, in writing, to the town clerk, immediately after the formation or alteration thereof. It seems that said superintendents did not have the power, in case the records of the boundaries of districts should be found defective or indefinite, or should be in dispute, to cause the same to be amended or an amended record of such boundaries to be made, as was given to school commissioners.

As to said alleged order of said Searle it is possible that in 1848 he was town superintendent of schools in Middletown; that there were doubts as to the boundaries of school district no. 10 in said town; that he prepared the order alleged to have been made by him and informed the then district clerk of said district and allowed him to copy the same; that subsequently he, for some reason, decided not to make such order.

In the order made by Messrs Slocum and Stone, October 22, 1842, organizing school district no. 22, the westerly line of said district is indefinite, while the easterly, northerly and southerly lines are certain and definite. It appears that James Tait owned or occupied land on the westerly side of district no. 22, but the easterly line of his land did not extend from the ridge or height of land, the northerly boundary, to the ridge or height of land, the southerly boundary. Commissioner Adair in his examination of said westerly line of said district, under said order of October 22, 1842, decided that it was the intention of said order to extend the easterly boundary of the land of said Tait in a straight line to the height of land forming the southerly boundary of said district no. 22, and made his order of June 22, 1895, amending the records of the westerly line of said district accordingly.

I concur with Commissioner Adair in his decision.

The appeal herein is dismissed and the order of said School Commissioner Adair of June 28, 1895, is confirmed.

3673

In the matter of the appeal of Peter Van Doren v. the school commissioner of Seneca county.

An order of a school commissioner intended to determine indefinite and defective boundaries will not be sustained when the order so changed districts as to take territory from one and add the same to another district, unless the several trustees have consented thereto, or the other statutory proceedings have been observed.

An admission that the order being made only for the purpose of defining a boundary, yet effected an alteration, is fatal to it.

The fact that the alteration only affected a small piece of territory of but little value is not of consequence.

Service of copies of appellant's pleadings upon the former commissioner, whose order is appealed from, held unnecessary, he having ceased to hold that office and not being the real party in interest.

Decided March 13, 1888

Draper, *Superintendent*

This is an appeal from an order of Isaac H. Stout, as school commissioner of Seneca county, made on the 29th day of November 1884, fixing and describing the boundaries of school district no. 14 of the town of Covert. The ground of appeal alleged is that the order changed the boundaries so as to take territory from district no. 12, and add the same to district no. 14.

The order of the commissioner was made for the purpose of fixing and defining an indefinite and defective boundary under the provisions contained in title 2, section 13 of the Consolidated School Act.

It recited the fact that no change or alteration was intended; yet it is admitted that, by inadvertence or error, a small parcel of land, alleged to be of little value, was transferred from one district to the other by the order.

It is admitted, also, that the boundaries as fixed in the order appealed from are materially different from the boundaries as they have existed for many years. But it is claimed that such alteration was effected not by the order, but by the operation of chapter 223 of the Laws of 1881.

It is impossible for me to see how the order appealed from can be upheld. Indefinite or uncertain boundary lines may be fixed and determined without the consent of the trustees of the district affected or without the other statutory proceedings which are prerequisite to an alteration of districts.

The law provides a simple and expeditious way for ascertaining and defining an uncertain boundary line by a school commissioner, but it does not permit him to make an alteration in a boundary line without either the consent of the trustees of the districts affected or the approval of the board of officers authorized by law to hear objections and determine the matter.

No principle is better established than that no alteration of a school district can be effected except by taking the several steps which the statute explicitly lays down.

The admission that the order being made only for the purpose of defining a boundary, yet effected an alteration, is fatal to it. The fact that the alteration affected only a small piece of territory, and that of small value, is not of consequence. Moreover, the alteration effected in the present case may not be inconsequential, for I am not prepared to sustain the proposition that chapter 223 of the Laws of 1881 worked a permanent and lasting alteration of district boundaries when it was repealed the following year.

I have had some hesitation about considering this appeal because of the delay in bringing it before the Department, the explanation of which is not very satisfactory. But as I can readily see why the fact that an alteration which was not intended by the commissioner might, not for a considerable time, come to be understood or appreciated by the people, I have thought it well to overlook the delay and consider the case. I have not lost sight of the objection of the respondents that the school commissioner had not been served with the papers, and, therefore, had not been made a party to the proceeding. I do not think it

important that he should have been. He is not the real party in interest. The case has been cared for on the part of the respondents with sufficient ingenuity and thoroughness to negative the idea that any more help was necessary upon that side.

The appeal is sustained and the order appealed from is set aside and held to be inoperative and of no effect.

4004

In the matter of the appeal of Jacob J. Dillenback v. Charles E. Whitney, as school commissioner of the third school commissioner district of the county of Jefferson.

A school commissioner, proceeding according to section 13, subdivision 1, title 2, of the Consolidated School Act, made an order intended to define obscure boundary lines of school districts, but which in effect set off large farms from one district to another. *Held,* irregular and order set aside.

Decided September 15, 1891

H. E. & G. E. Morse, attorneys for appellant

Draper, *Superintendent*

This is an appeal from an order of the school commissioner of the third commissioner district of the county of Jefferson, defining the boundary lines between districts nos. 1 and 4 of the town of Lyme in said county. The order was made on the 31st day of December 1890, being the last day of the term of said Whitney as school commissioner. This order could not have been intended to work any alteration in the boundary line referred to. If that was intended, it would have been necessary for the school commissioner to have received the consent of the trustees of the districts affected, and in the event of their refusal to give consent, he could only have made a provisional order; but he proceeded under section 13, subdivision 1, title 2 of the Consolidated School Act, which only provides for defining an obscure boundary line. Proceeding in this way he could only seek out the line as originally run and describe and define it accordingly. The papers in the case satisfy me that more than this was done. Whole farms are transferred by the operation of this order from one district to the other, and what seems even more strange, their owners had no notice of the order or its effect for six months after its date. The order of any public officer, made without notice to interested parties, and upon his own motion or at the instigation of persons whose identity is not revealed, upon the last day of his official life, is to be closely scrutinized. It should not be made at such a time, except for the strongest reasons. No reasons are manifest for this action. If the boundary line is in question, is obscure or erroneously defined upon the public records, the incoming school commissioner could remove the difficulty as well as the outgoing one, and certainly no action of such character should be taken without the knowledge of persons who would be interested therein.

The present school commissioner has made answer in the case, although he seems to have some question as to whether the order can be sustained. Among other things he sets up the fact that the residences of men whose farms are transferred from one district to the other, are nearer the schoolhouse in the district to which they are transferred than the schoolhouse in the district with which they have heretofore been affiliated. This possibly might be a reason for the alteration of a district boundary, but it is not a reason in support of the order now appealed from, which only assumes to define an obscure boundary.

In view of these considerations, I feel constrained to sustain the appeal and hold the order appealed from to be void and of no effect.

3676

In the matter of the appeal of Walter A. Ling v. school district no. 8, town of Martinsburgh, Lewis county.

A school commissioner's order will not be sustained, when by the order the boundary lines of districts are changed without the consent of the trustees of the districts affected thereby.

Decided April 6, 1888

Draper, *Superintendent*

This is an appeal from a tax list made by J. H. Van Aernam, sole trustee of school district no. 8 in the town of Martinsburgh, Lewis county. The appellant is included in such tax list.

He insists that he should be taxed in district no. 8 of the town of Turin, Lewis county, and that he is wrongfully upon the list in the town of Martinsburgh. It appears that the real estate in question has been taxed for many years in district no. 8, town of Martinsburgh. The only ground for the objection of the appellant to the validity of the tax list is an order made by Leonard T. Cole, school commissioner, on the 27th day of December 1887, in which he states that after a careful examination of school district boundaries, he finds that the lands of Walter A. Ling are not within the limits of school district no. 8 of the town of Martinsburgh, but they do belong to school district no. 8 in the town of Turin. The school commissioner had no power to change the boundary lines between district no. 8 in the town of Martinsburgh, and district no. 8 in the town of Turin, by a simple order under his hand, without the consent of the trustees of the districts affected thereby. No such consent was given. The commissioner does not assume to have changed or altered such boundary lines, but only to have defined a fixed but indefinite one.

The proofs submitted upon this appeal by persons who have been conversant with the circumstances for a great many years, taken in connection with the fact that the lands of the appellant have been taxed for many years in district no. 8

in the town of Martinsburgh, seem to be at variance with the conclusion of the commissioner.

I can not see my way clear to uphold such an order made just at the expiration of the term of office of the commissioner, the advisability of which seems to be so strongly opposed by the proofs in the case. The appeal is therefore dismissed.

3929

In the matter of the appeal of Robert Douglass v. P. H. Martin, as trustee of school district no. 13, town of Massena, county of St Lawrence.

General acquiescence for a long period of years, supported by parol evidence, that certain lands formed a part of a school district. *Held,* sufficient to sustain the theory that the lands in question were regularly set into the district and constitute a part thereof.

It must clearly appear that two adjoining farms owned by the same person, lying in two districts and occupied as one farm, to authorize them to be assessed in one body in the district in which the occupant resides.

Decided December 1, 1890

Draper, *Superintendent*

Appellant is a resident of the town of Norfolk, St Lawrence county. He is the owner of two certain lots, one of 65 acres, situate in school district no. 5, town of Louisville, and one of 120 acres, claimed to be situate in district no. 5 of Louisville. These lots adjoin, and there are buildings upon the 65 acres which the appellant claims are at times occupied by him and his agents and servants.

Appellant claims that the entire farm lying in one body should be taxed for school purposes in district no. 5 of Louisville.

The respondent, the trustees of school district no. 13, town of Massena, answers the appeal and avers:

That the farm of 120 acres was formerly the property of Aaron C. Allen; that while in his possession, and about 35 years ago, this land was set off from district no. 5, Louisville, to district no. 13, Massena, and has since been considered a part of district no. 13, where it has been taxed regularly for school purposes; that the former owner, Aaron C. Allen, and his son, have successively held the office of trustee of district no. 13, Massena, while residing upon said premises; that after the transfer of said lands, the site of the schoolhouse was moved to a point that would better accommodate the inhabitants of such newly acquired territory. Respondent denies that the lots in question are occupied by the appellant, his agent or tenant residing on the lot of 65 acres; that the owner and men hired to do particular work, go to the farm and occasionally remain over night, but when their work is done return to their homes and families in other localities. The respondent presents a statement of the valuation of taxable property in the respective districts, showing district no. 5 to be the stronger, and district no. 13 to be in debt for the building of a new schoolhouse, and asks that said farm of appellant of 65 acres be set off to district no. 13 aforesaid.

Other allegations are made by the appellant and denied by the respondent, which I do not deem material to the disposition of the appeal.

Two questions are presented: first, Is the lot of 120 acres a part of district no. 5, Louisville, or is it a part of district no. 13, Massena? second, If the lot is a part of district no. 13, is it taxable in district no. 5 by reason of the facts that both lots adjoin, and are owned and occupied by the same person, either as owner or tenant residing on the lot in district no. 5?

In support of the first proposition, the appellant alleges that no order setting off the farm of 120 acres to district no. 13, can upon examination, be found in the town clerk's office, and that it follows that no such order was made. The fact before me is clear that, for many years, 35 I think, this property has been recognized by owners and all district officers, as a part of district no. 13, has been regularly taxed by district no. 13, and not elsewhere; its occupants have been recognized as residents and electors of district no. 13, and the further fact appears that the former owner remembers taking proceedings to have the land set off into district no. 13.

After such a lapse of time, the long and uniform acquiescence in the fact that the lands were a part of district no. 13, the incumbrance of the district, its share of which this land has thus far borne, the possible loss of the commissioner's order from the town clerk's office, I shall not sustain the appellant's position upon this point. I must hold the lands to be a part of district no. 13, Massena.

Upon the second proposition, it is not made to appear clearly to me that the farms of 65 acres and 120 acres are taxable together in district no. 5. I am not satisfied that the property is occupied as one farm by the owner or his agent residing on the lot of 65 acres in district no. 5, Louisville, so as to bring it within the rule authorizing the taxation of the 120 acres in district no. 5.

The petition of the respondent to have the 65 acres set off to district no. 13, should be addressed to and decided by the school commissioner, in the first instance.

The appeal is, therefore, overruled.

4022

In the matter of the appeal of Ralph Wolford v. school district no. 7 of the town of Knox, county of Albany.

In ascertaining the boundary lines of a school district for the purpose of an assessment of a parcel of land in the proper district, public records are decisive of the question, and that they can not be changed by outside proof.

Decided November 18, 1891

A. R. Hunting, attorney for appellant

Draper, *Superintendent*

The appellant owns a farm in the school district above named, consisting of 130 acres, and also a second farm in the same district consisting of 26 acres.

He also owns a farm of 84 acres situated in the town of Wright in the county of Schoharie. About the 1st of January, last, the trustee of school district no. 7 of the town of Knox, issued a tax list to raise money for school purposes, and included therein the three farms aforesaid. The appellant insists that the farm of 84 acres should not be taxed in the said district, and brings this appeal to have the matter determined.

The same question has been presented once before, but without adequate papers or a map by which the Superintendent could be guided. Leave was granted to present the matter again.

The real question in the case is as to where the boundary line between district no. 7 of the town of Knox, Albany county, and district no. 1, of the town of Wright, Schoharie county, really runs. The appellant insists that the county boundary line is the boundary line. The respondents insist that it was altered some years ago, so as to include in district no. 7 of Knox certain lands in the town of Wright, and among others, the 84 acres in question. The town records in the town of Wright make the boundary line between the two districts identical with the boundary line between the two counties. There are no records of school district boundaries in the town of Knox. District no. 7 of Knox has been reported to this Department as lying wholly within the town of Knox.

I am of the opinion that these public records are decisive of the question, and that they can not be changed by outside proof. It therefore follows that the trustee of district no. 7, Knox, fell into an error when he included this farm of 84 acres in the tax list appealed from. In consequence of this, the appeal must be sustained, and the trustee is directed to withdraw and amend the same by eliminating therefrom the 84 acres in question.

3821

In the matter of the appeal of Allen T. Goldsmith v. Seneca M. Short, trustee of school district no. 13, towns of Manchester, Ontario county, and Palmyra, county of Wayne.

An order made by school commissioners more than 25 years ago, altering district boundaries, acquiesced in by repeated acts on the part of one who now collaterally raises the question of its regularity will be upheld.

Trustees are justified by lapse of time, and general recognition of the action of the school commissioners, in acting in accordance with the terms of the order.

Land lying partly in two districts, and owned and occupied as one farm, is not to be assessed as one farm in the district in which the owner resides, unless assessed in one body on the last revised town assessment roll.

Decided November 6, 1889

H. R. Durfee, attorney for appellant

Draper, *Superintendent*

It seems that the appellant owns and occupies a farm which the respondent claims lies partly in the above-named district and partly in district no. 3, towns

of Palmyra and Arcadia, with the residence in district no. 13. Against the objection of the appellant, the respondent has included the entire farm in a tax list issued on or about the 9th day of September 1889. This appeal is brought for the purpose of testing the validity of such action.

The appellant claims that no part of his farm is in district no. 13, in consequence of irregularities committed by the school commissioners having jurisdiction, in altering certain district boundaries. He insists that such irregularities rendered their action invalid. If this were so his farm would be wholly embraced within district no. 3.

This claim can not be upheld. It is not necessary or proper to determine that collateral and remote question upon this appeal. It is shown that the action referred to was taken 25 years ago; that it was never appealed from or otherwise questioned, and has been generally recognized by the public, and that the appellant has repeatedly recognized its validity by paying taxes, participating in school meetings, and serving as trustee of district no. 13. The lapse of time, and the general recognition of the action of the school commissioners, was sufficient to justify the respondent in acting in accordance with the terms of the order of the commissioners.

But there is another question raised by the pleadings. It is alleged by the appellant, and is uncontroverted, that the entire farm in question is not assessed as one lot upon the last revised assessment rolls of the town. The part lying in each school district is assessed by itself. The Legislature of 1889 amended section 66, title 7 of the Consolidated School Act so as to affect such a case as this. The statute now contemplates that, in case a farm lies partly in two or more school districts, the trustees shall only tax so much of it as lies in their own school district, if that part appears as a separate parcel on the town assessment rolls. It is not the policy of the law to permit trustees to make original assessments, except where absolutely necessary. The general rule is that they must, in levying taxes, follow the town assessment rolls which are made by officers specially chosen with reference to that duty. An entire farm lying in two districts is to be taxed for school purposes in that district containing the residence only "if assessed as one lot on the last assessment roll of the town after revision by the assessors."

This precludes the respondent from assessing the entire farm of the appellant in his district, and it becomes necessary to sustain the appeal so far as to direct the respondent to withdraw his tax list and correct the same by striking therefrom the item descriptive of or referring to that portion of the farm of the appellant not lying in district no. 13.

The appeal is sustained.

3804

In the matter of the appeal of school district no. 13, of the town of Greene, Chenango county v. Marcus N. Horton, school commissioner of the second district of Chenango county, and school district no. 22 of said town.

An order of a school commissioner defining a disputed boundary line between school districts will be sustained, unless it is clearly made to appear that the commissioner has erred in his proceedings. It is to be assumed that he has acted regularly and discreetly.
Decided August 1, 1889

Eugene Clifton, attorney for appellants

Draper, *Superintendent*

This is an appeal from an order made by the school commissioner of the second commissioner district of Chenango county, made on the 22d day of January 1889, defining the boundary line between school districts nos. 13 and 22 of the town of Greene.

The result of the order of the commissioner involves a strip of land in no. 22, which had previously been supposed to be in no. 13. Accordingly, no. 13 is aggrieved, as this reduces the taxable valuation of the district. There is no question raised as to school accommodations, and it is said there are few, if any, children of school age living upon the land in dispute.

The determination of the commissioner is stoutly resisted by district no. 13, even to an extent beyond that for which any apparent cause exists.

Whether the commissioner has correctly defined the boundary line between the two districts, that is, has laid it out where it was originally placed, is an obscure question, and one exceedingly difficult of determination upon written papers. The papers submitted are voluminous, and relate almost exclusively to old records and statements or understandings of people either dead or very aged. They have been read with care, and more than once. It is next to impossible to gain any intelligent understanding of the matter in dispute, after the most studied examination of the papers.

Inasmuch as the appellant does not satisfy me that the order of the commissioner is wrong, I must affirm it. This is done without prejudice to the right of the appellant to raise the question again if there is any sufficient reason why it should be raised. If district no. 13 is very seriously aggrieved, it ought to be able to show the fact. The commissioner appears to have attended to the matter with painstaking care, stoutly insists that his order defines the boundary rightly, and adduces much proof to sustain his conclusions. This action should be upheld until it is made clearly to appear that he is in error.

The appeal is dismissed.

5156

In the matter of the appeal of school district no. 1, town of Mount Hope, Orange county, from the action of School Commissioner Kaufmann in issuing an order to correct or amend the boundary line between school district no. 1, Mount Hope, and no. 3, Greenville.

A school commissioner does not possess power under subdivision 1 of section 13 of title 1 of the Consolidated School Law *to modify or alter* the disputed boundaries of school districts. He possesses the power to examine the records and to determine what the boundaries of such districts really are and to issue orders accordingly.

Decided December 2, 1904

William T. Shaw, attorney for appellant

Draper, *Commissioner*

On September 1, 1904, William P. Kaufmann, school commissioner of the second commissioner district of Orange county, issued an order for the purpose of correcting or amending the boundary line between school district no. 1, Mount Hope, and school district no. 3, Greenville. The real question to be determined by such order of the commissioner is, in which of these two districts should the property of Ephraim Manning be located.

It appears that this question was first raised in the year 1901. In that year the Manning property was assessed in each school district. In March 1903 Mr Manning commenced an action against school district no. 3, Greenville, to recover the taxes which he claimed to have erroneously paid that district. The case was tried in the county court of Orange county. That court held that the Manning property was located in school district no. 1, Mount Hope, and was not, therefore, assessable in school district no. 3, Greenville. To reach a decision on the question it was necessary to determine the boundary line between such districts. The court held that the town line between the towns of Mount Hope and Greenville was the boundary line between these two school districts.

The Greenville district was evidently dissatisfied with such decision and the trustee thereof petitioned School Commissioner Kaufmann, on May 5, 1904, to fix definitely the boundary line between such districts.

Subdivision 1 of section 13, title 5 of the Consolidated School Law confers on a school commissioner the power *to amend the records* of the boundaries of a school district when the same shall be indefinite or in dispute. It was under this provision of law that the school commissioner proceeded in this case. The commissioner did not possess the power, under this provision of law, *to modify or alter* the boundaries of either of these districts. He possessed the power to examine the records and to determine what the boundaries of such districts really were and to issue orders accordingly.

On June 23, 1849, the supervisor, town clerk and town superintendent of the town of Mount Hope, held a meeting for the reorganization of that town into suitable school districts. These officers passed resolutions defining the boundaries of such districts and among these is one describing the boundaries of

district no. 1, Mount Hope. This description is on file in the town clerk's office. The county court of Orange county held in the case hereinbefore named that this order fixed the town line between the towns of Mount Hope and Minisink (now Greenville) to be the boundary line between district no. 1, Mount Hope, and district no. 3, Greenville. School Commissioner Kaufmann reached the same conclusion and stated so before me on a hearing in this appeal. He also wrote Mr Shaw, the appellant's attorney, to the same effect under date of August 26, 1904.

It appears clear that the town line in question is the boundary line between these two school districts and that the Manning property is, therefore, within the boundaries of the said school district no. 1, town of Mount Hope.

The school commissioner expressed the opinion that it was the intention of these town officers to include the Manning property in district no. 3, Greenville. The records, however, show that they failed to do so. The school commissioner also claims that as a matter of right or of equity between these districts the Manning property should be in the Greenville district. For these reasons he issued his order of September 1, 1904. Such order was virtually an order altering the boundaries of the school districts in question and could not legally be issued under the provision of law which he cited. To accomplish the result desired by the school commissioner it will be necessary to issue an order of alteration of district boundaries which is an entirely different proceeding and must comply in all details with the provisions of the several sections of title 6 of the Consolidated School Law. Such order should not be issued unless a substantial reason exists for taking such action.

The appeal herein is sustained.

It is ordered, That the order issued September 1, 1904, by William P. Kaufmann, school commissioner, and entitled: "In the matter of the disputed boundary line between school district no. 1, town of Mount Hope, and no. 3, town of Greenville," be, and the same is, hereby vacated.

5245

In the matter of the appeal of Renwick Dibble v. the trustees of school district no. 2, town of Shandaken, Ulster county.

When a school commissioner extends the boundaries of a school district to include taxable property not within such district the expense thereof is a charge upon such district and should be paid by the trustee upon the certificate of the school commissioner.

The Commissioner of Education will not make an allowance for costs in appeal cases as the law does not authorize it.

Decided March 8, 1906

O. Q. Flint, attorney for appellant

Draper, *Commissioner*

On September 2, 1900, B. W. Cammer, principal of the school in school district no. 2, Shandaken, Ulster county, wrote the State Superintendent of Public

Instruction, claiming that there was certain land adjacent to such district which was not included in any school district and therefore not paying its proportionate share of taxes for maintaining a public school. State Superintendent Skinner, on September 22, 1900, the day on which such letter was received at the State Department, referred such letter to School Commissioner Flint and directed him to investigate the allegation of Principal Cammer. The commissioner was also directed that in the event of his finding that the territory in question was not located within the boundaries of a school district to take the necessary action to place such territory within the school districts to which it properly belonged. Commissioner Flint made the investigation as directed by the State Superintendent and found that there were certain lands adjoining district no. 2, Shandaken, which were not included in any school district. The commissioner properly directed the appellant herein, a surveyor, to survey these lands so that an order could be made in due form annexing such lands to school district no. 2, Shandaken, of the third commissioner district of Ulster county. After this territory was annexed to district no. 2, Shandaken, that district became a joint district. The bill of the surveyor amounted to $17.40. This bill was properly audited by Commissioner Flint and by Commissioner Schoonmaker of the third commissioner district of Ulster county, and duly certified by them to the trustee of school district no. 2, Shandaken, as provided by section 13, title 5 of the Consolidated School Law. This bill appears to have been reasonable for the services rendered and was a legal and proper charge upon said district. It should have been promptly paid.

Respondent claims that the reason the bill was not paid was because all land was not included in the survey which should have been and the further reason that the district has been unable to collect the tax levied upon most of the land which was included. These reasons are not valid. If other land should have been included the district had proper remedy under the law and should have taken the necessary action to protect its right to such additional territory. The school law contains ample provisions for the collection of school taxes, and if this district has failed to collect the taxes levied upon this property it is due to the negligence of the officers of the district.

Appellant requests that an allowance of $25 be made for the costs in this proceeding. The school law does not authorize the Commissioner of Education to make an allowance for costs in appeal cases and this Department has uniformly refused to order such allowances. The request in this respect must be denied.

The appeal herein is sustained.

It is ordered, That school district no. 2, Shandaken, shall within 30 days from the date hereof, pay the appellant herein, Renwick Dibble, the sum of $17.40 with 6 per cent interest thereon since August 1, 1901, and that the trustees of said district be and they hereby are authorized and directed to make any and all provision necessary to pay such amount and to levy and collect the same on the taxable property of said school district.

5367

In the matter of the appeal of Arthur H. Carpenter from the action of Daniel H. O'Brien, school commissioner of the first school commissioner district of Lewis county.

A school commissioner who refuses to make an order simply to correct an irregularity in boundary lines and not serving any good educational purpose will be sustained.

Decided December 18, 1907

Harry W. Cox, attorney for appellant
Daniel H. O'Brien, attorney in person

Draper, *Commissioner*

Appellant petitioned School Commissioner O'Brien to make an order transferring his property from union free school district no. 7, town of West Turin, to common school district no. 6, town of West Turin. On October 18, 1907, Commissioner O'Brien rendered a decision on the question and declined to make the order. The commissioner filed a written opinion in making his decision. In such opinion the commissioner states in substance that there is no material difference in the distance from the home of appellant to the schoolhouse in district no. 7 and to the schoolhouse in district no. 6; that the taxes in district no. 7 are much larger than the taxes in no. 6 and that this is the real motive for petitioning for such transfer; that if the property of appellant should be transferred to no. 6 appellant's children would continue to attend school in no. 7 because of the superior school facilities of that district; and that no good educational reason exists for making the alteration of boundaries prayed for in such petition.

Appellant sets forth in his moving papers the opinion of Commissioner O'Brien in denying the order of alteration. That opinion therefore becomes a part of this proceeding. Appellant does not object in any way whatever to the grounds upon which the commissioner predicated his decision. He does not deny that he will continue to send his children to school in no. 7 even if his property should be transferred to no. 6 nor does he deny that the question of taxation is the real motive which induced him to petition for an order changing the boundaries of these districts. He does not claim that a good educational reason exists to justify the commissioner in making the order prayed for.

Appellant alleges the necessary statutory conditions to make such order legal and bases his rights to such order in substance upon the allegations that his property does not join the boundary line of no. 7 except at a point, that his property is surrounded upon two sides by the territory embraced in no. 6, that no. 7 is not in compact form and that his children are required to travel through no. 6 in order to reach the schoolhouse in no. 7.

The only question entitled to consideration is the one charging that the property in question is not contiguous to the boundaries of school district no. 7. Upon the record this allegation is not sustained. It appears that in 1879 the school commissioner having jurisdiction made an order transferring certain property from no. 7 to no. 6. Such order, which is made a part of this proceeding,

shows that portions of lots no. 80, no. 72 and no. 81 were transferred to no. 6. The boundary of no. 7 would therefore be as shown upon the map submitted in the answering papers. This shows that the property in question is not joined to district no. 7 by a mere point but that there is an actual line of contact of about 14 chains.

It appears that the property set off by the order of 1879 from district no. 7 was owned by one Emory Allen but the order distinctly shows that all of lot 81 was not set off. It also appears that the Allen property and that portion of lot no. 81 not included in the order of 1879 have passed into one ownership and are known as the Allen estate. This however does not change the boundary of the district. The boundary of the district is that fixed by the commissioner's order even if the whole of lot 81 is owned by one person and assessed in school district no. 7 as land lying in one body.

It is urged by appellant that the boundaries of no. 7 and of no. 6 are irregular and that such boundaries would be more regular were the commissioner to make the order prayed for. In the original establishment of a district regard should be had to symmetry and compactness of territory. In an alteration of district boundaries regard should also be had for these conditions. A school commissioner in refusing to make an order simply to correct an irregularity in boundary lines and not serving any good educational purpose will not be overruled.

I must therefore hold that the question was one upon which the school commissioner could determine in his discretion and that he acted properly, legally and wisely in the matter.

The appeal herein is dismissed.

SCHOOL DISTRICTS—CONSOLIDATION

5191

In the matter of the dissolution of school districts nos. 19 and 24, town of Verona, Oneida county, and the annexation of such districts to school districts nos. 11 and 6 of Verona.

An equitable adjustment of taxation should not be the controlling influence in the consolidation of school districts. A school commissioner, however, could very properly take that question into consideration in arriving at his decision.

A school commissioner's action in consolidating weak districts will be regarded wise and sustained when such action will result in giving all parties concerned better school facilities without imposing unjust burdens or hardships upon any one.

Decided July 14, 1905

Hon. J. T. Durham, attorney for appellants
Coville & Moore, attorneys for respondent

Draper, *Commissioner*

On March 11, 1905, Daniel J. Coville, school commissioner of the third commissioner district of Oneida county, made preliminary orders dissolving school districts nos. 19 and 24, town of Verona. A small portion of each of these districts was annexed to school district no. 6, Verona, but nearly all of the territory of each of such districts was annexed to school district no. 11, Verona. The trustees of school district no. 6 and of district no. 11 consented to the alterations made by such orders to the boundaries of their respective districts. The trustee of district no. 19 and of district no. 24 refused to consent to the alterations made by such orders to the boundaries of their respective districts. The school commissioner therefore, in issuing such preliminary orders, gave proper notice of a hearing thereon. The trustees of the two dissenting districts in the exercise of a lawful right requested the supervisor and town clerk of their town to be associated with the school commissioner at such hearing. These officers complied with such request. The hearing on the preliminary order of the school commissioner was held on May 25, 1905. At the close of the hearing this local board voted unanimously to affirm the orders of the school commissioner.

No record of the boundaries of any of these districts could be found in the records of these respective districts or in the records of the office of the town clerk of the town in which such districts are located. It was necessary for the school commissioner to have a definite and clear description of each of these districts before he could legally make the necessary orders of dissolution and of consolidation. The commissioner therefore properly undertook to establish these boundaries. He caused a survey of each of the four districts affected to be made by a competent civil engineer and surveyor. He possessed ample authority to make such surveys under subdivision 1, section 13, title 5 of the Consolidated

School Law. In establishing these boundary lines the school commissioner appears to have made an honest endeavor to fix the boundaries on such lines as had been generally accepted by all parties concerned as the dividing lines between these respective districts for a long period of years. The commissioner appears to have been governed by the best information which he was able to obtain. The appellants do not question the accuracy of any of these boundary lines as established by the commissioner except at one point. The appellants allege that a small portion of school district no. 26 of the town of Verona was included by this survey in district no. 19, Verona, and that such portion was included because it contained a piece of the N. Y. O. & W. R. R. There appears to be some question as to whether the portion of territory in question should be included in district no. 19, Verona or in district no. 26, Verona. In including it in district no. 19 the commissioner acted upon the best information obtainable. The evidence offered by appellants to show that such territory should be included in district no. 26 is not conclusive. Since appellants raise this objection, to be sustained, they must show conclusively that the commissioner erred in fixing the line as he did at this point. In this they fail.

The special point which appellants make on the alleged inaccuracy of this boundary line is that in making the order of dissolution in the case of district no. 19, and in making the order by which no. 19 was consolidated with no. 11, the school commissioner did not follow the actual boundaries of district no. 19 and the orders were thus defective and therefore void. This contention is not correct. The school commissioner by separate surveys and under due process of law, established the boundaries of these four districts in question. When he made a description of the boundaries of district no. 19 as surveyed and filed the same in the office of the town clerk, the boundaries given in that document became the legal boundaries of that district and remain such until changed by proper and legal authority. The commissioner was therefore required to give such description in his orders of dissolution and annexation. He could not properly have used any other description. If the school commissioner erred in the establishment of the boundaries of district no. 19 and included therein a portion of the territory of district no. 26, Verona, the remedy was an appeal from the action of the school commissioner to the Commissioner of Education for an order directing the school commissioner to make such changes in his order establishing the boundaries of district no. 19 as the circumstances in the case required.

If it is established that an error has been made and a portion of district no. 26 has been included in district no. 19, such error may be corrected by the commissioner issuing another order transferring from the consolidated district such portion of that district as properly belongs to district no. 26. Such error, if it has been made, would not be sufficient ground for vacating the orders in question.

No other irregularity in the proceedings in question is alleged. The pleadings show that the school commissioner complied with every requirement of the law in making these orders and that all necessary papers were properly filed.

Therefore, the only remaining question to be determined in this appeal is, Will the action of the commissioner in dissolving these two districts and annexing the territory thereof to district no. 11 promote the educational interests of the people embraced within such consolidated district? The numerical and financial strength of each of these districts for the school year ending July 31, 1904, is shown by the following table:

DISTRICT	AVERAGE ATTENDANCE	ASSESSED VALUATION
No. 19	8 58	$39 316 96
No. 24	7 45	80 311 34
	16 03	$119 628 30
No. 11	80 52	83 079 ..
	96 55	$202 707 30

District no. 19 is weak financially and numerically. None of the children residing in this district will be required to travel an unreasonable distance to attend school in the consolidated district. District no. 24 has a smaller average attendance of pupils than district no. 19. No. 24 however is strong financially having an assessed valuation of more than twice the assessed valuation of district no. 19. The children of no. 24 will not be required to travel an unreasonable distance to attend school in no. 11. It appears, however as though some of the property in no. 24 would be located so as to give more convenient school facilities if it were transferred to district no. 12, Sconondoa. This is a question which may be settled in the future in accordance with such demands as those concerned may make and as the justice of the circumstances shall require. No. 11, before the annexation of the additional territory in question was strong numerically but weak financially. The above table shows that the average attendance of the pupils in no. 11 was 80.52 or five times the combined average attendance of districts no. 19 and no. 24. The assessed valuation of no. 11 however is about one third less than the combined valuation of nos. 19 and 24. In other words no. 11 was compelled to educate five times as many children as nos. 19 and 24 with only two thirds as much taxable property. It also appears that many persons not taxpayers reside in district no. 11 and send their children to school in that district, but are employed by a corporation located in district no. 19 and paying taxes in no. 19. The schoolhouse in no. 11 is easily accessible from all sections of the consolidated district. The public highways are in good condition and are much traveled. The schoolhouse in no. 11 is located in the village of Durhamville which is the outlet or trade center of the territory embraced in this consolidated district. The schoolhouse in no. 11 appears to be in good repair and to afford suitable and sufficient accommodations for the additional pupils required to attend school therein because of this consolidation. A better school is maintained in no. 11 than has been or possibly could be maintained in either no. 19 or no. 24. The

appellants allege that one of the objects sought by this consolidation is to reduce the taxation in no. 11. They show that the taxation in no. 19 and in no. 24 has been much less than in no. 11 and for this reason they claim they should be permitted to continue their districts. They insist that the school commissioner had no right to take into consideration an equitable adjustment of taxation for school purposes in consolidating these districts. In this contention the appellants are wrong. An equitable adjustment of taxation should not be the controlling influence in deciding such questions. The school commissioner, however, could very properly take that matter into consideration in arriving at his decision. Taking all the facts above recited into consideration I think the action of the commissioner in creating this enlarged district was wise and will result in giving all parties concerned better school facilities without imposing unjust burdens or hardships upon any one. The rate of taxation for those who reside in no. 19 and no. 24 will be somewhat greater but not sufficient to be at all burdensome. If the taxation is somewhat greater the benefits derived will be proportionately greater.

The appeal herein is dismissed.

This decision must be filed with the clerk of the town of Verona, Oneida county, and notice thereof be by him given to the appellants and respondent, with opportunity to examine the same, and copy thereof filed with the clerk of school district no. 11, town of Verona, Oneida county.

4481

In the matter of the appeal of William J. Dwyer and others v. Lincoln A. Parkhurst, school commissioner, second commissioner district, Madison county.

Under the provisions of section 9, title 6, as amended by section 4, chapter 264, Laws of 1896, any school commissioner may dissolve one or more districts in his school commissioner district, and may, from such territory form a new district; he may also unite a portion of such territory to any existing adjoining district or districts. Such action may be taken without procuring the assent or dissent of the trustee or trustees of the districts to be affected, or making any preliminary order, or giving any notice of any meeting to hear objections, if in his judgment such action was for the best educational interests of such district or districts; and from such territory form a new district, and may unite a portion of such territory to any existing adjoining district or districts. Any qualified voter of any of the districts affected, conceiving himself aggrieved, or injured, by reason of said order can appeal therefrom to the State Superintendent of Public Instruction.

Decided October 6, 1896

Baldwin, Kennedy & Magee, attorneys for appellants
S. M. Wing, attorney for respondent

Skinner, *Superintendent*

The appellants in the above-entitled matter appeal from an order made by Lincoln A. Parkhurst, as school commissioner of the second commissioner dis-

trict of Madison county, on or about June 20, 1896, and which order was to take effect on June 25, 1896, dissolving school district no. 12, town of Sullivan; nos. 1 and 13, town of Fenner, and no. 4, town of Lincoln, all in the county of Madison and said second commissioner district, and erecting or forming a new school district, to be known as no. 1, town of Fenner, which new district was to include therein the land and territory described in said order, which order was filed in the office of the clerk of said towns of Sullivan, Lincoln and Fenner, respectively, on said June 25, 1896.

The appellants allege, in substance, as grounds of appeal:

1 That said order is irregular and void for want of jurisdiction on the part of the commissioner of the subject matter embraced in the order.

2 That no greater educational advantage is to be derived from the proposed change of said districts.

3 That the change is unnecessary and uncalled for.

4 That the children outside of the village of Perryville will be compelled to travel long distances to attend school.

5 That the parents of children will be put to much inconvenience in getting their children to the school of the new district.

6 That the schoolhouses in the districts dissolved, which are now in good condition, would be abandoned and sold at a great loss.

The respondent, Parkhurst, has answered the appeal, and to such answer the appellants have filed a reply.

The following material facts are established:

That in the winter of 1895 and spring of 1896 the question of dissolving said school districts nos. 1 and 13, Fenner; no. 12 of Sullivan, and no. 4 of Lincoln, and forming from the territory comprising said districts one common school district, was discussed by the inhabitants of said districts, and in the latter part of March 1896, a meeting of such inhabitants was held in the schoolhouse in district no. 13 of Fenner, for the purpose of ascertaining their sentiments in relation to such action, and that said Commissioner Parkhurst, who was present, might know the sentiment prevailing; that at said meeting twenty-three or twenty-four of the taxpayers and voters of said district were present, and a vote was taken that the said commissioner make an order dissolving said districts and erecting from the territory of such dissolved districts a new district; that at said meeting a petition was prepared asking said commissioner to take such proceedings, and which petition, signed by the trustees of each of districts nos. 1 and 13 of Fenner and no. 4 of Lincoln, and a large number of the voters of all of the districts to be affected, was subsequently presented to said commissioner for his action; that on or about May 22, 1896, said Commissioner Parkhurst, under the provisions of sections 1 to 6 of title 6 of the Consolidated School Law of 1894, made his order to consolidate said districts and form them into one common school district, which order was to take effect on August 29, 1896; and on or about June 1, 1896, under section 4 of said title 6 of said Consolidated School Law, gave notice that on June 13, 1896, at the Cross hotel, in

the village of Perryville, he would hear objections to said order; that on said June 13, 1896, said commissioner and a large number of persons residing in said school district, met at said hotel, and said commissioner stated to those present that at the making by him of the order of May 22, 1896, he did not know of the amendment made by chapter 264 of the Laws of 1896 to section 9, title 6, of said Consolidated School Law of 1894, and that he intended to annul said order of May 22, 1896, and proceed under the provisions of said section 9 as so amended; that said commissioner vacated and annulled said order, and subsequently made his order of June 20, 1896, from which order this appeal is taken; that the total resident population of school age residing in the four school districts dissolved by said order, as reported by the trustees of said districts, respectively, for the school year ending July 31, 1896, was as follows: district no. 1, Fenner, 8; district no. 13, Fenner, 33; district no. 12, Sullivan, 19, and district no. 4, Lincoln, 11; that the average daily attendance at the schools in said districts during said school year ending July 31, 1896, was as follows: district no. 1, Fenner, $2\frac{6}{10}$; district no. 13, Fenner, $18\frac{2}{10}$; district no. 12, Sullivan, $11\frac{5}{10}$, and district no. 4, Lincoln, $6\frac{5}{10}$; that the aggregate assessed valuation of taxable property in said districts is as follows: district no. 1, Fenner, $33,800; district no. 13, Fenner, $51,700; district no. 12, Sullivan, $83,000, and district no. 4, Lincoln, $30,950; that some of the territory forming said districts has been annexed by said commissioner to district no. 7, Fenner, and district no. 6, Lincoln; that the schoolhouses in the following-named districts dissolved by said order are out of repair, and are not reasonably comfortable for use by the pupils attending school therein, and can not be made so without a considerable expenditure of money upon each of them, namely, no. 1, Fenner; no. 12, Sullivan, and no. 4, Lincoln.

It further appears that of the affiants in the affidavits presented in support of the appeal herein, ten, at least, are nonresidents of and are not voters in any of the four districts dissolved, and twenty of them have no children of their own, or any children residing with them, who attend or who are of school age.

It does not clearly appear how many children who attended the school in said dissolved districts would be obliged to travel a greater distance to attend the school in the new district, nor does it clearly appear that any children will be obliged to travel a greater distance than that which a portion of the children residing in all rural school districts are required to travel. Messrs Christman and Bellenger, who were in the districts dissolved, have been set off in school district no. 7, Fenner.

Section 9, title 6, of the Consolidated School Law of 1894, as amended by section 4, chapter 254, Laws of 1896, which became a law on April 15, 1896, enacts: "Any school commissioner may dissolve one or more districts, and may from such territory form a new district; he may unite a portion of such territory to any existing adjoining district or districts. When two or more districts shall be consolidated into one, the new district shall succeed to all the rights of property possessed by the annulled districts."

Under the provisions of said section 9, above quoted, on and after April 15, 1896, School Commissioner Parkhurst had authority and jurisdiction, either upon or without any petition asking it, and without procuring the assent or dissent of the trustee or trustees of the districts to be affected, or making any preliminary order or giving any notice of any meeting to hear objections, if in his judgment such action was for the best educational interests of such districts, to make an order, to take effect on a day to be named therein, dissolving one or more school districts situate within his commissioner district, and from such territory form a new district, and may unite a portion of such territory to any existing adjoining district or districts.

Such order could be appealed from to the State Superintendent by any qualified voter of any of the districts affected by the order if such person was injured thereby, and upon such appeal said order could be reviewed.

From the proofs presented herein I am of the opinion that the order appealed from was for the best educational interests of the districts affected thereby, and that the authority vested in the school commissioner to make said order, has been wisely exercised.

I decide:

1 That said order appealed from is regular and valid; that School Commissioner Parkhurst had jurisdiction over the subject matter, and had legal authority, under section 9, title 6, of the Consolidated School Law of 1894, as amended by section 4 of chapter 264 of the Laws of 1896, to make the order, under the objections of the qualified voters of the district affected by said order, or of the trustees of said district dissenting.

2 That better educational results will be derived by the dissolution of said school districts and the formation of a new district.

The appeal herein is dismissed and the said order of School Commissioner Parkhurst, dated June 20, 1896, is confirmed.

4015

In the matter of the appeal of Frank R. Fillmore from an order of Adelia H. Wilson, school commissioner of the third commissioner district of Onondaga county.

A school commissioner's order consolidating school districts *set aside* where it is clearly shown that the order is prejudicial to a large number of families having children of school age residing therein.

Decided October 17, 1891

Draper, *Superintendent*

This is an appeal from an order made by the school commissioner on or about the 9th day of August 1891, consolidating school district no. 14 of the town of DeWitt, Onondaga county, with school district no. 11 of the same town. It

is claimed by the appellant that many of the children of school district no. 14 who attend the school, will be compelled to travel a road which runs through the center of both districts, something over three miles, and that a great hardship would be done the inhabitants of that portion of the district lying farthest east in district no. 14, where there is a large number of children of school age. It is also alleged that a very long and steep hill would render the passage of children over this road difficult. It is suggested that a division of district no. 14, by which the inhabitants of the eastern portion could be attached to district no. 8 of the town of Manlius, which adjoins district no. 14 on the east, would better accommodate the children of those families. This suggestion, however, is a matter to be addressed to the school commissioner, in the first instance, and it is not necessary for me to pass upon it upon this appeal.

No answer has been interposed, but I am advised by the school commissioner that there is some question about the wisdom of the order, and that she anticipates that the same will not be sustained.

It seems to me from the facts presented, that the commissioner has been misled by some of the inhabitants of the districts affected, into making an order which is not for the best interests of a large number of the inhabitants of the district.

I conclude, therefore, to sustain the appeal and set aside the order appealed from.

3847

In the matter of the appeal of John K. Larmon v. Joseph W. Barbur, school commissioner of the first commissioner district of Washington county.

A commissioner's order consolidating school districts, which has been regularly made, will be upheld unless it is shown by a preponderance of proof to be unwise, and is opposed to the best educational interests of the territory affected.

Decided December 26, 1889

Draper, *Superintendent*

This is an appeal from an order of the school commissioner of the first commissioner district of Washington county, consolidating school districts no. 1, of Cambridge, and no. 10, of White Creek, made on the 18th day of November 1889.

Objection to the consolidation is made by the appellant and a considerable number of the residents of school district no. 1, of Cambridge. They allege as the reason for their objection, that the consolidation will largely increase the school taxes in their district. They say that the district now maintains a satisfactory school and has valuable property which it will lose the benefit of if the order of the commissioner is permitted to stand. They also say that the district has a library of 2700 volumes, school apparatus valued at $500, and receives annually for the tuition of nonresident pupils about $500.

It is not alleged that the proceedings taken by the commissioner have not been regularly taken, and in the manner provided by statute. The board of trus-

tees in each district in September last, consented to the proposed order. This being so, the appellant has the burden of showing, by clear and overwhelming proof, that the order is opposed to the best educational interests of the territory affected. Having been regularly made, it is to be sustained unless manifestly unwise. The appellant fails to make such a showing as will justify the setting aside of the order. It appears that the incorporated village of Cambridge is entirely within the limits of the two districts. The entire policy of the school laws is in the direction of bringing all the public school interests of each city and incorporated village within a single management, for it is believed that larger schools are more thoroughly organized, more perfectly graded, and productive of better results. The fact that one of the districts affected receives nonresident tuition fees, aggregating $500 per annum, does not materially affect the question; nor does the other fact, if it be a fact, that the school taxes will be increased in such district. It is by no means certain that that will be the case. In any event, it is clear that both of the districts affected are strong in amount of taxable property, the district here objecting having taxable property amounting to near $300,000 in value. It is abundantly manifest that the consolidated district is able to erect a handsome school building and organize a graded school, and if this is done, as is likely, it will prove highly advantageous to the educational interests of the village of Cambridge. There is no claim, so far as I have observed, that any patron of the school will be seriously inconvenienced in consequence of distance from the school building. The fact that a very large number, possibly more than half of the residents of one of the districts affected, are opposed to the consolidation, has been well considered. It is a weighty fact in the case, and has not been passed by lightly; but I am constrained to believe that, when the new arrangement shall go into operation, it will be approved by substantially the entire population of the village.

It appears that before the trustees of the respective districts gave their consent to the consolidation, the question was submitted to a vote of the legal voters of the two districts. A meeting was held on the 27th day of August, last, and the polls were kept open from 10 o'clock in the morning until 3 in the afternoon, for the purpose of taking an expression of the opinion of the qualified voters of the two districts. At such meeting, 382 votes were cast, of which 270 were in favor of consolidation, and 110 were opposed thereto. This shows a very strong sentiment in the village in favor of the action appealed from.

It is usual in all such cases to find some opposition to action of this character; but the time ordinarily comes, as I am confident it will in this case, when substantially the entire people are convinced of the wisdom of it.

It is made to appear by the school commissioner that the buildings used for school purposes in both of the districts affected, are old and without any of the modern improvements for heating and ventilating, and are ill adapted for school purposes. Indeed all of the more weighty considerations seem to support the action of the commissioner, and the time for such action seems opportune. In

any event, the appellant fails to make a case which would justify the setting aside of the order appealed from.

The appeal must, therefore, be dismissed, and the stay of proceedings granted herein, on the 30th day of November 1889, is hereby revoked and annulled.

3660

In the matter of the appeal of Charles Anderson, of school district no. 6, town of Bainbridge, county of Chenango v. Willis R. Hall, school commissioner.

The action of a school commissioner in consolidating two school districts which were weak and unable to sustain good schools will not be disturbed, where it is shown that by the consolidation a district has been formed of sufficient strength to maintain a good school.

The order of the commissioner consolidating districts should recite the fact that the trustees of the districts affected had consented to the order.

The consent of a district meeting is not a compliance with the statute.

Decided January 21, 1888

Draper, *Superintendent*

This appeal is taken by a resident of school district no. 6, town of Bainbridge, Chenango county, from an order made by the school commissioner of the second district of Chenango county, consolidating school district no. 6 with school district no. 8 of that town.

The order was made on the 18th day of May 1887, and went into effect on the 1st day of June 1887.

It is alleged by the appellants that school district no. 6 had no trustee at the time the order was made, the person who held the office having removed from the district, and that the action of the district meeting in school district no. 6 at which a vote in favor of the consolidation was secured, was poorly attended, only three voters being in attendance and that the vote was not a fair and full expression of the voters of the district.

The respondent, the school commissioner, alleges that before the order was made he obtained the consent of the sole trustee of each district, that before making the order he consulted with nearly every voter in school district no. 6 and found no opposition to the proposed order. That the consolidation is for the best interests of both districts, as each was weak and unable to sustain a good school and by uniting them a district of reasonable strength was formed. He also states that the old schoolhouse in district no. 6 is worthless.

The appellants do not allege sufficient grounds upon which to sustain their appeal. The statute provides that with written consent of the trustees of all districts affected thereby, the school commissioner may alter any school district under his charge. It appears such consent was obtained. At the time it was given the trustee of school district no. 6 was a resident of his district.

The commissioner in his order instead of reciting the consent of the trustees, stated that both districts had given an affirmative vote on the question of annexa-

tion. Now, so far as the school commissioner's action is concerned, the vote of a district meeting would not comply with the statute, and while it is not expressly required, the order should have recited the consent of the trustees of both districts to be affected. But the fact appearing that the consent of the trustees was in fact obtained, I have concluded to dismiss the appeal. The school commissioner, however, is hereby directed to procure and attach the written consent of the trustees to the order or make an amended order reciting such consent, within thirty days from this date.

3904

In the appeal of Bernard Donel and others v. Ezra B. Knapp, school commissioner of the second commissioner district of Onondaga county.

Appeal from a commissioner's order consolidating school districts, the effect of consolidation being to greatly inconvenience children who would become patrons of the school. A majority of the electors of one of the districts is clearly opposed to consolidation, the districts affected by the order each being sufficiently strong to maintain proper schools. Appeal sustained.

Decided August 29, 1890

Draper, *Superintendent*

This is an appeal from an order made by the school commissioner on the 24th day of July 1890, consolidating school districts numbered 2 and 3, of the town of Tully. The order was made upon the consent of the sole trustee in each district. The prevalent opinion in district no. 3 is evidently averse to the consolidation. It seems that a meeting of the residents of this district was held on the 9th day of June, for the purpose of getting an expression of the feeling in the district touching the matter. Upon a vote being taken at such meeting 13 declared themselves in favor of the consolidation and 31 against the same. The principal reason alleged by the appellants in support of their appeal is that their children will have to go much farther to school. It is admitted on all sides that they would certainly have to go a half mile farther than at present, and that in some instances children would have to go two miles and a half to reach the school in district no. 2.

Both districts are reasonably strong both in the number of residents and in the value of property. No. 2 is much the stronger. The number of children attending school in this district last year was 122, and the assessable valuation was $342,500. The number of pupils registered in no. 3 last year was 29, and the assessable valuation $78,900. Thus at present, no. 2 stands in no need of the annexation of no. 3, and it seems to me that no. 3 is sufficiently strong to maintain proper school accommodations. This being so, I think it follows that the question upon the desire of the majority of the residents of district no. 3, so far as there has been any expression of the desire of such majority, has been opposed to the consolidation or annexation. It seems to me advisable, therefore, that the order of the commissioner should not be upheld.

I observe in the papers some statements to the effect that the schoolhouse in district no. 3 is not in a suitable state of repair. While the result of my deliberation upon the matter will be to continue district no. 3 as at present constituted, it must be borne in mind by the residents of such district, that in case they fail to maintain a schoolhouse in suitable condition for a public school, and to maintain a school which will meet the needs of all the residents of the district, an order such as that to which they now so strenuously object, will of necessity be made sooner or later.

The appeal is sustained.

5351

In the matter of the appeal of Melvin H. Pendleton from an order dissolving school district no. 2, Scio, and annexing the territory thereof to school district no. 1 and district no. 3, Scio.

When it appears that the action of a school commissioner in consolidating two districts promotes the educational interests of all parties concerned without placing improper burdens upon the residents of either district and without the operation of a hardship upon any of the residents of either district, his action should be sustained.

Decided September 30, 1907

Draper, *Commissioner*

On April 15, 1907, John D. Jones, school commissioner of the second school commissioner district of Allegany county, made an order dissolving school district no. 2, town of Scio, and annexed portions thereof to school districts no. 1, Scio, and no. 2, Scio. A short time previous to the date on which these orders were made the school commissioner gave an informal hearing to a committee representing school district no. 2. It appears that all phases of this question were discussed at this hearing and the school commissioner planned to rearrange the territory of district no. 2 to meet the wishes of the residents of that district so far as possible. It appears that the general understanding at the termination of the hearing was that the school commissioner would soon make the orders. Such orders were made April 15th and the fact that they were made on that date must have been generally understood. This appeal however was not instituted until July 3d or nearly three months after the orders were made. The appeal should have been instituted within thirty days after such orders were made. This long delay in bringing the appeal is sufficient ground to warrant me in dismissing this proceeding.

The greater portion of district no. 2 was annexed to district no. 1. District no. 1 embraces the hamlet of Scio. The schoolhouse in this district is a new modern building recently erected at an expense of $12,000. It is located in the northwest corner of the district and the schoolhouse in district no. 2 is located in the northeast corner of that district. The dividing line between these districts is the Genesee river. The school buildings of these districts were located on

opposite sides of the river and only about 200 rods apart. District no. 2 employed but one teacher. District no. 1 employs four teachers and maintains a graded school. The consolidation of these two districts will materially strengthen the educational facilities of this community. The social and business interests of the residents of district no. 2 center in no. 1. Nearly all the children of district no. 2 are within a very reasonable distance of the schoolhouse in district no. 1. It appears that only two families are about two miles from such schoolhouse. Good roads are maintained and are always open. None of the children will be required to travel more than 200 rods farther than they were required to travel to attend school in district no. 2.

Appellants object to being taxed to pay the bonded indebtedness of district no. 1 incurred for the erection of the new building because they had no voice in authorizing the erection of such building. The residents of district no. 1 liquidated one sixth of the expenses of erecting this schoolhouse before district no. 2 was annexed thereto. The residents of former district no. 2 will have equal rights and privileges in and to this building. It is entirely just they should contribute their proportionate share towards its erection. It appears from these pleadings that the school commissioner has promoted the educational interests of all concerned by the action taken and he should be sustained.

The appeal is herein dismissed.

SCHOOL DISTRICTS—DISSOLUTION

5181

In the matter of the appeal of Ira R. Jones, sole trustee of school district no. 11, town of Erin; of David C. Jayne, sole trustee of school district no. 2, town of Erin; of Howard L. Burleau, sole trustee of school district no. 5, town of Erin; of Baldwin E. Snell, sole trustee of school district no. 7, town of Erin; of Herbert Staples, sole trustee of school district no. 12, town of Erin; of Erwin Hollenbeck, sole trustee of school district no. 13, town of Erin, and of Jacob Arthur Chase, sole trustee of school district no. 15, town of Veteran, from the action of George Turner Miller, school commissioner of the sole school commissioner district of Chemung county in making certain orders abolishing said school districts, establishing new school districts and thereby altering the boundaries of other school districts.

The original part of a section of law restated in an amendatory act speaks from the date of its original enactment and not from the date of the amended act.

Under section 9 of title 6 of the Consolidated School Law a school commissioner may dissolve a school district without the consent of the trustees of the districts affected. There is some question as to the right of a school commissioner under such section to alter the boundaries of a union free school district without the consent of the trustees of such district.

The arrangement of school districts must be such as will serve educational ends and best meet the convenience of the patrons of the schools. In the arrangement of school districts the wishes of the inhabitants are entitled to careful consideration from the school commissioner.

Distances of two, three, and three and one-half miles are too great for small children or delicate children to travel each day over rough roads either by walking or riding to attend school.

A school district though weak in numbers and in property value should not be dissolved unless the children residing in such district and required to attend school are placed within a reasonable distance of a schoolhouse.

A school commissioner is not justified in disturbing the educational work of a whole township by wholesale dissolution of school districts and rearrangement of school privileges without even consulting the inhabitants thereof, unless a substantial, even an overwhelming, educational reason exists for taking such action.

Decided March 22, 1905

Richard H. Thurston, attorney for appellants
George Turner Miller, attorney for respondent

Draper, *Commissioner*

During the latter part of July and the early part of August 1904, the respondent, school commissioner of Chemung county, made orders abolishing six school districts in the town of Erin and one school district in the town of Veteran. Out of the territory comprising these seven school districts, two new districts were

erected and the remainder of such territory was annexed to adjoining districts. The principal portion of such remaining territory was annexed to the school district including the village of Horseheads and to the school district including the village of Breesport. In abolishing these districts, in forming the two new districts, and in making the other alterations in district boundaries the school commissioner issued twenty-four orders. This appeal is brought to vacate all of these orders and to restore all the districts affected by such orders to their status previous to the issuance of said orders.

The school commissioner made all of the orders in question under the provisions of section 9, title 6 of the Consolidated School Law. The consent in writing was not obtained from the trustees of any of the districts affected. School district no. 1 of the town of Horseheads is a union free school district whose boundaries do not coincide with the boundaries of an incorporated village. Many of these orders alter the boundaries of that district. It is claimed by the appellants that section 9 of title 6 does not apply to union free school districts and that all orders made under the provisions of that section and which affect union free school district no. 1, Horseheads, are defective. It is argued by counsel for appellants that in making these orders the school commissioner was executing a general plan which had been deliberately formulated and that the issuance of all of these orders was essential to the consummation of that plan. It appears that seven of the orders relate to union free school district no. 1, Horseheads, and that these orders are so interrelated to other orders as to affect six other school districts. It is argued that if the orders affecting district no. 1, Horseheads, are defective as to that district, they are defective as to the other six districts which they affect and that all correlative orders are also defective. In other words, counsel for appellants claims that these twenty-four orders are so interdependent that if one is defective they are all defective. It does appear that there is such a mutual relation between the several orders affecting district no. 1, Horseheads, and those affecting the other six districts that if the former orders are defective the latter must be defective also.

Previous to the passage of chapter 264, Laws of 1896, the statute conferring authority to alter a common school district was sections 2, 3 and 4 of title 6 of the Consolidated School Law. This law provided two methods of altering a common school district — one with the written consent of the trustees of the districts affected and one without such consent. It should be understood, however, that the term *alteration* as used in section 2 of title 6 has always been held to mean the transfer of real property from one district to an adjoining district. Previous to the passage of chapter 264 of the Laws of 1896 section 30 of title 8 of the Consolidated School Law provided for the alteration of union free school districts whose boundaries do not coincide with those of an incorporated village. Section 30 simply provided that a school commissioner might alter union free school districts in the manner provided in title 6. In other words, previous to the passage of chapter 264 of the Laws of 1896 the methods of *altering* a common school district and a union free school district were identical and the consent

or refusal to consent of the trustees of the districts affected was the first step in a proceeding of alteration of district boundaries. There is a distinction between the *alteration* of a district and the *dissolution* of a district. Thus far we have considered the law relating to the *alteration* of districts up to 1896 and up to that time the consent of the trustees of the districts affected was an essential point.

Section 6 of title 6 provides for the *dissolution* of common school districts and of union free school districts, but in each proceeding the consent of the trustee is required.

As stated before, the orders in question were issued without the consent of the trustees of any of the districts affected. As a school commissioner had not authority to make such orders previous to the enactment of chapter 264 of the Laws of 1896, the question to determine is, What power did the enactment of such law confer on school commissioners in the dissolution and alteration of school districts? Chapter 264 of the Laws of 1896 amended section 9 of title 6 of the Consolidated School Law by incorporating these words in that section: "Any school commissioner may dissolve one or more districts and may from such territory form a new district; he may also unite a portion of such territory to any existing adjoining district or districts." If this amended section applies to union free school districts, the school commissioner possessed legal authority to issue all of the orders in controversy. If it does not apply to union free school districts he did not possess such authority.

Counsel for appellants contends that section 9 of title 6 does not apply to union free school districts. His argument is that section 30 of title 8 of the Consolidated School Law provides that union free school districts may be altered as title 6 provides that common school districts may be altered. This provision of section 30 was enacted in 1894 and it is claimed that the provisions of article 6 enacted at that time are the only provisions which apply to union free school districts. Amendments to title 6 enacted by the Legislature since 1894 do not apply to union free school districts unless it is expressly stated in such amendments that they shall apply to such districts. Section 30 originally provided that no union free school district having an outstanding bonded indebtedness should be divided or altered. This section was amended in 1899 by omitting from the section the words "or altered." In order to make this amendment the whole of section 30 was restated. Restating such section for the purpose of making an amendment thereto does not give to such section the effect of an original enactment. All of the original part of such section restated in the amendatory act speaks from the date of its enactment in 1894 and not from the date of amendment in 1899. As section 9 of title 6 was not in existence in 1894 and was not enacted until 1896, its provisions do not apply to union free school districts. This theory is supported by Cooley in his work on *Constitutional Limitations* (*see* p. 76, 6th ed.) and by the Court of Appeals of this State in Ely v. Holton, 15 N. Y. 156; Moore v. Mansert, 49 N. Y. 332; Matter of Estate of Prime, 136 N. Y. 347; and Allison v. Welde, 172 N. Y. 421.

This Department has repeatedly held that section 9, title 6 as amended by chapter 264, Laws of 1896, confers on school commissioners absolute power to dissolve a school district without the consent of the trustees. It has also held that when a commissioner has dissolved a district under this section he may annex the territory of such dissolved district to any adjoining district — either common school districts or union free school districts — without the consent of the trustees of the districts affected. This decision has been made on the theory that the annexation of territory from a dissolved district is not an *alteration* of a district under the provisions of sections 2, 3 and 4 of title 6 of the Consolidated School Law. In view of the fact that no other provision is made for the alteration of union free school districts and also in view of the decisions of the Court of Appeals above cited there appears to be some question as to the soundness of such decision in relation to the annexation of such territory to a union free school district without the consent of the trustees of such districts.

The action of the school commissioner in abolishing these seven school districts was taken without any consultation with the inhabitants thereof or without their knowledge even that such action would be taken. There was no demand, not even a request, from the residents of these districts for such action. On the other hand, these people were opposed to the dissolution of their districts. Not a single officer or resident of any of these seven districts has joined the respondent in his answer to these appeals. Nor does the school commissioner claim that the people desired the changes which he made. In most districts school meetings were held and the trustees authorized to employ counsel and appeal from the action of the commissioner to this Department. There appears to be no division of sentiment among the people of these districts. There does appear to be a unanimous sentiment in resisting this action of the school commissioner which seems arbitrary in the extreme. The people residing in these districts were entitled to a hearing at least at the hands of their commissioner before such wholesale rearrangement of school privileges was put into effect. Their wishes in this matter were also entitled to careful consideration from the school commissioner. The arrangement of school districts must be such as will serve educational ends and best meet the convenience of the patrons of the schools.

The territory embraced in these seven districts is located in a farming region. Many of the residents of these districts do not live on the main public roads. Many of the highways in these districts are rough and difficult to travel especially in the winter. In this section of the state it is not possible for children of tender age to travel long distances to attend school. These are conditions which the school commissioner should have taken into consideration in determining on the alteration or dissolution of such districts and the formation of new districts. These districts, however, appear to have been absolutely ignored by the commissioner in making the orders in question.

Before the commissioner dissolved these districts nearly all the children therein resided within one and one-half miles of a schoolhouse. The salaries paid the teachers in these districts during the school year were as large as the salaries

paid in many districts having a larger assessed valuation. Part of these districts have recently made extensive repairs on their buildings so that such buildings conform to modern ideas of health and comfort. The people of these districts appear, therefore, to have willingly given proper support to their schools, to have maintained good schools, to have been interested in their schools, and to have been contented with their school privileges which appear to have been as good as those of the surrounding country. If the buildings of part of these districts were poor and in need of repairs as alleged by the commissioner, he was not justified on that condition alone in dissolving these districts. He possessed ample power under the law to compel them to repair their buildings or to erect new ones.

As these districts stand, under the orders of the commissioner, there are children in all of them who must travel two miles, three miles, and three and one-half miles in order to attend school. The distance from one section of one of the districts to the schoolhouse of such district is five miles. These distances are too far for small children or delicate children to travel each day over rough roads, either by walking or riding to attend school.

The respondent alleges that these districts were weak and that the policy of the State has been to dissolve weak districts. He claims that the State recognized these districts as weak since the apportionment of district quotas is based on the assessed valuation of districts. He justifies his action in dissolving these districts on the ground that their assessed valuation is less than $40,000. His position on this point is neither right nor sound. If the State regarded districts having an assessed valuation of $40,000 or less as too weak to maintain schools and its policy is to dissolve such districts, why did the State raise the district quota to $150 for all districts having an assessed valuation of $40,000 or less? What was the object of the State in making the quotas for such districts larger than it made the quotas for districts having an assessed valuation of more than $40,000? Was not this discrimination for the purpose of encouraging and fostering the weak districts instead of abolishing them? These districts were not strong districts but they maintained their schools without complaint. The most of these districts were sufficiently strong financially and numerically to do this. The majority of these districts had a registration of 14 to 19 pupils with an assessed valuation of $22,395 to $32,400.

The controlling motive which guided the respondent in this matter does not appear to have been the benefits to be conferred upon the inhabitants of these seven districts by such changes in school district boundaries, but it does appear to have been his desire to strengthen the districts in which the villages of Breesport and Horseheads are located. The commissioner acknowledges that these districts have a high tax rate, that such tax rates are burdensome, and that his desire to decrease such tax rates and especially the tax in the Breesport school district was one of the reasons which induced him to make these orders. He alleges other reasons but this appears to have been the controlling one. He had no moral or legal right to abolish seven districts and subject the inhabitants

thereof to the inconvenience and hardships which must follow therefrom in order to reduce the tax rate of another district.

A school commissioner is justified in dissolving a school district when such district is too weak numerically and financially to maintain a school and when the inhabitants of such district may be given better school facilities in adjoining districts. A school district though weak in numbers and in property value, should not be dissolved unless the children residing in such district and required to attend school are placed within a reasonable distance of a schoolhouse. A school is not to be absolutely condemned because it may be small in numbers. A small school is not necessarily or naturally a poor school.

It is quite probable that some alterations of district boundaries could have been made in these districts to good advantage and possibly some of these districts could have been wisely abolished. However, a school commissioner is not justified in disturbing the educational work of a whole township by wholesale dissolution of school districts and rearrangement of school privileges without even consulting the inhabitants thereof, unless a substantial, even an overwhelming educational reason exists for taking such action. Such reason does not exist in this case. The appellants are entitled to a restoration of their school districts.

The appeals herein are sustained.

It is ordered, That the orders of George Turner Miller, school commissioner of the sole school commissioner district of Chemung county, and each of them, made on July 28, 1904, in dissolving school district no. 1, town of Erin, on August 12, 1904, in dissolving school district no. 2, town of Erin, on August 9, 1904, in dissolving school district no. 5, town of Erin, on August 1, 1904, in dissolving school district no. 11, town of Erin, but describing no. 5, town of Erin, on August 2, 1904, in dissolving school district no. 7, town of Erin, on August 1, 1904, in dissolving school district no. 12, town of Erin, on August 10, 1904, in dissolving school district no. 13, town of Erin, and on August 1, 1904, in dissolving school district no. 15, town of Veteran, be, and each of them is hereby vacated.

It is also ordered, That an order made by the said George Turner Miller, school commissioner of the sole school commissioner district of Chemung county, on August 2, 1904, forming a school district designated no. 2, Erin, in the title and no. 1, Erin, in the body of said order, be, and it is, hereby vacated; and

That an order made by the said George Turner Miller, school commissioner of the sole commissioner district of Chemung county on the 2d day of August 1904, in forming a new school district designated school district no. 1, Erin, be, and it is hereby vacated.

It is further ordered, That each and every order made by George Turner Miller, school commissioner of the sole school commissioner district of Chemung county, between July 1, 1904 and September 1, 1904, in altering the boundaries of school districts no. 1, Horseheads, no. 3, Erin, no. 1, Baldwin, and no. 16, Veteran, be, and each of them is, hereby vacated.

5328

In the matter of the appeal of Martin W. Knight, sole trustee of school district no. 14, town of Hancock, from an order made by Frank L. Ostrander, school commissioner of the first commissioner district of Delaware county, confirming an order made by him dissolving school district no. 14, town of Hancock, and annexing the territory of such district to union free school district no. 20, town of Hancock.

To justify the dissolution of a school district possessing a sufficient number of children and the financial resources to maintain a satisfactory school when the residents of such district are unanimously opposed to such action, some overwhelming educational necessity should be shown to exist.

Decided August 27, 1907

Wagner & Fisher, attorneys for appellant
Freeman L. Taylor, attorney for respondent

Draper, *Commissioner*

On January 17, 1907, Frank L. Ostrander, school commissioner of the first school commissioner district of Delaware county, made an order dissolving school district no. 14, town of Hancock, Delaware county, and annexing the territory thereof to union free school district no. 20, town of Hancock. The order was made under sections three and four of title 6 of the Consolidated School Law. The order recited that the trustees of district no. 14 had not consented. The school commissioner fixed a date as required by section 4 when he would hear objections to such order. At the hearing before the school commissioner and in this proceeding the respondent raised the question of the jurisdiction of the school commissioner to make the order in question under sections 3 and 4 and also raised several questions of regularity of procedure. It is unnecessary to consider any of these technical questions. This case should be determined upon the question whether or not the school commissioner was justified under all the circumstances in dissolving no. 14 and annexing its territory to district no. 20.

Union free school district no. 20 includes the greater portion of the village of Hancock. This district maintains a graded school including an academic department and employs ten teachers. It has an assessed valuation of nearly $350,000. For ten years district no. 14 has contracted for the education of its children with district no. 20 instead of maintaining a home school. During the past school year it paid district no. 20 $600 for instructing its children. It has been cheaper for district no. 14 to operate under the contract system at this tuition than to maintain a home school.

The cost per capita of maintaining the school in no. 20 is greater than the tuition per pupil which no. 14 has paid under the contract between these districts. The feeling on the part of district no. 20 appears to be that if the children of no. 14 are to enjoy school privileges afforded by no. 20 the property of no. 14 should pay its proportionate share of the expense of maintaining such school

privileges. This feeling has resulted in the agitation of the annexation of district no. 14 to district no. 20.

District no. 14 has an assessed valuation of about $90,000 and 42 children of school age. It has sufficient assessable property and sufficient children to maintain a school. A portion of this district is also within the limits of the village of Hancock. A branch of the Delaware river separates the two districts. It appears that the schoolhouse in no. 14 is unfit for use. The district has preferred to contract with no. 20 instead of maintaining a home school because it has been cheaper and because the district has thereby avoided the expense of building a new schoolhouse. It appears therefore that the principal question involved is one of taxation or expense. However the residents of no. 14 appear to be unanimous in opposing the dissolution of their district and annexing it to no. 20. A petition signed by every voter of the district, protesting against the order of the school commissioner is included in the moving papers. I have repeatedly refused to sustain an order of a school commissioner dissolving a district possessing a sufficient number of children and the financial resources to maintain a satisfactory school when the residents of such district are unanimously opposed to such action. To justify the dissolution of a district under such circumstances some overwhelming educational necessity should be shown to exist. It is not shown to exist in this case. The annexation of district no. 14 to no. 20 is not essential to the educational needs of no. 20. No. 20 will be able to maintain just as good a school without the annexation of no. 14 as it would if such territory should be annexed.

Appellant sets forth in his pleadings that district no. 14 is willing to erect and equip a new schoolhouse at a cost of $8000 and to employ two teachers. Respondent claims that this proposition is not made in good faith, that the annual meeting of this district in 1906 voted down a proposition to erect a new schoolhouse and that the district is not willing to vote a proper tax for the erection of a new building. The school commissioner has full authority over this question. The schoolhouse is conceded to be unfit for use and not worth repairing. The school commissioner may therefore make an order condemning the schoolhouse and he may even name in such order the amount necessary to expend in the erection of a new building suitable to the needs of such district.

The appeal herein is sustained.

It is ordered, That the preliminary order made by Frank L. Ostrander, school commissioner of the first commissioner district of Delaware county, on the 17th day of January 1907, in dissolving school district No. 14, town of Hancock, and in annexing the territory thereof to school district no. 20, town of Hancock, and the order made by the said Frank L. Ostrander, school commissioner of the first commissioner district of Delaware county, on the 24th day of April 1907, in confirming said preliminary order be, and each of said orders is, hereby vacated.

5399

In the matter of the dissolution of school district no. 2, town of Schroon, county of Essex.

Dissolution and annexation of school districts; opposition of electors of dissolved district. A school commissioner dissolved a district adjoining a union free school district and annexed the territory thereof to such union free school district. The action was taken by the school commissioner under section 9 of title 6 of the Consolidated School Law [Education Law § 27] which did not require the consent of the trustee of the dissolved district. Nearly all the qualified electors of such district were opposed to the dissolution. The union free school district had just built a new schoolhouse and the district was bonded for $6000. The dissolved district was strong enough numerically and financially to maintain a good common school. It was held that where the practically unanimous opposition of the electors of a dissolved district is presented, together with the extension of an existing bonded indebtedness of one district over the territory of the district dissolved, the order of dissolution will be set aside unless it is apparent that the educational advantages of the new district are overwhelmingly superior to those afforded by the district dissolved.

Decided December 29, 1908

Draper, *Commissioner*

This is an appeal by Darius B. Squires, Leroy B. Crane and Henry Bohrman, taxpayers in school district no. 2, in the town of Schroon, Essex county, from an order made by Freeman C. Pond, school commissioner of the second commissioner district of Essex county, dissolving school district no. 2 of the town of Schroon and annexing a part thereof to school district no. 1 in such town and another part to school district no. 8 of said town. The order of dissolution was made by the commissioner by virtue of the authority vested in him under section 9 of title 6 of the Consolidated School Law.

The appellants are residents and taxpayers of that part of district no. 2 which is annexed to district no. 1. District no. 1 is a union free school district having a school of four departments. The order dissolving such district no. 2 and altering the boundaries of districts nos. 1 and 8 of such town of Schroon was duly signed by said Freeman C. Pond on June 30, 1908, and filed in the office of the town clerk of the town of Schroon July 10, 1908. The form of this order is not attacked by the appellants.

On the hearing before me the attorney for the appellants did not insist upon the objections raised in the petition to the sufficiency and regularity of the proceedings instituted by the school commissioner, and to the validity of the order entered in such proceedings. It only remains to be determined whether or not the commissioner was justified in dissolving district no. 2, and annexing the territory embraced therein to districts nos. 1 and 8.

District no. 1 comprises the unincorporated village of Schroon Lake with a permanent population of about 450. The business and social interests of the community are centralized in this village. The principal roads leading to and from it are maintained in a passable condition at all times of the year. The

assessed valuation of the real and personal property in this district is about $102,000, with a tax rate of $2.20 on the hundred.

Prior to the making of the order dissolving district no. 2, and annexing a part thereof to district no. 1, a new school building had been erected in the latter district, at a cost of about $6000, for the payment of which bonds were issued payable in 12 equal annual instalments. One of these instalments has already been paid. The new school building was erected quite near the boundary line between districts nos. 1 and 2 apparently for the better accommodation of the inhabitants of the latter district should the consolidation of the two districts be effected.

District no. 2 has an assessed valuation according to the trustee's report for 1908, of $40,294, over half of which is assessed to nonresidents owning summer homes, cottages, hotels and boarding houses on or near the shore of Schroon lake. It would appear from the petition that nearly or quite all the qualified electors and taxpayers of district no. 2 are opposed to the consolidation. Forty-eight (48) of them, paying taxes on about 80 per cent of the entire assessed valuation of the district, signed a protest against it. Sixteen of these are nonresidents, owning summer cottages and homes within the district. These nonresidents own property in the district having an assessed valuation of $22,350.

The bonded indebtedness of district no. 1 was voted by the qualified electors thereof for the erection of a new school building without any special effort to ascertain whether the electors of district no. 2 would agree to join with them in sharing this burden. It seems to have been assumed that the consent of district no. 2 was immaterial. The order of dissolution and consolidation was subsequently issued. As a result the taxpayers in district no. 2 are made to assume an indebtedness without their consent. The school commissioner states that a number of taxpayers and residents in district no. 2 expressed their willingness to be taken into the new district. But there was no effectual effort made to secure an expression of the will of all the qualified electors and taxpayers of district no. 2 either by the commissioner prior to the execution of his order or by the trustees of district no. 1 prior to the location and erection of the new schoolhouse in that district.

Two very weighty objections against the validity of this order are thus presented: (1) The practically unanimous opposition of the qualified electors and taxpayers, and (2) the extension of an existing bonded indebtedness of one district over another district without the consent of the latter. To overcome either of these objections it must clearly appear that the educational interests of district no. 2 are greatly advanced by the consolidation. Where both objections exist a merely comparative superiority of subsequent school facilities over those existing prior to the consolidation, would be insufficient. Such superiority must be overwhelming — so insuperably great as to make it the absolute duty of the school commissioner in the promotion of the educational advantages of the

district affected, to make the order of consolidation. It may be assumed that the school in district no. 1 will afford better educational facilities than that in district no. 2. District no. 1 has a new building with modern furniture and apparatus; the school is graded and taught by four competent teachers. The school in district no. 2 is ungraded, with one teacher having an elementary license; nothing but elementary subjects are taught therein. The residents and taxpayers say they are willing to maintain a good common school and it is evident that the financial resources of the district are sufficient for the purpose.

I have held that where a district is sufficiently strong to maintain a good common school and the residents and taxpayers thereof are willing to contribute to its support, such district should not be dissolved and consolidated with another district against the wishes of a majority of such residents and taxpayers. (Appeal of Donel, no. 3904, August 1890; Appeal of Olenhouse, no. 4012, October 1891.) In the case at hand the children of the district will be required to travel increased distances to reach the schoolhouse in district no. 1. These distances are not very considerable, and, but for the almost unanimous objection to consolidation on the part of the residents and taxpayers of the district, would not be material. In a case somewhat like this, decided by me as Superintendent of Public Instruction in 1891, I set aside a school commissioner's order, dissolving a district, upon evidence that a respectable portion of the patrons of the school demands a continuance of the school facilities which had been afforded them by the dissolved district. (Appeal of Gulick, no. 4018, November 1891.) The fact that a district is relatively weak and that the school in the district to which it is to be annexed is larger and more liberally equipped, is not of itself sufficient to justify its dissolution when the evidence tends to show that nearly all of the patrons of the school object to such dissolution. This principle has been laid down by me in the case of the appeal of Fogarty (no. 3930, December 1890). Many other decisions of this Department might be cited supporting the proposition that dissolution is only favored where the district affected is weak either numerically or financially, and where the educational interests of the district would thus be greatly advanced. Where there is neither pronounced weakness nor any desire for dissolution and annexation on the part of the people of the district, the commissioner should not take such action unless the educational necessities of the district demand it. It can not be said that district no. 2 is weak in any sense. It has sufficient taxable property to properly maintain a good common school. The people of the district are willing to be taxed for this purpose.

The apparently almost unanimous desire of the residents and taxpayers of district no. 2 to continue their school in that district and their emphatic protest against the added burden of the bonded indebtedness of district no. 1, incurred without their consent and without reference to their wishes, leads me to doubt the advisability of dissolving district no. 2 and annexing any portion of it to district no. 1. The educational advantages derived from the consolidation are

not sufficiently great to justify the issuance of the order and I can not therefore sustain it.

I come to this conclusion reluctantly for I am sure that the school commissioner issued the order complained of in entire good faith, believing that the educational interests of the community affected would be materially advanced thereby. He claims that he was influenced in his action by the suggestions of members of the Department staff. If this is to be mentioned it should also be said that the Law Division advised him that consolidation might be justified if provision were first made for the payment of the cost of the erection of the new building in district no. 1 by appropriation. However this may have been, I can not allow my decision of this appeal to be so controlled. The Commissioner of Education acts judicially in the determination of appeals brought to him under the law and his decisions should not be affected by the acts and statements of his subordinates.

Owing to a misapprehension of the effect of the order appealed from, the residents of district no. 2 have maintained a school during the pendency of this appeal. No stay was asked for or granted. The commissioner's order took effect from its entry, and from that date district no. 2 was dissolved and ceased to exist. The school maintained in that district subsequent to the date of the entry of the order was not legally a public school; but owing to the peculiar circumstances of this case I have deemed it advisable to legalize the action of the district in respect to such school.

The appeal herein is sustained.

It is hereby ordered, That the order of Freeman C. Pond, school commissioner of the second commissioner district of Essex county, dissolving district no. 2, town of Schroon, Essex county, and annexing portions thereof to districts nos. 1 and 8 of such town, filed in the town clerk's office of such town on July 10, 1908, shall be and the same is, hereby set aside and declared of no effect.

It is hereby further ordered, That all the actions and proceedings taken by district no. 2, and any of its officers, pertaining to the maintenance of a school in such district, from the date of the filing of such order, are hereby legalized, ratified and confirmed and declared to be of the same force and effect as though such order had not been made.

5278

In the matter of the appeal of Arthur E. Duell as trustee of school district no. 7, town of Truxton, from the action of Ernest W. Childs, school commissioner of the second commissioner district of Cortland county, in making certain orders dissolving said school district no. 7, Truxton, and annexing the territory thereof to adjoining districts.

The dissolution of a school district and its annexation to another district is not justified by the fact that the older children in the advanced or academic grades would have the

advantage of a course of study maintained for pupils of such grade. It is quite as necessary to provide adequate facilities for the younger children of the district as the older.

A district having sufficient property and children to maintain an ideal country school should not be dissolved when such action is opposed by a majority of the residents of the district.

Decided September 29, 1906

Davis & Lusk, attorneys for appellant
William D. Tuttle, attorney for respondent

Draper, *Commissioner*

On May 21, 1906, School Commissioner Childs made an order dissolving school district no. 7, Truxton, and annexing all its territory to union free school district no. 6, Truxton. An appeal from the action of the commissioner in making such order was filed at this Department on June 29, 1906. On July 27, 1906, the school commissioner made an amended order which was in effect the same as the original order except that a small portion of the territory formerly comprising school district no. 7 was annexed to adjoining common school district no. 10, Truxton. An appeal from this order was filed with the Commissioner of Education on August 27, 1906. The same questions are involved in both appeals and we will therefore combine the two proceedings and dispose of them in one decision.

The school commissioner made these orders under the authority of section 9, title 6 of the Consolidated School Law. The jurisdiction of the commissioner to make said orders under such section of the law is challenged by appellant. Other technical questions of procedure are also raised by appellant. I do not deem it desirable to determine this appeal upon the questions of law which are raised. The questions raised in this appeal are such that it seems advisable to decide them upon the reasons which actuated the school commissioner for taking such action instead of his technical method of procedure.

It appears that the schoolhouse in district no. 7 was in a dilapidated condition and not worth repairing. A special meeting of the district was held March 6, 1906, to consider the question of erecting a new building. Commissioner Childs attended this meeting and advised the voters what the provisions of the school law were in relation to the erection of new buildings. A ballot was taken at that meeting on the propostion to erect a new schoolhouse and such proposition was carried by a vote of 25 to 16. It does not appear that the commissioner suggested at this meeting that it was advisable to dissolve the district. Between the date of this special meeting and the making of his first order on May 21, 1906, Commissioner Childs received a petition signed by 14 residents of the district requesting the dissolution of such district and the annexation of its territory, or such part as may be deemed advisable, to union free school district no. 6, Truxton. The reason assigned in this petition for praying for such action is that the conditions which require a new schoolhouse

and improved grounds lead petitioners to believe that the "educational and pecuniary" advantages of the inhabitants of the district require it. The school commissioner in making his order predicated it upon the petition.

The question to be determined in this proceeding therefore is whether or not the action taken by Commissioner Childs in dissolving district no. 7, Truxton, was wise and will afford better educational facilities to the inhabitants of that district.

The parties to this proceeding practically agree upon the essential facts involved in this controversy. District no. 7 had an assessed valuation of $72,374. There were at least forty-three children between the ages of 5 and 18 years residing in said district and of these twenty-nine attended school in such district during the past school year and the average attendance at such school was 19.24. It is also alleged by appellant and not denied by respondent that several of the children residing in school district no. 7 attended school elsewhere during the past year because their parents were opposed to the teacher employed in district no. 7. In district no. 7 all children resided within a walking distance of the schoolhouse and it appears that all of them were within one and one-half miles of the schoolhouse and a large majority within one mile. The distance which a large number of the children would be required to travel to attend school in district no. 6 is two and one-half and even three miles. These long distances for young children may render regular attendance upon school almost prohibitive. These children would also be required to travel over rough roads which drift in the winter.

These facts show that district no. 7 was a strong rural district containing a sufficient number of children who regularly attended school and a sufficient amount of taxable property to maintain a good school without imposing undue burdens upon the taxpayers of the district. In fact, with a new schoolhouse which the voters have already authorized, this district may well be an ideal country district.

The great majority of the residents of this district are opposed to its dissolution and willing to make any expenditure necessary to maintain a satisfactory school. A petition protesting against its dissolution signed by thirty-one of the residents of the district has been filed at this Department. These petitioners represent a minority of the taxable property of the district but they represent thirty-five children of school age.

It appears that nineteen children residing in district no. 7 attended school during the past year in district no. 6 and this is urged by respondent as a strong argument in support of his action. These nineteen children however were in the advanced and academic grades. It may be true that district no. 6 supports a better school than district no. 7 as it maintains an academic department. If all the children of no. 7 could attend no. 6 without any hardship they might receive better school privileges. But all of the circumstances are to be taken together. The dissolution of the district is hardly justified by the fact that the

older children in the advanced or academic grades would have the advantage of the course of study in no. 6 maintained for pupils of such grades. It is quite as necessary to provide adequate facilities for the younger children of the district as the older.

If there was evidence of a predominant wish in the district that the action of the school commissioner should be sustained with reason to believe that provision would be made for carrying the younger children to the Truxton school the appeal would be dismissed provided it should be determined that the order of the commissioner is technically valid. But under all the circumstances I have concluded that it ought not to be sustained.

The appeal herein is sustained.

It is ordered, That the order made by Ernest W. Childs, school commissioner of the second commissioner district of Cortland county, on the 21st day of May 1906, dissolving school district no. 7, Truxton, and annexing the territory thereof to school district no. 6, Truxton, and also the amended order made by the said School Commissioner Childs on the 27th day of July 1906, dissolving said district no. 7, Truxton, and annexing a portion of the territory thereof to district no. 10, Truxton, and the remaining portion to district no. 6, Truxton, be, and the same are, hereby vacated.

5456

In the matter of the dissolution of school district no. 17, town of Brownville, Jefferson county.

Order dissolving school district; inconvenience of residents. An order dissolving a school district and annexing its territory to other districts will not be set aside on the sole ground that some of the residents of the district are inconvenienced by their assignment to other districts. As nearly, if not quite, a majority of the electors of the district favored the dissolution, and it appears that the school commissioner acted in good faith in behalf of what he considered the educational welfare of the community, his order will be sustained, unless it is shown by a preponderance of evidence that he committed an error.

Decided June 9, 1910

Draper, *Commissioner*

The appellant, Julius E. Maynard, was sole trustee of district no. 17, town of Brownville, county of Jefferson, and he complains of the action of the respondent, William J. Linnell, school commissioner of the third commissioner district of the county of Jefferson, in dissolving such district, and annexing portions thereof to districts nos. 7, 8, 10 and 14 of such town. District no. 17 was a fairly strong district financially, having an assessed valuation of $31,390. There are fourteen children of school age in the district, but the average daily attendance has not exceeded four and a fraction during the past three years.

There has apparently been considerable friction in this district during recent years, caused chiefly by controversies which have arisen at school meetings over contracting with other districts for the instruction of its pupils. At the last annual meeting it was voted to maintain a home school. Soon thereafter the schoolhouse burned. The papers in the case do not specifically allege that the building was intentionally burned, although there is an intimation that persons in the district were responsible therefor.

The appellant insists that a considerable number of persons in the district are prejudiced by the school commissioner's orders, since, by the annexation of the portions of the district where they live to other districts, they will be compelled to convey their children to and from school, while formerly they lived within easy walking distance of the school. It is conceded that the appellant will be inconvenienced by the school commissioner's action. Three of the others who oppose the dissolution are adversely affected thereby. All of these live in the immediate neighborhood of the site of the schoolhouse in the dissolved district; since the distribution of the territory of the dissolved district, these persons live somewhat over two miles from the schoolhouses in the districts to which they have been assigned. As near as can be made out from the papers in the appeal, there are three pupils who will be required to travel two miles or more to attend the schools in the districts to which they have been assigned.

The apparent inconvenience occasioned to some of the residents of the district dissolved by their assignment to other districts, is not of itself sufficient to justify a reversal of the order of dissolution. It is not possible to dissolve a district and annex its territory to other districts without adding more or less to the burden of those who lived in close proximity to the schoolhouse in the district dissolved. It is evident that nearly, if not quite, a majority of the electors of the district favor the dissolution. Many of these are parents of children who will be required to go a greater distance to reach the schools which they are to attend. If the school privileges of their children were injuriously affected by the orders appealed from, it is fair to assume that they would have entered their protest. The districts to which the territory of the dissolved district is annexed are numerically and financially stronger than the dissolved district. One of them maintains a graded school with an academic department. The roads leading through the districts to the several schoolhouses are well traveled and maintained in good condition. The hardships imposed upon the pupils in requiring them to attend the schools in the surrounding districts are not serious.

In the absence of a more pronounced protest upon the part of the inhabitants of the dissolved district, the orders of the respondent must be sustained. If he had acted arbitrarily against the expressed wishes of a considerable majority of the qualified electors of the district, a different decision might have been rendered. The school commissioner has apparently acted in good faith in behalf of what he considers the educational welfare of the community. He

has presumptively familiarized himself with local conditions. The burden is upon those who attack his orders to show that he has made an error. The appellant has not established by a preponderance of evidence that an error has been committed.

The appeal is dismissed.

5459

In the matter of the appeal of John E. Mehaffy and others from the action of school commissioner Forrest H. Gibbons in dissolving school district no. 14, town of Waddington, St. Lawrence county.

Dissolution of district; inconvenience of appellants. The facts that appellants who appeal from an order dissolving a school district and annexing the territory thereof to other districts, are inconvenienced in respect to the greater distances between their residences and the schoolhouse in the district to which they are annexed is not sufficient in itself to warrant setting aside the order appealed from.

Disagreements among residents as cause for dissolution. Where it appears that the residents of a district have constantly disagreed as to school affairs, particularly in respect to contracts with other districts for the instruction of their children, and as to necessary repairs to the schoolhouse in such district, and as an apparent result of one of those controversies the schoolhouse was destroyed by fire, the school commissioner will be sustained in the exercise of his judgment that such district should be dissolved.

Decided June 16, 1910

Malby & Lucey, attorneys for appellants

Draper, *Commissioner*

The respondent, Forrest H. Gibbons, school commissioner of the second school commissioner district of St Lawrence county, made and entered an order, to take effect March 20, 1910, dissolving school district no. 14 of the town of Waddington, and annexing the territory thereof to school districts no. 12, town of Waddington, and nos. 24 and 31 of the town of Lisbon. The appellants appeal from such order.

The record shows that the district dissolved had an assessed valuation of $29,224. There were ten children of school age in the district, but only seven of them attended school. These seven children are the children of the appellants. The farms occupied by these appellants are annexed to district no. 24, town of Lisbon. By the change made, Mr Rutherford's one child will be required to travel a distance of about one and three-quarters miles to the schoolhouse in district no. 24, while the schoolhouse in district no. 14 was located only a short distance away. Mr Mehaffy's place is located about seven-eighths of a mile from the site of the schoolhouse in the dissolved district, and a little more than a mile from the schoolhouse in district no. 24. Mr McCreedy lives about two-thirds of a mile from the site of the schoolhouse in the district dissolved and about a mile and a third from the schoolhouse in district no. 24. There is some conflict of opinion as to the character of the roads required to be traveled to reach the

two schoolhouses. Both roads are difficult to travel during the winter months; but it is not clearly established that the road to the schoolhouse in district no. 24 is so difficult as to seriously hinder the school attendance of the appellant's children. The appellants are somewhat inconvenienced in respect to the greater distance between their residences and the schoolhouse in district no. 24, but this ground of complaint is not sufficient in itself to warrant setting aside the order appealed from. A school district can not be dissolved and its territory annexed to other districts without adding to the distances from school of some of the residents of the district dissolved.

It is not difficult to comprehend the cause which led the respondent school commissioner to dissolve this school district. The records and correspondence on file in this Department show that the inhabitants of the district have habitually disagreed as to its school affairs. The respondent has endeavored to eliminate the constantly recurring disagreements. The controversy arose, as in many other cases, between the parents of children of school age who desired their children to be taught in the home school, and other qualified electors who had no children and who sought to obtain a compliance with the laws relating to the maintenance of public schools at the least possible expense.

The respondent endeavored to compel the district to suitably repair its schoolhouse. One special school meeting was held in 1908, and it was voted to repair; the next night the schoolhouse burned to the ground. In 1909, at the annual meeting, the district voted to contract for the instruction of its pupils. The trustee attempted to carry out the directions of the annual meeting, and provided a conveyance to carry the pupils of his district. The arrangement was unsatisfactory to the appellants, and two of them, Mr McCreedy and Mr Mehaffy, refused to send their children to the school in the district with which the contract was made. They were both arrested and tried for a violation of the compulsory attendance law. The jury rendered a verdict of not guilty. The Department investigated certain charges made in respect to the contract for instruction, and refused to approve it because it was made with a district too remote from the residence of the appellants, there being other districts much more accessible. In March, 1910 a special meeting was called to vote upon the question of building a new schoolhouse. It was decided by a vote of 10 to 8 not to rebuild.

The respondent asserts that the contract system as applied to this district has proven unsatisfactory, and that its continuance would increase the factional strife among the inhabitants of the district. The surrounding districts are affected by the controversy and have been reluctant to receive the pupils of the dissolved district, owing possibly, to the forcible opposition of the parents of such pupils to the making of contracts. The respondent has concluded that since the district has refused to rebuild its schoolhouse the district must either be continued as a contracting district, or be dissolved. The opinion of the respondent as to the advisability of such dissolution is entitled to great weight. He knows the interested parties, and is familiar with the educational needs of the community. It

must be assumed that he would not, without some cause deemed sufficient by him, do away with the school organization of this district, against the emphatic protests of these appellants. The appellants should not prevail against the respondent unless it is clearly established that the school facilities of the dissolved district and of the district to which its territory has been annexed, are materially injured by his order. It does not appear that such is the case.

The papers indicate that the trustees and many of the inhabitants of the districts whose boundaries are changed by the annexation of the territory of the dissolved district, are opposed to such annexation. The law permits a dissolution of a district and the annexation of its territory to other districts without the consent of trustees. The inhabitants of the districts affected may be aggrieved parties and could be heard on an appeal from the order annexing the territory of the dissolved district to their districts. But they are not parties to this appeal. They merely state their objection without giving a reason therefor. However much they may be prejudiced by the order appealed from, their objections will not be considered in the absence of proof of their alleged grievances.

The school commissioner has evidently used his best efforts to maintain the integrity of this district. He has frequently advised the electors thereof to provide sufficient and appropriate school accommodations for their pupils; they have persistently refused to take any such action. Under all these circumstances it must be held that he acted wisely in dissolving such district.

The appeal is dismissed.

5439

In the matter of the appeal of George D. Bender and others from the change of survey made by School Commissioner Sweet in school district no. 11, town of Bethlehem, county of Albany, in creating district no. 15.

Division of districts. Where it becomes necessary for a school commissioner to divide a district into two districts and there is no controversy as to such necessity, the order of the school commissioner making such division will not be set aside where it appears that there is no material discrimination in favor of one district as against the other as to accessibility and the amount of the assessed valuation set apart into each district. Such order will not be disturbed where it appears that the educational interests of the inhabitants of the new district are promoted by the privilege afforded by establishing and maintaining a school in their midst while the school facilities of those remaining in the old district are not injuriously affected.

Decided February 28, 1910

Bender & Hinman, attorneys for appellants
William A. Glenn, attorney for respondents

Draper, *Commissioner*

This appeal is from an order made by School Commissioner Newton Sweet of school commissioner district no. 1 of the county of Albany, and filed in the

office of the town clerk of the town of Bethlehem, on October 30, 1909, which order divided school district no. 11 and formed two new districts from the territory thereof, to be known as school districts nos. 11 and 15 of the town of Bethlehem.

Former district no. 11 was a large district and financially and numerically strong, having an assessed valuation of $226,150 and fifty-eight children of school age, as appears from the reports for the preceding school year, on file in this Department. The schoolhouse in such district is old and inadequate to meet the needs of the district as it formerly existed. There are two hamlets or neighborhoods containing about an equal number of inhabitants, situated at almost the extreme ends of this district. One called Normanskill is located along the Delaware turnpike as it crosses the stream of that name, while the other, called Elsmere, is about one and one-half or one and three-quarters of a mile farther along on such turnpike. The schoolhouse is on a high bluff a considerable distance back from the turnpike, and is very inaccessible. It is situated about 400 feet from the Normanskill and about one and one-half miles from Elsemere. A question was raised as to the selection of a new site and the erection of a new schoolhouse. A special meeting was called to consider such question and a controversy arose as to the selection of a site for the new building. Those living in the Elsmere end of the district desired to change the site to one more convenient and nearer that place. Such a proposition was voted upon and defeated. The meeting then adjourned without further action as to the erection of a new building or the repair and improvement of the old.

It was subsequently suggested that the district be divided. A number of conferences were held at which such suggestion was considered. Two of such conferences were held at the Department, and were attended by the school commissioner of that district and by the Chief of the Law Division, representing the Department. It was agreed by both factions of the old district that a division was desirable. It was then sought to secure an agreement as to where the dividing line should be located. The parties interested were not able to agree as to the location of such line. It was then concluded that the school commissioner should exercise the jurisdiction conferred upon him by law and execute an order creating two districts out of former district no. 11 and establishing the boundary line between such districts. It is from this order that this appeal is brought.

There is no question involved in this appeal as to the propriety of a division of this district. It is doubtless impossible to harmonize the opposing factions; they can not both be equally served by existing conditions; if the district is left as it was, equal justice to both would demand a new schoolhouse at a place much nearer Elsmere than the location of the present building. It was in apparent recognition of the justice of such a demand that the people of Normanskill apparently acquiesced in a division of the district.

In view of this situation the only question remaining for determination pertains to the fairness of the division of the territory of the old district between the

two new districts. The division line was run by a competent surveyor, and his affidavit shows that there are 1228 acres in district no. 11, and 921 acres in district no. 15. The appellants live in district no. 11. There are no residents set off in district no. 15 who complain of the unfairness of the division. There seems to be no complaint based upon the ground of inaccessibility. The schoolhouse in new district no. 11 remains as before, conveniently accessible to the inhabitants of Normanskill and vicinity, while the inhabitants of new district no. 15 may determine for themselves where their new schoolhouse shall be built. There is a sufficient number of children of school age in each district to maintain a good elementary school. Those desiring secondary instruction will continue as before in their attendance at high school in the city of Albany. The educational interests of the two communities are not adversely affected by the division.

The chief contention on the part of the appellants is that the division imposes an unequal burden of taxation upon them. There is some difference between the figures presented by the appellants and respondents as to the assessed valuation of the real property in the two districts. But even the appellants' statement shows that the valuation has been equally divided, there being according to such statement a valuation of $111,150 in district no. 11, and $111,600 in district no. 15. This does not show that the school commissioner has dealt unfairly with either district.

District no. 11, in which the appellants live, retains the schoolhouse and all the property belonging to the old district. District no. 15 will be required to purchase a site and build a new schoolhouse. District no. 11 may be required to expend some money in repairing the old schoolhouse, but the amount will be small compared with what would have been required if the old district had not been divided. If the division had not been made, a new schoolhouse on a new site must have been provided, or an addition to the old schoolhouse must have been built so as to have given adequate accommodation to all the pupils of the district, with an additional teacher. The division obviates the necessity of employing an additional teacher, for the present, at least. It is therefore difficult to see how the burden of taxation upon the taxpayers remaining in district no. 11 will be materially increased by the division of which the appellants complain.

It does not appear that undue discrimination has been made against district no. 11 by the setting off of this new district. The educational interests of the inhabitants of new district no. 15 are clearly promoted by the privilege thus afforded of establishing and maintaining a school in their midst, which will be conveniently accessible to all of them. The school facilities of those remaining in district no. 11 are not materially disturbed. Under the conditions existing, it is apparent that the financial resources of the district are not crippled. The residents of the new district are earnest in their desire that they be given the privilege of maintaining a school of their own. Under all the circumstances it is advisable to sustain the order of the school commissioner.

The appeal is dismissed.

4707

In the matter of the appeal of John Neer and others v. Robert E. Sternberg as school commissioner, second commissioner district, Schoharie county.

Where a school commissioner, under the provisions of section 9, of title 6, of the Consolidated School Law of 1894, as amended by section 4, chapter 264, of the Laws of 1896, by his order, dissolves a school district and fails to provide in such order of dissolution for uniting a portion of the territory of such dissolved district to any existing adjoining district or districts and fails to make an order concurrent with the order of dissolution for annexing such territory to such existing adjoining district or districts, the order is void for the reason that a school district is not legally dissolved until all its parts are annexed to one or more existing adjoining district or districts.

Decided December 6, 1898

E. A. Dox, attorney for appellants

Skinner, *Superintendent*

This is an appeal from an order made by Robert E. Sternberg of the second commissioner district of Schoharie county, dated July 30, 1898, dissolving school district 10, Richmondville, Schoharie county, said order to take effect August 1, 1898.

The appellants allege as the principal grounds for bringing their appeal, in substance, that said order was not filed in the office of the clerk of the town of Fulton, in which town a part of the territory of school district 10 is situate; and that said order dissolves school district 10 without annexing its territory to any adjoining district or districts or making an order providing for such annexation. School Commissioner Sternberg has answered the appeal, and to his answer the appellants have made reply.

It is admitted that School Commissioner Sternberg, on July 30, 1898, made an order dissolving school district 10, Richmondville, Schoharie county, such order to take effect August 1, 1898, and filed said order July 30, 1898, in the office of the clerk of the town of Richmondville, Schoharie county; that a portion of the territory of such district 10 was situate in the town of Fulton, Schoharie county, but that said order of dissolution was not filed in the office of the clerk of said town; that said order did not annex any portion or portions of the territory of such dissolved district to any one or more of the existing adjoining school districts, nor did Commissioner Sternberg make any order or orders annexing the territory of the dissolved district to any existing adjoining district or districts.

Under the provisions of section 9 of title 6 of the Consolidated School Law of 1894, as amended by section 4 of chapter 264 of the Laws of 1896, any school commissioner has power to dissolve any one or more school districts within his commissioner district and from such territory form a new district or districts; and to unite a portion or portions of the territory of the dissolved district to any existing adjoining district or districts.

Under the provisions of said title 6 it is the duty of school commissioners, in the formation, alteration and dissolution of school districts, to file the orders made by them, with all notices, consents and proceedings relating thereto with

the clerk of the town or towns in which the territory or any part thereof embraced in or affected by such order or orders is situate, immediately after such formation, alteration or dissolution.

This Department has uniformly held that a school district is not dissolved until all its parts are annexed to any existing adjoining district or districts.

Commissioner Sternberg should have included in his order, dissolving school district 10, Richmondville, orders annexing the territory of such dissolved district to such adjoining district or districts existing to which he had determined to annex such territory, or he should have, concurrently with his order of dissolution and dated on the same day as the order of dissolution, made an order annexing such territory to such existing adjoining district or districts and immediately filed the same, with his order of dissolution, in the office of the clerk of the respective town or towns in which the territory embraced in or affected by such order or orders was situate.

The note on page 247 of the Code of Public Instruction of 1887, quoted by Commissioner Sternberg in his answer, has no application to proceedings taken under section 9 of title 6 of the Consolidated School Law of 1894, as amended by section 4, chapter 264 of the Laws of 1896, but has reference to the provisions contained in sections 2, 3 and 4 of title 6 of the Consolidated School Act of 1864, where school districts are altered by transferring one or more parcels of land from one district to another district or districts, and such action, in fact, results in a dissolution of the districts from which such parcels are taken.

Commissioner Sternberg states in his answer that orders annexing or uniting the territory of the dissolved district to existing adjoining district or districts could not be made without procuring a survey of such portions. When he decided to dissolve district 10 and to annex its territory to other districts, he should have taken, before making any order, the necessary steps to enable him to include in the order of dissolution, or in the concurrent order, a description of the territory to be united to the existing adjoining district or districts, stating to which district or districts such territory was united. This he failed to do.

I decide:

That the order of School Commissioner Sternberg, dated July 30, 1898, appealed from, was absolutely void for the following reasons: That said order, or a duplicate thereof, was not filed by him immediately with the clerk of the town of Fulton, Schoharie county, a portion of the territory of the district proposed to be dissolved being situate in said town; that said order appealed from did not include therein the annexation of the territory of such dissolved district to existing adjoining district or districts, and that no order was made by him concurrent with said order of dissolution annexing such territory to such existing adjoining district or districts, and hence said school district 10, Richmondville, was not in law or in fact dissolved, but such district exists today the same as if said order appealed from had never been made; that the order was, at the time of filing the same, and is void.

The appeal herein should be sustained and the order appealed from set aside as absolutely void.

It is not necessary for me, in the disposition of the appeal herein, to examine or pass upon the other grounds stated therein.

The appeal herein is sustained, and the order made by School Commissioner Sternberg, dated July 30, 1898, dissolving school district 10, Richmondville, Schoharie county, is vacated and set aside as absolutely void.

4849

In the matter of the appeal of James Corscadden, of the town of Minerva, Essex county, v. Edward J. Owen, as school commissioner of the second commissioner district of Essex county.

Any school commissioner, under section 9, title 6 of the Consolidated School Law of 1894, as amended by section 4, chapter 264 of the Laws of 1896, has authority to dissolve one or more school districts and from the territory of the district so dissolved, to form a new district or districts; he may also unite a portion of such territory to any existing adjoining district or districts.

A school district is not legally dissolved until all its territory is included within a new district or united to an adjoining district or districts.

This Department has uniformly ruled that in orders forming, altering or dissolving school districts the description of the territory affected or embraced in said order should be so complete and definite that a surveyor at any future day may be able to run its boundaries without reference to any other document than the order forming, altering or dissolving the districts affected; that for this purpose the exterior lines should be defined by reference to natural monuments, marked trees, creeks etc., or to township lines of historical notoriety, such as the lines of the great original subdivisions of tracts into lots, or the course of highways. When these fail the courses and distances as ascertained by the compass and chain should be given.

Decided March 31, 1900

Charles P. Coyle, attorney for appellant
E. T. Stokes, attorney for respondent

Skinner, *Superintendent*

This is an appeal by James Corscadden as trustee, etc., from two orders made December 28, 1898, by Edward J. Owen, as school commissioner of the second commissioner district of Essex county, namely, one order dissolving school district 3, Minerva, Essex county, and another order forming a new school district to be known as district 3, Minerva, Essex county; each order was, by its terms, to take effect immediately.

The appellant is the trustee of district 3, which district the first order appealed from herein, assumes to dissolve.

The appellant alleges various grounds for bringing his appeal.

Commissioner Owen has answered the appeal, and to such answer the appellant has replied, and to such reply a rejoinder has been made by the respondent, and to such rejoinder a rebutter has been filed by the appellant. The papers are voluminous, but contain largely matter not relevant to the question presented for

my decision, namely, whether said two orders, made by Commissioner Owen, are in conformity with the provisions contained in title 6 of the Consolidated School Law of 1894, and the amendments thereof, and the rulings of this Department relating to the formation, alteration and dissolution of school districts.

Section 9, title 6 of the Consolidated School Law of 1894, as amended by section 4, chapter 264 of the Laws of 1896, provides that any school commissioner may dissolve *one or more districts,* and may, *from such territory,* form a new district; he may also unite a portion of such territory to any existing adjoining district or districts.

Under the above provisions of section 9, Commissioner Owen had authority to dissolve school districts 3 and 12, Minerva, Essex county, and from *such territory,* that is, the territory formerly comprising such districts 3 and 12, form a new district; or he could unite a portion or portions of *such territory* to any adjoining district or districts.

Commissioner Owen did *not* have authority, under said section 9, or under any other provisions of said title 6, to dissolve district 3, and from the territory formerly comprising such dissolved district 3, to form a new district, and including within the boundaries of such new district any portion of district 12, no dissolution of such district 12 having been made. So long as district 12 exists, that is, is not dissolved, its boundaries can not be altered and a portion of its territory taken to form a new district erected from the whole or part of a district dissolved, under the provisions of said section 9.

While district 12 exists, its boundaries can not be altered except as provided in sections 1, 2, 3 and 4 of title 6 of the Consolidated School Law of 1894 as amended.

It would seem, from the proofs filed herein, that the object which Commissioner Owen wished to accomplish was to alter the boundaries of district 12 and the consequent alteration of district 3, by transferring certain parcels of land from district 12 to district 3. Such objects could have been accomplished, in proceeding in accordance with the provisions contained in sections 2, 3 and 4 of title 6.

The order of Commissioner Owen, dated December 28, 1899, appealed from, assuming to dissolve district 3, is defective in not including therein a full description of the territory comprising such district, as shown by the records in the office of the clerk of the town of Minerva, Essex county.

The order of Commissioner Owen, dated December 28, 1899, appealed from, assuming to erect a new school district, states "that a school district be, and the same is, hereby created *out of parts* of territory heretofore *forming the whole* of the original district 3 this day dissolved by my order, and the following lots in township 26, Totten and Crossfield purchase (*now a part of school district 12,* and to which the trustee of said district consents by writing, hereto annexed), lots 77 etc."

Assuming, for the purposes of argument only, that Commissioner Owen had authority to make such order, the order is defective in not stating *what part*

of the territory heretofore forming original district 3 are included in the new district which he assumed, by such order, to erect.

Such order is also defective in not complying with the uniform rulings of this Department that the description of a district erected should be so complete and definite that a surveyor, at any future day, may be able to run its boundaries without reference to any other document than the order forming, altering or describing it. For this purpose the *exterior lines* should be defined by reference to natural monuments, marked trees, creeks etc., or to township lines of historical notoriety, such as the lines of the great original subdivision of lots, or the course of highways. When these fail, the courses and distances as ascertained by the compass and chain should be given.

The order, assuming to erect such new district, does not give a description thereof, nor its exterior lines.

For the foregoing reasons the two orders appealed from herein, made by Commissioner Owen, should be vacated and set aside.

Under section 1 of article 1 of title 7 of the Consolidated School Law of 1894, when any school district shall be formed, the commissioner within whose district it may be, shall prepare a notice, *describing such district,* and appointing a time and place for the first district meeting, *and deliver such notice to a taxable inhabitant of the district.*

By section 2 of article 1, title 7 of such law, it is the duty of the taxable inhabitant to whom such notice is delivered by the commissioner, to notify every other inhabitant of the district, qualified to vote at the meeting, by reading the notice in his hearing, or in case of his absence from home, by leaving a copy thereof, or so much thereof as relates to the time, place and object of the meeting, at the place of his abode, at least six days before the time of the meeting.

The provisions above cited are substantially those contained in sections 1 and 2 of article 1, title 7 of the Consolidated School Act of 1864.

This Department has uniformly ruled that the commissioner must prepare the notice; that the notice must contain a description of the new district as the same is contained in the order erecting it, which should be by metes and bounds; that such notice should be addressed by name to a taxable inhabitant of the new district, and delivered to such inhabitant; and stating therein that such inhabitant was required to notify every person residing in the territory therein described who is entitled to vote at school district meetings under the provisions of the school law; that the meeting was for the purpose of electing officers, voting taxes, and transacting such other business *as is permitted by law;* that the manner of serving the notice, as provided in section 2, article 1, title 7, should be stated in the notice, and such notice dated.

Annexed to the appeal herein as exhibit "B" is the notice of Commissioner Owen, as prepared by him, appointing a time and place for the first district meeting of the new district, assumed to have been erected by him. Such notice is not addressed to a taxable inhabitant of the new district, assumed to have

been erected; it does not contain a description of such district as contained in the order erecting it; it does not require *any one* to notify the persons qualified to vote at such school meetings in such new district that the first district meeting of said district will be held at a time and place named, etc.

There is no proof of the manner of service of such notice. Such notice is defective, not being in conformity with the provisions of the Consolidated School Law, relative to the first meeting in such new district, and the rulings of this Department thereunder.

The appeal herein is sustained.

It is ordered:

That the two orders made by said Commissioner Owen, dated December 28, 1899, one assuming to dissolve school district 3, Minerva, Essex county, and one assuming to erect a new district comprising the territory of district 3 and portions of the territory of district 12, Minerva, Essex county, be, and the same are, hereby vacated and set aside.

It is further ordered:

That the proceedings taken at a meeting held January 6, 1900, at the house of Charles Dougherty or Doherty, claiming to be the first district meeting of a new school district 3, Minerva, Essex county, be, and the same are, hereby vacated and set aside.

1904

In the matter of the appeal of Abram D. Stryker, Peter W. Miner and Benjamin F. Taylor as trustees of school district 4, Locke, Cayuga county, v. Edwin S. Manchester as school commissioner of the second commissioner district of Cayuga county.

This Department has uniformly held that under section 9, title 6 of the Consolidated School Law of 1894 as amended by section 4, chapter 264, Laws of 1896, any school commissioner may dissolve any one or more school districts within his commissioner district and from the territory formerly comprising such district or districts so dissolved form a new district or districts or he may unite such territory to any existing adjoining district without obtaining the consent of the trustees of the districts to be affected; the remedy of any person who feels injured or aggrieved by such action is to appeal from the order of the commissioner to the State Superintendent of Public Instruction.

The dissolution of such district or districts and the formation of a new district or districts or the uniting of the territory of the dissolved district to an existing adjoining district is not an alteration of the school district, within the provisions contained in sections 2, 3 and 4 of title 6 of said school law and the acts amendatory thereof, but such sections apply only where real property is taken from one district and united to some other district or districts and no dissolution of the district is made.

Decided November 15, 1900

C. G. Parker, attorney for appellant

Skinner, *Superintendent*

This is an appeal by the trustees of school district 4, Locke, Cayuga county, from certain orders made on July 5, 1900, by Edwin S. Manchester as school

commissioner, second commissioner district of Cayuga county, dissolving school district 1, Locke, Cayuga county, and uniting portions formerly comprising such dissolved district to school district 4, Locke, and the residue of such territory to school district 1, Moravia, Cayuga county.

The appellants allege, in substance, as the grounds for bringing their appeal, that Commissioner Manchester did not have jurisdiction to make the orders appealed from; that the commissioner should have proceeded under the provisions contained in sections 2, 3 and 4 of title 6 of the Consolidated School Law; that such action is unjust to said district 4, Locke.

The appeal herein was filed in this Department September 6, 1900. On September 14, 1900, upon application of Commissioner Manchester I gave him permission to amend the orders appealed from, by describing more definitely the territory affected by such orders, and extending his time to make answer to the appeal herein. On September 21, 1900, I received from said commissioner a copy of such amended orders. On September 22, 1900, I received the answer of the commissioner to the appeal herein.

By section 9 of title 6 of the Consolidated School Law of 1894, as amended by section 4, chapter 264 of the Laws of 1896, it is provided that any school commissioner may dissolve one or more school districts and from the territory formerly comprising the district or districts so dissolved, form a new district or districts, or he may unite a portion or portions of such territory to any adjoining district or districts.

Since the amendment of section 9 by the Legislature in 1896, this Department has uniformly held that any school commissioner may dissolve one or more school districts within his commissioner district, and from the territory formerly comprising such district or districts so dissolved he may form a new district or districts, or he may unite such territory to any existing adjoining district without applying for or obtaining the consent of the trustee or trustees of the district or districts to be affected by such action on his part; that the remedy by any person or persons who were residents and qualified voters in said district or districts at the time of such dissolution who felt *aggrieved,* that is, *injured,* by such order of dissolution is to appeal from such order to the State Superintendent of Public Instruction under the provisions contained in title 14 of the Consolidated School Law of 1894, and the rules of practice of this Department regulating appeals; that the dissolution of a district or districts, and the formation of a new district or districts from the territory formerly comprising such dissolved district or districts, or the uniting of such territory to any adjoining district or districts is not an *alteration* of districts within the provisions contained in sections 2, 3 and 4 of title 6 of the Consolidated School Law of 1894, and the acts amendatory thereof; but such sections apply *only* when a portion or portions of real property are taken from one district and united to some other district or districts, and *no dissolution* of a district is made.

The object sought to be obtained by the amendments of said section 9 in 1896 was to enable school commissioners to dissolve school districts weak in school population or weak in average attendance upon instruction, or weak financially,

without obtaining the consent of trustees of districts so affected, and if refused, the making of a preliminary order, and the subsequent action of a local board, but giving the right of appeal to the State Superintendent from such action of school commissioners.

No appeal from said orders of Commissioner Manchester has been taken by any qualified voter of district 1, Locke, dissolved, and it appears that the trustee of said district consented, in writing to the dissolution of the district, and the disposition made by the commissioner of the territory formerly comprising the district. The appellants are trustees of school district 4, Locke, to which district property formerly in district 1, of the assessed valuation of $5080 has been added by the orders appealed from. Such district has not been injured, that is, impaired, diminished, harmed or damaged by such addition of territory. It appears in proof that the aggregate valuation of said district 4 is $211,350. Of the grounds alleged by the appellants in their appeal for bringing their appeal, not one of them is established by proof.

It appears in proof that district 1, Locke, at the time it was dissolved by Commissioner Manchester, was weak in its total resident school population, having less than ten children of school age, and weak in the average attendance upon instruction in the school therein, the report of the trustee for the school year of 1899–1900 showing that the daily average attendance was about two.

I decide (1) that the appellants herein have failed in establishing any grievance or injury sustained by school district 4, Locke, Cayuga county, by reason of the orders made by School Commissioner Manchester, appealed from, or any amendment of such orders; (2) that School Commissioner Manchester has wisely exercised the authority vested in him by the school law in making the orders appealed from, and the amendments thereof, and that the appeal herein should be dismissed, and the orders appealed from, and the amendments thereof should be affirmed.

The appeal herein is dismissed and the orders of School Commissioner Manchester, appealed from, are, together with the amendments thereof, hereby affirmed.

3915

In the matter of the appeal of John E. Morris and others v. William R. Anderson, school commissioner of the first commissioner district of Dutchess county.

School commissioner's order against which no irregularity is averred, annulling school district and annexing its parts to other districts, upheld, when it was not clearly shown that residents of the districts would be greatly inconvenienced by its operation, and especially so in a district which will not maintain a suitable building for the school.

Decided October 14, 1890

Draper, *Superintendent*

This is an appeal from the order of the school commissioner, made on the 26th of July 1890, annulling school district no. 4 of the towns of East Fishkill

and Beekman, and annexing portions of said district to district no. 2 of Beekman, and no. 5 of East Fishkill.

No irregularities in the proceedings of the school commissioners are alleged. The order was made upon the assent of the trustees of the three districts affected thereby. Some of the residents of district no. 4 now come in and object, alleging that they have always maintained a good schoolhouse and a good school, and that the effect of the order will be to compel their children to go farther to school. The school commissioner shows, on the other hand, that the schoolhouse has been unfit for use for some time, and that he has repeatedly urged the district to construct a new one, and that they have continually neglected so to do. The district is not very strong in any event, and it is not shown that the operation of the order will greatly inconvenience the residents thereof. In all events, the school commissioner is upon the ground, is familiar with all the circumstances, and appears to have acted with deliberation and for good reasons. Before his order should be overruled by the Department, the appellants should present a clear and overwhelming case.

The appeal is dismissed.

3685

In the matter of the appeal of V. R. Chubbuck v. L. H. Barnum, ex-school commissioner of the first commissioner district of Steuben county.

An order of a school commissioner annulling a district and dividing and annexing the territory to other districts which has been consented to by all the trustees of the districts affected will be sustained, unless it is clearly shown by overwhelming proof that the action appealed from was inadvisable.

Decided May 5, 1888

Draper, *Superintendent*

This is an appeal from an order made by L. H. Barnum, late school commissioner in the first school commissioner district of Steuben county, on the 3d day of December 1887, annulling school district no. 6, of the towns of Fremont and Howard, and dividing the territory of said district among adjoining school districts. The order was made upon the consent of all the trustees of the districts affected thereby. Objection is raised thereto by Mr Chubbuck and some other residents of the district annulled. On the other hand the order is supported by many residents of the district annulled. I have read all the papers in the case with care, and fail to find sufficient reason for setting aside the order of the commissioner. The district annulled was very weak. It seems more than probable that the change will afford better school facilities for the residents thereof than they had before, although it is likely that a portion of them will have to go a longer distance. It is usual to support school commissioners in a matter of this kind, particularly when their order is based upon the consent of all of the trustees of the districts affected, unless it is clearly shown by overwhelming proof that the action appealed from ought not to have been taken. That fact is not made to appear to my satisfaction.

The appeal is therefore dismissed.

3916

In the matter of the appeal of William Kimball and others v. S. W. Maxon and Charles E. Whitney, school commissioners of the first and third commissioner districts of the county of Jefferson.

School commissioner's order annulling and dissolving a school district, *set aside*, when it appears undisputably that the district is able to maintain a school, and the sentiment of the district is substantially unanimous against the dissolution, and when the proposed dissolution would necessitate the children of the district going a long distance to secure school privileges. When no reason for the making of the order is shown, the order should be vacated.

Decided October 14, 1890

Porter & Walts, attorneys for appellants

Draper, *Superintendent*

This is an appeal from the order of the school commissioners, made on the 26th day of July 1890, annulling and dissolving school district no. 2, of the town of Brownville in the county of Jefferson. The appellants allege that the district referred to is abundantly able to maintain a school, that the sentiment of the district is substantially unanimous against the dissolution thereof, and that, if the order of the commissioners should be upheld, it would necessitate the children of the district going a long distance to school.

The school commissioners make no answer, and I am, therefore, obliged to assume that the allegations of the appellants are true. If they are true, and if there was no other reason for making the order, it should be set aside. No such reason appears.

The appeal is sustained, and the order referred to set aside and declared to be of no effect.

4012

In the matter of the appeal of George Olenhouse v. James R. Main, as school commissioner of the third commissioner district of Albany county.

Order of a school commissioner annulling a district *set aside* for the reason that, upon appeal, it is conclusively shown that the district is the owner of a site and schoolhouse, is free from debt, and maintains a school; that the taxpayers, with unanimity, are willing to support the school. It also appears that the district to which the commissioner's order annexed the territory of the annulled district, is in debt for quite an amount.

Decided October 6, 1891

R. H. McCormick, jr, attorney for appellant

Draper, *Superintendent*

This appeal by a taxable inhabitant and elector of school district no. 12, town of Guilderland, Albany county, is from an order of School Commissioner Main, annulling district no. 12, Guilderland, and consolidating the territory

thereof with district no. 4 of the same town. It is alleged by the appellant that district no. 12 has existed for more than thirty years. The district owns a site and schoolhouse, and has heretofore maintained a school, and is willing to do so hereafter.

For the accommodation of the children of the district a school should be continued therein. It further appears that district no. 12 is free from debt, while district no. 4 to which it is proposed to annex the territory of district no. 12 is in debt for quite an amount, for the expense incurred in building a schoolhouse. If the consolidation is upheld, many of the children of the district will be compelled to travel from two to three miles to reach the schoolhouse in district no. 4. It also appears that there is a sufficient number of children residing in district no. 12 to warrant the continuance of a school therein. The taxpayers of the district are willing and able to maintain a school.

No answer has been interposed. I have reached the conclusion from the evidence presented that district no. 12 should not be annulled, and I therefore sustain the appeal and set aside the order of James R. Main, school commissioner, filed June 28, 1891, with the town clerk of Guilderland, annexing district no. 12 of Guilderland, to district no. 4 of the same town.

4018

In the matter of the appeal of John A. Gulick v. Everett O'Neill, school commissioner of the first commissioner district of Wayne county.

School commissioner's order dissolving a district *set aside* when it appears that the district is able to and does maintain a satisfactory school, in a good, substantial building owned by the district, well equipped with modern school furniture and apparatus, and when very general objection is made by the patrons of the school to the order of dissolution.

The order did not annex all parts of the annulled district to another or other districts. *Held,* fatal to its validity.

Decided November 10, 1891

Draper, *Superintendent*

This appeal is brought by an elector of school district no. 22 of the town of Sodus, county of Wayne, from the following orders made by School Commissioner Everett O'Neill, of commissioner district no. 1, Wayne county, namely: one dissolving school district no. 22, Sodus, in said county, bearing date August 25, 1891; another bearing the same date, annexing a part of the dissolved district to district no. 2 in said town; another, bearing the same date, annexing another part of district no. 22 to district no. 4 of said town; and another, bearing date September 17, 1891, annexing the remaining portion of district no. 22 to district no. 8 of the same town. To each of the above orders the consent of the trustee of district no. 22 was given. The trustee of each of the other districts affected, respectively consented to the order affecting his district, except the trustee of district no. 8 who refused his consent. In consequence of the refusal

of the trustee of district no. 8 to consent, the latter order was not to take effect until the first day of January 1892.

There are several objections raised by the appellant in opposition to the orders, but two of which need be now considered.

1 He insists that the order annulling district no. 22 was invalid for the reason that all the lands of the dissolved district have not been attached to some other district or districts.

2 That the action of the commissioner was not advisable, and contrary to the best educational interests of district no. 22.

Upon the latter proposition I have given careful attention to the proofs submitted. I find the fact to be that district no. 22 was a strong district, both in taxable property and in the number of children of school age; that, according to the last assessment roll the taxable property was valued at $59,801.95. The number of resident children of school age numbered forty-eight; that the district owns a good substantial schoolhouse, well equipped with modern school furniture and school apparatus; that a school taught by duly licensed teachers has been regularly maintained.

It further appears that the dissolution is strenuously opposed by the patrons of the school, and the appellant insists that, if the orders of the commissioner are upheld, very many of the children will be required to travel long distances to reach the schoolhouses in the district to which the parts of the territory of district no. 22 are to be annexed. It also appears that a number who urged the commissioner to make the change are now opposed.

I think the order dissolving district no. 22 is fatally defective. At the time of its issuance, no provision was made for the annexation of a portion of the territory of district no. 22 to another district.

The order of dissolution dated August 25, 1891, was to take effect immediately, and yet the order annexing a portion of its territory to district no. 8, was not issued until September 17, 1891, nearly a month later, and the trustee of district no. 8 having refused to consent to the annexation, the latter order was not to take effect until January 1, 1892.

In such cases the rulings of the Department have been that the operation of an order dissolving a district should also be suspended until the same date, so that if the order dissented from should be confirmed, all would go into operation at the same time. Information has reached the Department that the local board has met and refused to confirm the order of September 17th.

But I ground my decision that the orders should be set aside upon the undisputed evidence that a respectable portion of the inhabitants, patrons of the school, demand a continuance of the school facilities which have been afforded them by district no. 22. There has been no failure to maintain a school. The valuation of taxable property is such that the expense of sustaining a good school can not be burdensome, and the children should not be put to the inconvenience of traveling the increased distances to reach a schoolhouse which the upholding of the order would necessitate.

The appeal is sustained.

3788

In the matter of the appeal of Henry Done, of school district no. 14, of the towns of Albion and Orwell, county of Oswego v. Ida L. Griffin, school commissioner of the third commissioner district of Oswego county.

A school commissioner by an order dissolved a school district, assuming and believing at the time that the district was wholly within one town, when in fact it was composed of parts of more than one town.

The order was held to be ineffectual for the reason that the dissolved district, or its parts, were not thereby annexed to other districts, and in view of the fact that the district maintains a good school, and that all but two of the voters are opposed to dissolution; it was *held* that the order of the commissioner should be overruled rather than perfected.

Decided April 19, 1889

A. S. Barker, attorney for appellant

Draper, *Superintendent*

This appeal is taken by a taxpayer and legal voter of school district no. 14, of the towns of Albion and Orwell, county of Oswego, from an order of the respondent dissolving said district.

The appellant alleges that W. F. Bragdon, who signed himself as trustee of school district no. 14, of the town of Albion, and who referred to the district as of the town of Albion, consented to the dissolution, and that the respondent made an order, a certified copy of which is attached to the appellant's papers, which bears no date, but was made to take effect on the 20th day of October 1888.

Nothing is contained in the order which annexes the dissolved district, or its parts, to any other district. The appellant alleges that the voters of the district, with but two dissenting, are opposed to the dissolution of the same; that by the dissolution children of the district will be seriously inconvenienced, and compelled to travel a long distance to attend school, and in parts of the year will be unable to attend school; that a good school has been maintained in the district for many years and has been well attended by the children of the district; that the trustee who consented to the dissolution is a taxpayer in the district, but has no children of school age.

From the answer interposed by the respondent, it appears that at the time she obtained the consent of the trustee and at the time of the making of the order, she was not aware that the district was composed of parts of the town of Orwell as well as of Albion, and the only grounds stated in support of the order are that the district is a small one, and the value of taxable property very light, and consequently the tax for maintenance of the school, burdensome upon the people of the district; that the order was made after consultation with a number of prominent disinterested business men of the town of Albion.

I have considered this case with a great deal of care, and would like to see my way clear to sustain the commissioner, but it appears to me that the com-

missioner did not fully understand the feeling of the people of the district, and was, as is admitted by the answer, unaware that the district included a portion of the town of Orwell, and the order so indicates, for it is entitled " in the matter of the dissolution of school district no. 14 of the town of Albion, county of Oswego "; and so recited in the body of the order.

It is not claimed by the respondent that the district has not maintained a satisfactory school, and it appears by the pleadings of the respondent that the taxpayers, with the exception of two, do not complain or object to the burden which the maintenance of a school entails upon them. The inhabitants of the district seem to prefer the accommodation which a separate district and school affords them to a possible reduction of taxation which annexation to other districts might secure them.

The order of the commissioner, which was filed in the office of the town clerk on the 13th day of October 1888, is overruled.

The appeal is sustained.

5063

In the matter of the appeal of Robert A. Barton and others v. Everett A. Chick as school commissioner, third commissioner district of Jefferson county.

Under the provisions of the Consolidated School Law a joint school district is one that lies in two or more commissioner districts. In the alteration or dissolution of a joint school district the commissioners of such district or a majority of them must act. In the dissolution of a joint district without the consent of the trustees, the supervisor and town clerk of each of the towns in which the district is situated must have notice of the time and place appointed by the commissioners to hear objections, and have the right to act with the commissioners in the decision of the matter.

Decided February 24, 1903

Breen & Breen, attorneys for appellants
George H. Cobb, attorney for respondent

Skinner, *Superintendent*

This is an appeal from the action of a local board, consisting of Commissioner Chick, the supervisor and the town clerk of the town of Brownville, Jefferson county, held September 15, 1902, in the village of Glen Park, in refusing to confirm an order made by Commissioner Chick July 21, 1902, to take effect November 1, 1902, altering the boundaries of union free school district 1, Brownville and Pamelia, Jefferson county, in taking from such district all the territory therein, situated in the village of Glen Park, and also all the territory lying north and northeasterly of said village, and forming a new school district to consist of such territory so taken from such union free school district 1, to be known as school district 20, Brownville, Jefferson county. Commissioner Chick filed an answer to the appeal, and the board of education of such school

district, excepting trustee Theron B. Hubbard, filed a separate answer. Edward Moffatt, supervisor, and Edward Everett, clerk of the town of Brownville, have each filed a separate answer to the appeal.

The following facts are established:

Union free school district 1, Brownville and Pamelia, consists of lands situated in each of said towns, in the county of Jefferson, and the villages of Brownville and Glen Park, form a part of said district. The town of Pamelia is within the first commissioner district of Jefferson county, and for the year 1902 E. N. McKinley of Adams, was school commissioner of such commissioner district. The town of Brownville is within the third school commissioner district of said county, and in the year 1902 Everett A. Chick was the school commissioner of such district.

On or about May 10, 1902, a large number of the residents of the village of Glen Park presented to School Commissioner Chick a petition requesting him to alter the boundaries of union free school district 1, Brownville and Pamelia, by setting off from such district the territory lying within the village of Glen Park, and forming a new school district, the boundary lines of which should correspond to those of said village of Glen Park. July 21, 1902, Commissioner Chick made an order transferring from said district 1 all that part of such district then included within the corporate limits of the village of Glen Park, and also all of the territory of the district lying north, northeasterly and easterly of such village, then forming said district 1, and from such territory so transferred forming a new school district to be known as district 20, Brownville, Jefferson county; but in all other respects the boundaries of said district 1 of Brownville were to remain the same as prior to such order. The trustees of school district 1, not having consented to such alteration, said order was not to take effect until November 1, 1902. July 22, 1902, such order was filed in the office of the clerk of the town of Brownville, and a copy was served upon the trustees of such district 1, with a notice signed by Commissioner Chick, that on September 15, 1902, at 10 o'clock a. m., he would attend at the school building in the village of Glen Park and hear objections to such order and the proposed alterations, and that such trustees would request the supervisor and town clerk of the towns within which their district lay to be associated with him, at such time and place for the purpose of confirming or vacating such order. September 15, 1902, at 10 o'clock at the school building in the village of Glen Park, there were present, Commissioner Chick, Supervisor Moffat, and Town Clerk Everett, of the town of Brownville, I. R. Breen, counsel for the petitioners, and George H. Cobb, counsel for the board of trustees of district 1, and after hearing the parties for and against the order made by Commissioner Chick of July 21, 1902, due deliberation being had, said local board, by a vote of two to one, vacated said order of Commissioner Chick of July 21, 1902, and thereupon an order vacating such order of July 21, 1902, was made and signed by said commissioner and the supervisor and town clerk of the town of Brownville.

Under the provisions of title 6, of the Consolidated School Law of 1894, and the acts amendatory thereof, it is the duty of each school commissioner, in respect to the territory within his district, to divide it, so far as practicable, into a convenient number of school districts, and alter the same as therein provided. In conjunction with the commissioner or commissioners of an adjoining school commissioner district or districts, to *set off joint districts* composed of adjoining parts of their respective districts, and *separately to institute proceedings to alter the same in respect to territory within his own district.*

Under title 6 of the Consolidated School Law, a school district which lies in two or more commissioner districts is a *joint district.* Whenever it may be necessary or convenient to form a school district out of parcels of two or more school commissioner districts, the commissioners of such districts, or a majority of them, may form such district; and the commissioners within whose districts any such school district lies, or a majority of them, may alter or dissolve it.

Commissioner Chick, under subdivision 2, section 1, title 6 of the Consolidated School Law of 1894, as amended by section 1, chapter 223 of the Laws of 1895, had authority *separately to institute* proceedings to alter the same in respect to the territory (that is, of the joint district) *within his own district.* The preliminary order in this proceeding should have been made by Commissioners Chick and McKinley, and the board of education of district 1 notified that it could request the supervisor and town clerk of the town of Pamelia, as well as the supervisor and town clerk of the town of Brownville, to be associated with such commissioners in affirming or vacating such preliminary order.

Assuming, for the purposes of argument only, that Commissioner Chick had authority to make the order of July 21, 1902, the order is defective upon its face in not describing the territory affected by metes and bounds.

I decide that the action taken by the local board, September 15, 1902, in vacating the order of Commissioner Chick, dated July 21, 1902, is approved, and the appeal herein should be dismissed.

The appeal herein is dismissed.

SCHOOL DISTRICTS—ORGANIZATION

The inhabitants of joint school district no. 13 in the towns of Rome and Lee v. the commissioners of common schools of said towns.

If a school district has been recognized as legal for a length of time, regularity in its organization will be presumed in the absence of the proper record, and the commissioners of common schools can not form the district anew and order an election of officers under such circumstances.

The facts of this case are stated in the Superintendent's order.

Decided December 13, 1834

Dix, *Superintendent*

On the 1st day of October last the annual meeting was held in joint school district no. 13, in the towns of Rome and Lee, and officers were chosen for the ensuing year. To the regularity of the proceedings, exceptions were taken, and an appeal was presented to the commissioners of common schools of the two towns, who met and decided that they had no power to entertain the appeal. On examination of the records of the towns, it appeared that district no. 13 was not recorded, with a proper designation of boundaries, in either; whereupon the commissioners proceeded on the 1st day of November (that day having been previously appointed for the purpose) to form a new district by making additions to the district in question, and by making a specification of its boundaries. The district was then put on record in both towns, and a meeting was called in pursuance of the provisions of section 55, page 477, 1 R. S. to choose district officers. The meeting was held on the 12th of November, and district officers were chosen. To this proceeding exception is taken by the officers elected at the annual meeting on the 1st of October.

By an examination of the reports made by the commissioners of common schools of the towns of Rome and Lee, in the office of the Superintendent, it appears that joint district no. 13 has been regularly returned by the commissioners of those towns since the year 1822 as an organized district, lying partly in both towns, and that the public money has been apportioned to it according to law. A recognition of the district for so long a period can not with propriety be disregarded in consequence of a failure on the part of the proper officers to have it recorded. It was the duty of the commissioners, on being apprized of the fact, to meet together and declare the boundaries with a view to have them made a matter of record: but it can not be admitted for a moment, that the omission of the proper officers to comply with provisions of law, which are merely directory, is to vacate proceedings regularly conducted by the competent authority. It is true it does not appear, by the records, that the district was ever regularly organized in the manner prescribed by law; but notwithstanding

the statement given by the commissioners with regard to certain proceedings in both towns in setting off a part of each to the other, the Superintendent can not now permit the original formation of the district to be inquired into for the purpose of invalidating any thing that has been done within it since its organization. After the lapse of twelve years, during which the district has been returned by the commissioners of both towns to the Superintendent of Common Schools, and has complied with the directions of the statute so as to become entitled to the public money, regularity in its organization will be presumed; and the commissioners will be so far bound by the reports of their predecessors that they will not be allowed to impeach the accuracy of those reports. It has been repeatedly decided that a district, which has been for a series of years recognized as valid, is to be regarded as such, although no record of it can be found; and in such cases the commissioners have been directed, whenever the interposition of the Superintendent of Common Schools has been required, to meet and declare the boundaries of the district, and put them on record. In this case the commissioners have overstepped the limits of their authority, by treating the district as null, and ordering an election after forming it anew. They had power to annul the district; but without doing so in a formal manner, it could not be reorganized and treated as a new district. They could not give the notice provided for in section 55 before referred to, because it was not a new district; nor could they issue a notice under the provisions of section 57 (same page) because neither of the contingencies, on which the right to issue such a notice is dependent, had occurred. It is alleged that several of the appellants, who were the officers chosen on the 1st of October, were present and acquiesced in the proceedings of the commissioners. Admitting the fact, the difficulty still remains. There was a want of jurisdiction, so far as the order for a new election is concerned, and their consent could not give jurisdiction. They might have resigned, but could not by their consent give validity to any act on the part of the commissioners, not authorized by express provisions of law, which would abridge the period of their election to office. Notwithstanding the error of the commissioners, the Superintendent is well satisfied that they intended to act for the best good of the district, and without any doubt as to the extent of their powers.

It is hereby ordered, that so much of the proceedings of the commissioners aforesaid on the 1st of November last, as relates to the boundaries of district no. 13 in Rome and Lee, be confirmed, and that said boundaries be continued as established by them on that day. And it is hereby declared, that the proceedings of the meeting in said district on the 12th of November, held in pursuance of the order of the commissioners, are null and void; and that the persons chosen on the 1st of October last are and will continue to be the officers of said district until the next annual meeting, or until vacancies occur.

4166

In the matter of the appeal of John France v. T. E. Finegan, school commissioner, second commissioner district, Schoharie county.

In the formation of school districts this Department will not interfere with the discretion which the law reposes in the school commissioner where the convenience of individuals alone is affected and where no material interest of such individual or of the district is involved. A merely factious opposition, founded on selfishness or feeling, or wilfulness or fancied illusion, can not be successfully urged to defeat any public purpose good and desirable in itself.

Decided March 2, 1893

Hon. John S. Pindar, attorney for appellant
Hon. George M. Palmer, attorney for respondent

Crooker, *Superintendent*

On August 27, 1892, by the joint action and order of Commissioner Finegan, school commissioner of the second commissioner district of Schoharie county, and Commissioner Cary, school commissioner of the first commissioner district of Otsego county, which order was duly filed in the office of the town clerk of the town of Seward, Schoharie county, a new school district was formed and erected in said town and designated as no. 10, town of Seward. The territory comprising said new district was described in said order and consisted of parts of school district no. 14, of the town of Sharon; no. 6, of the town of Seward; no. 2, of the town of Seward, all in the county of Schoharie, and joint district no. 7, towns of Seward and Decatur, in the counties of Schoharie and Otsego. The trustees of the districts hereinbefore stated respectively consented in writing to the formation of said new district. That the order and survey of lands comprising said new district contained and embraced within its boundaries the residence and a large portion of the lands of John France, the appellant herein. That on August 29, 1892, Commissioner Finegan issued and delivered to one Eckerson a notice for the first meeting of the qualified voters of said new district, to be held at the house of one Eldridge, on September 8, 1892, at 7.30 p. m., for the purpose of electing officers of said new district, etc. That said notice contained a true description and boundaries of said new district, and was duly served by said Eckerson upon the appellant by reading the said notice to said appellant. That said appellant attended said district meeting on September 8, 1892. That on October 20, 1892, the trustee of said new school district no. 10 informed the appellant that the lands of the appellant were included in said new district. That on or about November 30, 1892, the appellant brought this appeal from the order of the said school commissioners forming said new district.

The appellant claims, as the principal ground of appeal, that he has one child of school age, and that such child can not attend the school in said new district without traveling more than two miles, and more than double the distance that would be required to attend the school in district no. 7, in which district appellant formerly belonged.

It appears from the papers filed in this appeal that said district no. 10, prior to the appeal herein, had purchased a site and erected a new schoolhouse thereon, at a cost of $1100, of which sum $500 was assessed and collected. That said schoolhouse is situate within about twenty rods of the railroad depot at Seward, and near the Lutheran church. That by the public highway the distance from the house of appellant to said schoolhouse in district no. 10 is only about a quarter of a mile further than to the schoolhouse in said district no. 7. That the lands of one Gilbert France, at the time when the said order forming said district no. 10 was made and said district erected, adjoined the land of appellant, and extended from said lands of appellant to the aforesaid railroad station and church and the site of the new schoolhouse. That between the dwelling-house of appellant and the said railroad station, church and site of the present schoolhouse, there was at the time of the formation of said new school district, and had been for some time previous thereto, a beaten traveled track and road on which the appellant and the public traveled on foot and with teams. That on said road bridges have been built, and appellant has worked upon said road and assisted in building the said bridges. That said road is partly upon the land of said appellant and partly on the land of Gilbert G. France, and extends in a direct line from the residence of the appellant to what is now the site of the new schoolhouse; the distance between the said two points being about half a mile. That prior to the formation of said new school district said road was the one used by the appellant in going to the railroad station, church etc. That on December 21, 1892, said Gilbert G. France made and acknowledged a deed to the appellant conveying to him and his assigns forever, a right of way over said lands traveled as aforesaid as a road, and to his servants and tenants, at all times, freely to pass and repass on foot and with horses, etc., carts, wagons, vehicles etc., subject to the rights of the public to use said way, and of the said Gilbert G. France, or his heirs or assigns, to use the same in common with the appellant, his heirs or assigns; and subject to the rights of said Gilbert G. France, his heirs or assigns, to dispose of the same to the public for a public road or highway. That said Gilbert G. France, by one Eldredge, his agent, tendered said deed to the appellant who refused to accept it, and thereafter the said Eldredge, as such agent, as aforesaid, in the presence and hearing of the appellant, placed said deed in the hands of one Arthur Fox, for the appellant, stating to the appellant that he could get said deed from said Fox at any time.

The appellant alleges that he can not get to the aforesaid road on the lands of Gilbert G. France without crossing the lands of one Mereness, and that the wagon track from appellant's house over the lands of Mereness to the lands of France has been closed up with bars or fences nailed up. It is alleged by the respondent, and not denied by the appellant, that said Mereness is a young man about 22 years of age, and the son-in-law of the appellant; that the record in the office of the clerk of Schoharie county, made as late as February 2, 1893, fails to show any conveyance of any land to said Mereness; that if said

Mereness owns any land, as stated by appellant, his right to the same is derived from appellant, and that the same has not been made in good faith, but only temporarily, and for purposes of this appeal, and such transactions, in reference thereto, if any, have been made since the formation of said new school district, and the commencement of this appeal.

The appeal herein must be decided upon the situation and condition of matters in said district, when the order forming and erecting said district was made.

It also affirmatively appears that the assessed valuation of school district no. 10, is $48,810, and that of school district no. 7, is $79,561.

In my opinion, the commissioners, in making the order and forming said school district no. 10, town of Seward, having received the written assent of all the trustees of the school districts to be affected, had jurisdiction, and that they exercised proper judgment and discretion in their action therein.

The appellant is bound to sustain his appeal by a preponderance of proof, and in this he has failed. The appellant has failed to show that any material interest of his or of the district is involved by the action of the said commissioners. This Department has held that it will not interfere with the discretion which the law reposes in the commissioners, where the convenience of individuals alone is affected, and where no material interest of such individual or of the district is involved.

While individual opposition to measures of public utility should be duly considered, that opposition should be allowed to have weight only as it has a substantial foundation in reason and justice. A merely factious opposition, founded on selfishness or feeling or wilfulness, or fancied illusion, can not be successfully urged to defeat any public purpose, good and desirable in itself.

The appeal herein is dismissed, and the order of said commissioners of August 23, 1892, forming and erecting school district no. 10, town of Seward, Schoharie county, is confirmed.

3517

Asa Bishop from an order of Leonard Davis, school commissioner of the third commissioner district of Ulster county, New York, filed April 14, 1886.

Formation of weak school districts will not be upheld when it is made to appear that the best interests of education do not warrant it.

Decided November 16, 1886

Draper, *Superintendent*

This is a proceeding by Asa Bishop, a taxable inhabitant and legal voter of school district no. 9, in the town of Olive, in the county of Ulster, appealing from an order of Leonard Davis, school commissioner of the third commissioner district of Ulster county, forming a new school district in the town of Olive, in said county, and altering school districts nos. 6, 8 and 9 in said town.

The grounds of the appeal are:

1 That the formation of the new district is not desired by the majority of the inhabitants and taxpayers who are included in the new district.

2 That the districts from which the territory and taxpayers have been taken to form the new district are not sufficiently strong to sustain such loss without consequent injury to the school interests in those districts.

3 That when the commissioner granted the said order he was misinformed as to the wishes of the voters of the districts.

4 That the consent of the trustees of school district no. 8 was obtained by misrepresentation.

5 That school district no. 8 has been recently provided with a new schoolhouse, and the district taxed therefor, and the taxpayers of district no. 8 who are included in the new district object to being included and compelled to again contribute toward the building of a new schoolhouse.

An answer has been duly served which controverts certain allegations of the petition on appeal.

But from all the proofs presented I am led to believe that at best but a weak school district has been formed by the order appealed from, and that the best interests of the people would not be subserved by weakening districts nos. 6, 8 and 9 both in taxable property and the number of school children as the order in question does.

I sustain the appeal, and overrule the order of School Commissioner Leonard Davis filed on or about April 14, 1886.

4248

In the matter of the appeal of Eustace H. Wheeler, John H. Hautsch and Elnathan Eldert, trustees of school district no. 13, town of Hempstead, Queens county, v. John B. Merrill, school commissioner, second commissioner district, Queens county.

Where an order is made by a school commissioner for the formation of a new school district from portions of the territory of two other school districts, and it appears, upon an appeal being taken from the order, that the formation of the new district would not promote the best educational interests of the districts affected; that undue discrimination has been made against one of the districts affected; that one of the districts would be crippled financially and the pupils in another district be required to travel a longer distance to attend school, or their school privileges be diminished, the order of the commissioner should be vacated and set aside.

Decided May 21, 1894

John Lyon, attorney for appellants
Thomas B. Seamans, attorney for respondent

Crooker, *Superintendent*

The appeal in the above-entitled matter is taken from the preliminary order of the respondent herein, bearing date July 20, 1893, which order was made

without the consent of the appellants, and was filed in the office of the town clerk of the town of Hempstead, forming a new school district, to be known as district no. 24, town of Hempstead, from a portion of the territory forming district no. 14, and a portion of the territory forming district no. 13, both of the town of Hempstead, of which latter district the appellants are the trustees, said order to take effect on October 25, 1893; and from the order of the local board, confirmatory of said order of July 20, 1893, which confirmatory order was filed in the office of said town clerk on September 21, 1893.

An answer to the appeal has been interposed by the respondent. The main objection of the appellants to the orders appealed from is that it included within said new district no. 24, a strip of land 800 feet in width, from said district no. 13, lying northerly of and adjoining the Merrick and Jamaica plank road.

The papers and proofs filed in this appeal show that prior to the date of said preliminary order of the respondent there were two school districts in the town of Hempstead with well-defined boundaries, said districts adjoining each other, and the territory of both districts being divided very nearly equally by the Southern Railroad of Long Island; that the greater portion of district no. 14 laid to the south, and all of district no. 13 laid to the north of said railroad; that the aggregate value of the taxable property in said district no. 14 was $251,300; that there were two schoolhouses in said district, one of which was built about five years ago and was used for a branch school, capable of accommodating about thirty-six pupils and was located near the railroad station at what is known as Valley Stream; that the number of children of school age in said district was about 300; that the trustees of said district consented that the northern portion of said district be taken to form the new district; that the aggregate value of the taxable property in district no. 13 was $112,360; that it had one schoolhouse centrally located in which two teachers were employed, the principal being a normal school graduate; that the total number of children of school age residing in the district was 214, of which 135 attended at some portion of the last year, and that the average daily attendance the last year was 56; that the trustees of said district refused to consent that the strip of land in said district, 800 feet in width, lying north of the Merrick road, be taken to form the new district, but did consent that the portion of such district between said Merrick road and the south line of the district might be taken; that the inhabitants of said district no. 13 are principally engaged in farming; that the tax rate in said district the last school year was eight mills on the dollar.

That upon the petition of certain persons and the consent of the sole trustee of said district no. 14, the respondent herein made, on July 20, 1893, his order, forming said new school district to be known as district no. 24; that the trustees of said district no. 13 having refused their consent to the alteration of said school district in the formation of said new district, a hearing was had

by the respondent, the supervisor and town clerk of the town of Hempstead, at the request of the trustee of district no. 14, being associated with the respondent; that after hearing the parties said local board made its order, confirming said preliminary order of respondent.

That it was shown upon said hearing that the aggregate assessed valuation of the portion of district no. 14 taken to form the new district is $71,400, and the aggregate assessed valuation of the property left in said district is $179,900; that the aggregate assessed valuation of the portion of district no. 13 taken to form said new district is $36,780, and the aggregate assessed valuation of the property left in said district is $75,600; that the aggregate valuation of that portion of district no. 13 taken, lying north of the Merrick road, is $16,530, and of that lying south of the Merrick road is $20,250; that if the Merrick road was made the northerly line of the new district the aggregate assessed valuation of property in district no. 13 would be $92,100; that the aggregate assessed valuation of the property included in said new district no. 24 is $108,180, and $22,530 greater than the aggregate assessed valuation in said district no. 13; that if the portion of land north of the Merrick road should remain in district no 13, the aggregate assessed valuation of said new district no. 24 would be $91,650; that every resident and taxpayer residing within and upon said strip of land 800 feet in width, embraced in the boundaries of the new district have protested against being annexed to the new district, and that in the entire territory proposed to be taken from district no. 13, there were only two persons who signed the petition to be annexed to the new district, and both of them reside south of the Merrick road; that of the petitioners for the new district, ten of them did not, at the time of signing the petition, reside within the territory of the proposed new district, nor do any of them now reside therein; that the children residing upon the strip north of the Merrick road are within a short distance of the schoolhouse in district no. 13, and nearer than they are to the branch school south of the railroad, and nearer than they will be to any schoolhouse centrally located in said new district; that no claim was made before the local board that the school in no. 13 is not a good school, nor that the educational facilities will be better in the new district than in district no. 13, nor that the children living north of the Merrick road will be nearer a school; that the north line of new district no. 24 is not defined by the course of highways, natural monuments and lot lines, but is a line from a point in the dividing line between districts nos. 13 and 16, 800 feet north of the northerly line of the Merrick road, and running thence eastward in a line parallel with and north of the Merrick road to the center of Grassy Pond road. It also appears that prior to the order of July 1893, within the territory of said new district, several hundred acres of farm land have been purchased by different land companies, and cut up into lots and placed upon the market, and prospective purchasers of such lots objected to purchasing because of the want of proper school facilities.

In the formation of new school districts, where the territory in existing school districts is taken to form such new districts, the object to be obtained is to promote the best educational interests of all the districts affected. No undue discrimination should be made against any one of the districts affected, nor should any district be crippled financially, nor should the pupils in any of said districts be required to travel a longer distance to attend school, or their school privileges be diminished.

In taking the strip of land 800 feet in width north of the Merrick road from district no. 13 in the formation of the new district, an undue discrimination is made against said district 13, and its condition crippled by reducing the aggregate assessed valuation in the sum of $16,530. Adding the aggregate assessed valuation of the portion of said district lying south of the Merrick road taken to form the new district, of $20,250, the total assessed valuation of property taken from such district is $36,780, leaving in such district property of aggregate assessed valuation of $75,580, while the new district would have property of the aggregate valuation of $108,180. That the pupils residing upon said strip of land north of the Merrick road are now nearer to a schoolhouse than they will be to any schoolhouse erected in the center of the new district, and until a new schoolhouse shall be constructed in such new district, will be without school facilities except such as may be afforded in the branch school at Valley Stream Junction, having a seating capacity for about thirty-six pupils only. In the formation of the new district, if the Merrick road had been made the northern boundary thereof, a compact district of about 450 by 650 rods in extent would have been established, which, with a schoolhouse centrally located, would afford convenient school facilities to all residing within its limits, would not have made any undue discrimination against either of the districts affected, nor have seriously crippled district no. 13 financially, and would have promoted the best educational interests of all the districts affected.

For the reasons hereinbefore stated I am of the opinion that it was an unwise exercise of the authority given to the respondent herein, in the formation of such new school district, to include within the boundaries thereof said strip of land 800 feet in width lying north of the Merrick road, and that the appeal herein should be sustained, and the order appealed from be vacated and set aside.

Appeal sustained.

It is ordered, That the preliminary order dated July 20, 1893, made by John B. Merrill, school commissioner of the second commissioner district of Queens county, forming a new school district in the town of Hempstead, Queens county, to be known and numbered no. 24 of said town, and the alteration of the boundaries of school districts nos. 13 and 14 in said town; and the order of the local board confirming said preliminary order, both of which orders were filed in the office of the clerk of the town of Hempstead, Queens county, be, and they hereby are, and each of them is, vacated and set aside.

4014

In the matter of the appeal of F. M. Henry v. Alson Cook, school commissioner of the second commissioner district of Lewis county.

Upon an appeal from the refusal of a school commissioner to set off a portion of a school district and form a separate district, it is shown that the portion sought to be detached contains a sufficient number of children to warrant the maintenance of a school.

The value of taxable property is sufficient to sustain a school without the tax being burdensome. The trustee of the district consents to the proposed alteration, and no objection is made thereto by any resident of the district.

Held, that the new district should be formed, and the commissioner is directed to make the necessary order.

Decided October 12, 1891

Draper, *Superintendent*

This is an appeal from the refusal of the school commissioner to set off a portion of school district no. 8 of the town of Lowville in the county of Lewis, and form a new district out of the detached portion.

The papers show that recently a new settlement has been developed in the northwest corner of the district, pursuant to the efforts of the Glen Wild Park Association. It is shown that there are fifteen children of school age residing in the portion of the district which it is proposed to set off. The assessable valuation of the present district is $43,865, and that part of the district which it is proposed to set off has a valuation of $12,410. The sole trustee of district no. 8 consents to the change; indeed, he is the appellant herein. The school commissioner makes no answer to the appeal. I find in the papers only a note from him in which he says that the children are no farther from school than in many country districts, and that nearly the entire district opposes the proposed change, and that he thinks yet a little time might better be allowed for further development. No opposition to the project is made by anybody in the district so far as the papers show. If the people who are directly interested have the energy to urge the matter, and others in the district do not take steps to oppose it, and if the trustee chosen by the district consent thereto, it would seem that the school commissioner might very properly accede to the request and grant the same.

In view of all the circumstances, I have concluded to sustain the appeal, and the school commissioner is directed to make an order creating a new school district as proposed.

3828

In the matter of the appeal of Rodolphus Francisco, Edwin R. Steenrod and Marvin Cook v. Sylvester Jagger, as trustee of school district no. 12, in the town of Colchester, Delaware county, and George D. Chamberlin, school commissioner of the first commissioner district of Delaware county.

There must be a strong case and overwhelming proof to justify the Superintendent in overruling the action of two school commissioners in refusing to sanction the formation of a new district out of parts of two school districts lying in different counties.

Decided November 14, 1889

Draper, *Superintendent*

The appellants desire a new school district created out of portions of school district no. 12, Colchester, Delaware county, and school district no. 1 of Rockland, Sullivan county.

The trustee of no. 12, Colchester, refuses to consent to the change. The school commissioners in Delaware and Sullivan counties have met upon the ground, investigated and considered the matter, and determined that it was not advisable to make the order, for the present at least. Upon this state of facts, the appellants come to the Department.

There are some informalities in the proceedings of the appellants. They have failed to make the school commissioner of Sullivan county a party to their proceeding, although that officer occupies a position in the matter inferior to no one else. There is a serious question raised as to the regularity of the service of the appellants' papers. Notwithstanding this, I have looked into the case. The circumstances would have to be extreme and the proofs overwhelming to justify the Superintendent in overruling two school commissioners and the trustee of one of the school districts affected, in refusing to sanction the formation of a new school district out of parts of two school districts lying in different counties. If they were to take the action, it would be in violation of all general principles governing such matters, and only because of a necessity so urgent as to know no law. The appellants fail to make out such a case.

The appeal must be dismissed.

3851

S. C. Armstrong and others v. Loyal L. Davis, as school commissioner of Warren county, Charles W. Noble, as supervisor, and A. R. Noble, as town clerk of the town of Johnsburg, in said county, and their successors in office.

A strong and clear case must be established to justify the Superintendent in overruling the action of the local board, in deciding not to confirm an order of a school commissioner forming a new school district. The convenience of some at the cost of inconvenience to others, is not a sufficient ground.

Decided January 3, 1890

Draper, *Superintendent*

It seems that on the 17th day of June 1887, the school commissioner of Warren county made an order organizing a new school district to consist of parts of school districts nos. 2 and 12 in the town of Johnsburg, and no. 11 of the town of Chester in said county. Consent to such order not having been obtained from all of the trustees of the territory affected, the school commissioner and supervisor and town clerk of the town of Johnsburg sat to hear objections thereto, and decided not to confirm the same. From this action this appeal is taken. The matter has been under discussion for a long time.

After the fullest consideration of the whole subject, I am of the opinion that the appellants do not establish a case which will justify me in overruling the conclusion arrived at by the commissioner, supervisor and town clerk. It is manifest that there are some residents of the neighborhood who are poorly supplied with school accommodations, and who would derive some advantage from the proposed change. It is by no means certain, furthermore, that, if the change should be made, some persons would not be as much inconvenienced as others would be helped. It seems to be simply a case of rival claims for closer access to a schoolhouse, and that whatever may be done to help one must necessarily be at the expense of another. A case is not established which is strong enough to justify the State Department in overruling the action of the local authorities.

The appeal must be dismissed.

4317

In the matter of the appeal of Theodore Kane, trustee of school district no. 6, town of Ward, Allegany county v. Stephen Pollard, school commissioner second commissioner district, Allegany county.

Where an order of a school commissioner, forming a new school district from portions of other school districts by which it will give better school facilities and increased convenience to persons and pupils occupying the transferred territory, and at the same time leaves the districts from which the transferred territory was taken sufficient resources with which to maintain good and sufficient schools, this Department can find no justification in setting aside his order.

Decided February 1, 1895

Reynolds, Brown & Reynolds, attorneys for appellant
Smith, Rockwell & Dickson, attorneys for respondent

Crooker, *Superintendent*

The above-named appellant appeals from a preliminary order made on July 3, 1894, by the above-named respondent, erecting a school district to be known as no. 8, Scio, in the towns of Scio and Ward, Allegany county, from territory formerly parts of district no. 6, of Ward, and no. 1, of Scio, and from the order of the local board made August 10, 1894, confirmatory of said preliminary order of July 3, 1894.

The principal grounds for said appeal, as alleged therein, are: (1) a new district is unnecessary to meet the demands or necessities of the inhabitants in said district for educational purposes; (2) there is not sufficient property in said proposed new district subject to taxation whereby a proper school can be maintained without great burden to the taxpayers thereof; (3) there are not sufficient pupils remaining in district no. 6 by which district school can be maintained; (4) if district no. 8 is formed it will be impossible to maintain a district school in district no. 6 on account of insufficiency of pupils residing therein.

It is established by the proofs presented herein, that school district no. 6, of Ward, Allegany county, was erected about fifty years ago; that at the formation of the district a large portion of the territory embraced in said district in the southerly and southwesterly parts thereof was forest; that the schoolhouse in said district was located and built in the northern part of said district over forty years ago, and since said schoolhouse was so located a greater portion of the southerly and southwesterly portions of said district have become cleared up and settled and that said schoolhouse is now a considerable distance northerly and northeasterly of the center of the territory therein in which the inhabitants of said district reside; that a large number of children of school age residing in said district no. 6 are compelled to travel from two to three miles to reach the schoolhouse in said district; that in the winter the roads leading to the schoolhouse are filled with snow, and said roads in the spring and fall are almost impassable; that there is no schoolhouse between that in district no. 1, of Scio, and the schoolhouse in said district no. 6, of Ward, a distance of five miles; that there are thirty-four children of school age residing within the territory of the proposed new district no. 8, of Scio, all of whom are two miles and over from any schoolhouse; that some years ago the subject of the erection of a new school district out of territory within said district no. 6, and the southerly and southwesterly portions of said district was agitated, but without any result to that end being accomplished.

It further appears that prior to July 3, 1894, a petition signed by a large majority of the residents and taxpayers within the proposed new district, having forty-one children of school age, was presented to the respondent herein as such school commissioner, asking for the erection of such new district; that after giving the subject examination and on July 3, 1894, the respondent herein made his order erecting said new district from territory formerly part of district no. 6, Ward, and no. 1, Scio, to be known as district no. 8, Scio, said order to take effect on October 5, 1894; that the trustee of district no. 6, of Ward, not having consented to said order, said respondent, on July 3, 1894, gave notice in writing to the trustees of districts nos. 6, of Ward, and 1, of Scio, respectively that on July 24, 1894, at 10 o'clock a. m., at the office of the town clerk of the town of Scio in the village of Scio he would attend and hear objections to said preliminary order made on July 3, 1894; that the date of said hearing was upon the request of said trustees postponed to August 10, 1894; that on August 10, 1894, there appeared said respondent and the supervisor and town clerk of each of the towns of Ward, Andover and Scio respectively, each and all of whom produced proof that they had been requested by said trustees of said school districts situated in their towns respectively, to be associated with the respondent as such school commissioner upon said hearing; that opportunity was given by said local board so organized to all persons who desired to be heard and to present their objections to said preliminary order, and after hearing all such persons as desired to be heard, and after due deliberation being had, the members of said local board voted unanimously to confirm said preliminary order of the said respondent,

dated July 3, 1894; that thereupon said confirmatory order of said preliminary order was drawn and signed by each member of said local board, to take effect on October 5, 1894, and which confirmatory order was duly filed.

It also appears that the aggregate assessed valuation of the real and personal property in said school district no. 6, of Ward, prior to said order of July 3, 1894, was the sum of $48,947, and that there were fifty-four children of school age residing in said district prior to July 3, 1894; that the aggregate assessed valuation of the real and personal property on July 3, 1894, of that part of district no. 1, Scio, taken to form said new district was the sum of $7800 with seven children of school age residing therein; that the aggregate valuation of the real and personal estate on July 3, 1894, in said new district no. 8, of Scio, was the sum of $26,365, and having forty-one children of school age residing therein; that the aggregate valuation of the real and personal property in said district no. 6, after taking from said district the territory embraced in the new district no. 8, of Scio, is the sum of $29,707, with nineteen children of school age residing therein, as admitted by the appellants; but I am satisfied by the proofs herein that there are between twenty and twenty-four children of school age in said district, with from six to twelve children who in a year or two will be of school age.

There is no provision of the school law, or any rule of this Department, defining the number of children of school age required to authorize the formation of a school district, or the number of such children requisite to maintain a school in a school district already formed.

I am of the opinion that the proofs herein clearly show that there are a sufficient number of children of school age within the territory of new district no. 8, of Scio, to maintain a school therein, and that there is a sufficient number of children of school age within the territory of district no. 6, of Ward, as altered by the orders herein appealed from, to maintain a school in said district.

I am of the opinion that the proofs herein clearly show the necessity of establishing a new school district to enable the inhabitants of the southerly and southwesterly portions of said district no. 6, of Ward, to send their children to school, by reason of the long distance such children were required to travel, and the hardship for such children to reach the schoolhouse in said district in the fall, winter and spring months on account of such long distances and the state of the roads.

The proofs herein clearly show that both school district no. 6, of Ward, and no. 8, of Scio, are, and each of them is, financially able to maintain good schools in said districts respectively without such being burdensome to the taxable inhabitants thereof. The qualified voters and taxpayers within said new district make no complaint of the burdens imposed upon them by the erection of the new district, and it is the appellant herein who is troubled relative to the burdens imposed upon such residents and taxpayers of said new district. The appellant herein does not claim that district no. 6, of Ward, as altered by said order, of July 3, 1894, is not financially able to maintain a good school in said district without being burdensome to the taxpayers therein.

This Department has held that where an order of a school commissioner forming a new school district from portions of other school districts by which it will give better school facilities and increased convenience to persons and pupils occupying the transferred territory, and at the same time leave the districts from which the transferred territory was taken sufficient resources with which to maintain good and sufficient schools, it can find no justification in setting aside his order.

On October 1, 1894, upon application of the appellant herein, I made an order staying all proceedings under and pursuant to said order of Commissioner Pollard, of July 3, 1894, and the confirmatory order of the local board of August 10, 1894, until the hearing and decision of the appeal herein, or until a further order shall be made by me in the appeal herein.

The appellant herein has failed in sustaining his appeal and the said appeal should be dismissed.

It is ordered, That the appeal herein be, and the same hereby is, dismissed.

It is further ordered, That the said order made by me herein on October 1, 1894, staying proceedings under the preliminary order of Commissioner Pollard of July 3, 1894, and the order of the local board of August 16, 1894, confirming said order be, and the same hereby is, vacated and set aside; and said preliminary order of Commissioner Pollard of July 10, 1894, and order of the local board of August 10, 1894, confirming said preliminary order be, and each of them is, hereby confirmed.

5298

In the matter of the appeal of the board of education of union free school district no. 7, town of Clarkstown, county of Rockland, from the orders and decisions of School Commissioner Hopper, in altering the boundaries of said district.

The action of a school commissioner in establishing a new school district which promotes the educational interests of the great majority of the residents of the territory affected will be sustained.

It is not absolutely necessary that the confirmatory order shall be identical in terms with the preliminary order.

Decided December 28, 1906

John E. Sicklés, attorney for appellants
Herman T. Hopper, attorney in person

Draper, *Commissioner*

On or about July 16, 1906, School Commissioner Hopper of Rockland county, made an order forming a new school district known as district no. 10, town of Clarkstown. This district was formed from portions of districts nos. 6, 7 and 8 of said town and the boundaries of such districts were therefore altered accordingly. The trustees of districts nos. 6 and 7 did not consent to the alteration of

the boundaries of their respective districts and the school commissioner properly made his preliminary order under the provisions of section 3, title 6 of the Consolidated School Law. The order appears to have been regularly made. Notice of a hearing on such order was given as required by section 4 of the same title. At this hearing the supervisor and town clerk of the town were associated by request with the school commissioner. The hearing was adjourned from time to time and the opposing districts were given full opportunity to be heard. After the hearings were closed the board voted to affirm the order of the school commissioner. The confirmatory order was then duly made by the school commissioner and the supervisor and town clerk properly joined in such order. It appears that the orders were properly executed and filed and that the proceedings were regular. Appellants raise one question of procedure that is entitled to consideration. It appears that the boundaries of district no. 10 as given in the preliminary order are not the same as the boundaries given in the confirmatory order. The school commissioner amended his preliminary order by changing the boundaries of the proposed district. The actual change made in such boundaries by the confirmatory order does not operate as any material hardship to district no. 7. It appears from appellants' map that the real effect of such change was to transfer the Powell or Armes property from no. 7 to the new district. It is not shown in which district the owner of this property prefers to be placed. It is not shown which of the schoolhouses of these two districts is the more accessible to children residing on such property and who might be compelled to attend school. It appears, however, from "Exhibit I" of appellants' pleadings that there are no children at present residing on such property who are required to attend school. Ordinarily the confirmatory order should be identical in terms with the preliminary order, but a slight change in the boundary of a new district, made for the purpose of equalizing the conditions between the districts affected is not good ground in itself for setting aside such order. If it were shown that such modification operated in some way as a hardship upon an individual or district a different question would be presented. The original or preliminary order is *inchoate* and of no effect whatever until the confirmatory order has been made. It must therefore be held that the order was properly made and the action of the commissioner sustained unless it is shown that upon the merits of the case the new district should not have been organized.

The new district includes the hamlet of Bardonia. Bardonia is located on the New Jersey and New York Railroad and between New City and Nanuet. District no. 7 includes the hamlet of West Nyack. This hamlet is a station on the West Shore Railroad. It appears that the distance from Bardonia to the schoolhouses in the adjoining districts is about two miles. The children residing at Bardonia were required, in going to and from school, to walk over country roads a distance of four miles. The distance which nearly all of these children were required to walk could be reduced at least one half by the formation of a new district. It also appears that the line of travel is not from Bardonia to West Nyack and that generally the residents of Bardonia have no interests at

West Nyack. The pleadings do not show the number of children in the new district who will attend school. There are twenty-three who were formerly in district no. 7 and appellants' map would indicate that there are as many more at least from the other portions of the district. It also appears that the hamlet of Bardonia is growing from year to year. The people residing within the territory composing the new district desired to have a school established at this hamlet. They appear to have been unanimous in this desire. Many of them personally requested the school commissioner to form a new district and later petitioned him to take such action.

District no. 7 opposes the formation of such district on the ground that it will weaken this district numerically and financially. This district has an assessed valuation of more than $270,000. The assessed valuation of the property transferred is a little over $30,000. The district will still have an assessed valuation of $240,000. The registration in district no. 7 last year was one hundred and fourteen and the number of children of school age was one hundred and thirty. Deduct the twenty-three children transferred to the new district and the number of children in no. 7 is one hundred and seven. The decrease in the number of children and in the property value of the district no. 7 will not be sufficient to interfere with the efficiency of the school which it will be able to maintain.

District no. 7 offered to maintain a branch school for the primary grade at Bardonia or to convey the children from that section to and from the schoolhouse in its district. This action on the part of no. 7 was an admission that the children at Bardonia did not have adequate school facilities. District no. , claims that its loss in taxes through the action complained of will be about $234 annually. This amount however would not pay the additional expenses of maintaining a primary school or of properly conveying the children from Bardonia to and from school. From the financial standpoint therefore the establishment of the new school district will reduce the expenses to district no. 7 from what such expenses would be were the district to maintain a branch school or convey the Bardonia children.

It is claimed by appellants that the school commissioner made his preliminary order before receiving a petition from the persons interested in the formation of a new district. It is immaterial when the commissioner received such petition. It was not necessary that a petition should be presented. The commissioner had ample authority to make such orders on his own initiation and without any petition. The fact, however, is that the people desiring a new district had personally importuned the commissioner to establish one. This was generally understood. The matter was presented to him in writing by a representative of the people interested. The commissioner told them to have a petition presented showing the sentiment of the people on such question. Before the petition was received he made the preliminary order. The petition was duly presented and considered by the board before the confirmatory order was made. The petitioners under all the circumstances were entitled to a new district. In the estab-

lishment of such district the school commissioner was promoting the best educational interests of the great majority of the people affected. His action appears to have been judicious, regular and in good faith. He must be sustained.

The appeal herein is dismissed.

3527

John H. Keeler v. Charles H. Ide, school commissioner of the second commissioner district of Erie county.

In forming a new district, the confirmatory order should be identical with the terms of the original order.

But a person who secures a slight modification of an order and gives his acquiescence to such modification, is not in a position to question the validity of the confirmatory order because of such modification.

Decided November 17, 1886

Draper, *Superintendent*

This is an appeal from the order of Charles H. Ide, as school commissioner of the second commissioner district of Erie county, N. Y., in making an order, dated the 16th day of July 1886, forming a new school district out of parts of district no. 4, in the town of Hamburg, and district no. 3, in the towns of Evans, Eden and Hamburg, and also from an order made by the said school commissioner, together with the supervisor and town clerk of the town of Hamburg, made upon the 27th day of July, 1886, confirming the first mentioned order.

Substantially the only ground upon which the appeal is taken is, that the order of the 27th of July was not identical in its terms with the order which it sought to confirm. It modified the boundaries of the new district in a slight particular. The appellant insists that this is fatal to the proceedings. Ordinarily, it would be, but the fact is made clear to me that the modification was made in the interest of and for the sake of satisfying the appellant, and in the belief that it would prevent further controversy. The appellant was present at the hearing held by the commissioner, supervisor and town clerk, for the purpose of affording an opportunity to persons aggrieved to state their objections, and acquiesced in the modification so far as it went, but desired more of a modification. He is not now in a position to raise the question. The members of the board say that they would have confirmed the original order precisely as it stood, but for the sake of suiting the appellant so far as they reasonably could. He can not be upheld in an effort to set aside the action of the board only because of a slight modification which he himself desired.

5407

In the matter of the appeal of William Barss, Seymour Knickerbocker, George Owens, William Higgins, Mrs Fannie Persons, Mrs William Higgins, Nelson West et al. as inhabitants and electors of alleged school district, no. 8, in the town of Chester, Warren county.

Order establishing school district out of portion of dissolved district. An order of a school commissioner which establishes a new school district out of a portion of a district which has been dissolved, which does not dispose of the remaining territory of the dissolved district nor show the alteration of the boundaries of the other districts to which it is assumed such remaining territory has been annexed, is defective and must be set aside.

Disorderly meeting; resolution legalizing act of trustee. A meeting is not necessarily illegal because disorderly. If a fair vote was taken upon a resolution, and the contending parties were equally blamable for the disorder, the action of the meeting will be sustained. A resolution accepting the act of a trustee in building a schoolhouse and authorizing the raising by tax of a sufficient sum to pay the cost thereof, legalizes the act of the trustee.

Decided May 17, 1909

John H. Cunningham, attorney for appellants
L. L. Davis, attorney for respondent

Draper, *Commissioner*

This is an appeal from an alleged order of James L. Fuller, school commissioner of the second school commissioner district of the county of Warren, in establishing the boundaries of school district no. 6, town of Chester, county of Warren, and from the acts of a certain special meeting held in such district for the purpose of ratifying the acts of the trustee of such district in selecting a site and erecting a new school building thereon. The appellants also complain of the acts of the trustee in arbitrarily selecting a site and proceeding with the erection of a school building thereon. A number of other acts are complained of, but the disposition of the case will depend upon the legality of the school commissioner's act in establishing the boundaries of the district and of the act of the district meeting in ratifying the selection of the site and erection of a schoolhouse thereon by the former trustee.

The papers on appeal do not clearly show material facts. There is much repetition, and constant jumbling of irrelevant assertions with material and essential allegations, so that it is exceedingly difficult to determine the rights of the respective parties. No maps are filed, or facts alleged showing how the appellants are injuriously affected by the order of the school commissioner in setting off into the several districts the parts of the original district. The appellants rely on the general allegation that the order was "against the best interests of the district and the promotion of education therein." They do show that the district was already weak and was further weakened by the order, while the other district was stronger and was further strengthened thereby. But this does not necessarily establish the illegality of the order.

The appellants do not state how the respondent came to organize school district no. 6. The school commissioner in his answer alleges that his district was formerly part of joint district no. 6, towns of Chester and Minerva, counties of Warren and Essex, and that he and School Commissioner Pond dissolved this joint district by an order dated December 3, 1907. It would appear that soon after January 1, 1908, the respondent Fuller made an order wherein he attempted to create out of a portion of such dissolved joint district a new district no. 6 in the town of Chester. This order was not filed in the town clerk's office until September 22, 1908, and of course did not take effect until that time. Prior to that time, on January 18, 1908, under the direction of the respondent Fuller a meeting of the district was held and the district was organized by the election of district officers. It would seem to follow from the crude and confusing allegations contained in the petition and the respondent's failure to controvert them, that this meeting was open to all qualified voters residing within that portion of the dissolved joint district situated in the town of Chester. It also appears that persons were elected officers of the district at the annual meeting who were residents of that portion of the district set off by the commissioner's order filed September 22d. It would seem that those people residing in that part of the dissolved joint district situated in the town of Chester assumed that the school commissioner had established such part of such district as a new school district. There is nothing in the papers on this appeal indicating just what disposition was made of this part of the former district. The order filed September 22, 1908, does not show on its face the disposition of this territory. It is entirely inadequate as an order establishing the boundaries of school district no. 6, town of Chester, and does not conform to the requirements of the law relating to the alteration of the boundaries of the North Creek union free school district, or of school district no. 10, town of Chester. This order must be set aside and a new order entered which shall distinctly set forth the boundaries of these three districts, and if necessary a survey must be made defining such boundaries.

The only other question worthy of decision is the legality of the resolutions adopted by the special meeting of the district held October 9, 1908. One of these resolutions accepted the act of a former trustee in erecting a school building on a site selected by him, and authorized the raising by tax of a sufficient sum to pay the cost of such building. Another resolution designated the site selected by the said trustee as the schoolhouse site for the district, duly describing such site by metes and bounds as provided by law. The papers show that this meeting was disorderly; that the voters present were many of them the givers and takers of severe blows. It does not sufficiently appear whether the appellants herein were the aggressors or the aggrieved. Both sides were probably equally guilty. In any event a fair vote seems to have been ultimately taken and the resolutions were adopted. All of these appellants, except Owens and Mrs Persons, were permitted to vote. Some of them resided outside of the district as established by the respondent's order of Septem-

ber 22d, and it may be questioned whether they were legal voters at that meeting. Such order was in force at the time this meeting was held, and until set aside on an appeal duly brought, controlled the residence of persons at such meeting and their qualifications as voters based thereon. I therefore decide that these resolutions were legally passed at such meeting and that they are sufficient to establish the site described as the schoolhouse site of the district, and to legalize the acts of the former trustee in selecting such site and in proceeding with the erection of a school building thereon.

The appellants have not successfully attacked the order of School Commissioners Fuller and Pond in dissolving joint school district no. 6, towns of Chester and Minerva. School Commissioner Fuller should have concurrently entered an order disposing of that portion of the dissolved joint district in the town of Chester by creating a new district or annexing it to other districts in such town or by doing both. He attempted to do this but his order was invalid and ineffective. It would be unjust to the district to hold that the invalidity of this order rendered void all acts of the district; the qualified electors in the district had no means of knowing that the school commissioner had not performed his full duty.

The appeal herein is dismissed except so far as it relates to the sufficiency of the order creating new district no. 6, town of Chester and annexing a portion of dissolved joint district no. 6, towns of Chester and Minerva, to North Creek union free school district and to district no. 10, town of Chester. As to such order the appeal is sustained.

It is hereby ordered, That the order of School Commissioner Fuller forming new school district no. 6, town of Chester, and annexing portions of the dissolved joint district no. 6, towns of Chester and Minerva, to other districts, dated January 2, 1908 and filed in the office of the town clerk of the town of Chester be set aside; and

It is hereby further ordered, That the present school commissioner of the second school commissioner district, county of Warren, shall forthwith enter in the town clerk's office of the town of Chester, a new order clearly defining as required by law the boundaries of the new district attempted to be established by the order hereby set aside, and also the boundaries of those districts to which portions of that part of dissolved joint district no. 6, towns of Chester and Minerva, were attempted to be annexed by the said order hereby set aside, and that the said new order so entered shall take effect as of the date of the original order.

SCHOOL EQUIPMENT

3936

In the matter of the appeal of Robert S. Hilton v. Daniel Lockwood, sole trustee of school district no. 20, town of Westerlo, county of Albany.

A trustee of a school district purchased for the district upon his own motion, and paid therefor, $15 for a set of school charts, for which he demanded reimbursement, and was refused. *Held* under the statute, to be entitled to his claim, and payment ordered.
Decided December 3, 1890

Draper, *Superintendent*

The appellant was trustee of school district no. 20, town of Westerlo, Albany county, from the annual school meeting of 1889, at which he was elected, until August 5, 1890, when the above-named Daniel Lockwood became his successor as trustee.

During appellant's term as trustee, he purchased one set of school charts which he furnished to the school of his district, the expense of which, $15, he paid and advanced for the district. He presented his claim therefor, to the annual meeting, where it was not allowed, and the trustee will not pay the claim.

The law clearly authorizes a trustee to incur an expense of not to exceed $15 in any year for charts, without a vote therefor by a district meeting. The trustee did this, and paid the expense, $15, for which he is entitled to prompt reimbursement by the district. The trustee, if there are moneys in the collector's hands, is hereby authorized and directed to give an order to the appellant for $15, the sum claimed.

If there be no money in the collector's hands, he will levy a tax upon the property of the district and liquidate the claim.

The appeal is sustained.

3659

In the matter of the application of Thomas C. Arnow and others for the removal of Henry A. Smith, James Cox and others, from the office of trustee of union free school district no. 1, town of Westchester, Westchester county.

At a meeting of a board of trustees in a union free school district held on the day preceding the annual school meeting, at which school meeting a majority of a full board was to be chosen, drafts were ordered for the final payment of moneys not yet due on a building contract and were issued to the assignees or beneficiaries of the contractor before payments were due under the contract. In consequence of this action the district sustained loss at least to the extent of $650, the contractor having since failed to complete his contract.

Held, That the fact that the payment was made on the day before an election at which a majority of the board was to be chosen, raised the inevitable inference that the act was not taken through inadvertence, but with gross negligence or deliberate purpose to effect some object other than to protect the public interests.

Held, A member of the board who was not present at the meeting when an illegal payment was made, can not in law be held legally and personally responsible for a loss occasioned the district, although evidence appears that he would have so voted had he also been present.

Held, That the members of the board who voted for this illegal expenditure of money are liable for the loss to the district occasioned by their action, and they are required to pay or cause to be paid to the district the amount lost, or be removed from office.

Decided January 5, 1888

Milton A. Fowler, attorney for complainants

H. C. Henderson and Charles G. Banks, attorneys for respondents

Draper, *Superintendent*

This is an application for the removal of certain trustees from office. The ground of complaint alleged is that they have made payments to one George A. Newbold, a contractor for the performance of certain work upon a new school building, in course of erection, in advance of the requirements of the contract, and that this fact, coupled with Newbold's abandonment of his contract before completion, has resulted in pecuniary loss to the district.

The contract with Newbold provided for payments during the progress of the work, as specified portions thereof should be certified by the architect to be properly completed. By the contract the sum of $2225 was to be held back and paid to the contractor only upon the full performance of his contract. At the annual school meeting held August 30, 1887, five new members, a majority of the whole number, were elected upon the board. On the day before election, at a meeting at which five members were present, the board ordered drafts in favor of Newbold's assignees or beneficiaries for the sum of $1675 on account of the final payment. The money was paid and he forthwith abandoned the contract.

The board as newly constituted, received bids for the completion of the contract and let the work to the lowest bidder for the sum of $1200. Beyond this it was alleged on one side, and admitted on the other, that the board is liable to one Braithwaite for the sum of $700 on account of the Newbold contract, because of its having accepted an order given to Braithwaite by Newbold for painting upon the building. This order was for $1000 of which sum $300 was paid August 20, 1887. It therefore required the sum of $1900 to procure the completion of Newbold's contract, while he had been paid all of the contract price except $750. In other words, the district was out of pocket $1150 by reason of Newbold's failure to finish his contract and because of payment made before being due. The architect swears, however, that Newbold had performed "extra work" upon the orders of the board to the value of more than $500 which had not been paid. If this is not true, it at least is not controverted. This would reduce the net loss of the district to the sum of $650. On the other hand it is alleged that numerous defects have been recently discovered in Newbold's work by reason of a thorough examination of the building having been made by an engineer under the direction of the State Board of Health, and that it would cost $1000 to make these good. I think it is shown clearly enough that some very serious defects exist, but the sum necessary to make them good is not shown to any degree of certainty which will enable me to make it the basis of my action. Nor am I prepared to say that the respondents are personally liable on account of such defects. Therefore, while I deem it proper to say that I do not assume to pass upon any of these accounts with care, and that the proofs are not before me which would enable me to do so, and it is not necessary for me to do so upon a proceeding of this nature, yet there is sufficient evidence here to satisfy me that the district lost at least the sum of $650 by reason of the acts complained of.

Numerous other matters are set up in the papers and were discussed to a considerable extent upon the argument, but I think I have stated all that is material to the question before me.

The respondents attempt to justify their action by showing that Newbold's contract was taken at a very low price and that they paid him money upon the certificates of the architect that the work had progressed sufficiently to justify such payments.

I do not think that this is a sufficient answer. Whether the contract price was low or not, is immaterial. The contractor had given what is admitted to have been a good and sufficient bond for the performance of his agreement and the board was bound to see that it was carried out to the letter. They had no right to be generous with the money of the public; members were not bound to recognize the certificate of the architect except as provided in the contract. The contract provided for the final payment of the sum of $2225 upon the full completion of the contract. The board was in position to insure its completion and it surrendered that position. The fact that this was done the day before an election at which a majority of the board was to be chosen, and after the financial statement for the year had been made up and printed for presentation to the

annual meeting, raises the inevitable inference that the act was not taken through inadvertence but with deliberate willingness to effect some object other than to protect the public interests.

It does not appear that the respondents acted through corrupt motives or impulses, that they derived any personal profit or advantage from their acts, or that they deliberately intended to defraud the district. It does clearly appear that they have failed to exercise that care in the protection of the interests of the district which they were bound to exercise.

Of the members of the board which made the payment to Newbold in advance of the requirements of his contract, Henry A. Smith, William Walsh, Henry Corkey and James Cox are still members. Cox and Corkey were present and voted for the payments to Newbold at the meeting on the twenty-ninth of August. Smith and Walsh were not present at such meeting, but they make affidavits in which they say they approved of the acts of their associates and would have voted for it if they had been present. I do not know of any principle of law, however, which would hold one legally and personally responsible for acts of their nature unless he was present at the meeting of the board and gave to them the sanction of his vote.

I have concluded, therefore, to dispose of the case in the manner following and,

It is hereby ordered, that Henry Corkey and James Cox pay or cause to be paid to the treasurer of union free school district no. 1, of the town of Westchester, the sum of $650 before the expiration of twenty days from the date of this order or that at that time they be removed from their office as trustees in said district.

3714

In the matter of the appeal of John M. Pendleton and others v. school district no. 3, town of Castleton, county of Richmond.

A district meeting is not authorized to allow a librarian a salary, and a vote to that effect is void.

A vote granting the balance of district moneys to the trustees to use in their discretion is void.

Decided October 3, 1888

Draper, *Superintendent*

This is an appeal from the action taken at the annual school meeting in district no. 3 of the town of Castleton, Richmond county as follows:

1 From the vote of the inhabitants in granting $75 to the librarian as salary.

2 From the vote of the inhabitants in granting to the trustees a sum not exceeding $1000 for the purchase of a clock.

3 From the vote of the inhabitants in granting a sum not exceeding $60 for the purchase of and placing a telephone in the school building.

4 From the vote of the inhabitants granting the balance of surplus moneys to the trustees to use in their discretion.

No answer is interposed by the respondent, and I am obliged, therefore, to accept the statements of the appellants as facts. It has been repeatedly held by this Department that a common school district has no power to levy a tax for the purpose of paying a salary to a trustee. I know of no distinction, upon principle, which can be drawn between a trustee and any other district officer, and it would therefore follow that the action of the district meeting in granting $75 to the librarian as a salary was unauthorized, and is void. I know of no law which will prevent a school district from expending a reasonable sum of money for the purpose of purchasing a bell or clock. Of the wisdom of expending $1000 for such a purpose, I am unable to judge. If it should be considered extravagant by any considerable number of residents in the district, I should be inclined to advise the holding of a special meeting for the purpose of reconsidering the matter, but I am of the opinion that the district has the legal right to raise a reasonable sum of money for such a purpose. It seems to me that the district meeting had the power to authorize the expending of $60 for the use of a telephone. The district meeting could not place any amount of moneys in the hands of the trustees to be used in their discretion. The surplus funds coming over from last year's accounts must be held by the supervisor or collector subject to the draft of the proper officers, for lawful indebtedness of the district, and must go to the reduction of the amounts voted for the expenses of the coming year. The tax levy authorized by the district meeting, from the action of which this appeal is taken, must be for a sum no larger than that authorized by the district meeting after subtracting from the same the sum of $75 voted to be paid to the librarian as a salary, as well as all moneys voted to be used by the trustees in their discretion, and also the balance on hand at the time of the annual meeting, unless said balance was taken into account by the meeting.

3690

In the matter of the appeal of Lemuel H. Cunliff and others, trustees of school district no. 25, town of Hempstead, Queens county, N. Y. v. Martin V. Wood, supervisor, Edmund J. Healy, B. Valentine Clowes, Thomas D. Smith and John W. DeMott, justices of the peace, and Thomas V. Smith, town clerk, comprising the board of town auditors of the town of Hempstead, Queens county.

In a case where a special statute, applicable to a particular town, provided that a certain trust fund should be apportioned among the school districts of the town in the same manner and upon the same basis as the State school moneys are apportioned, *held*, that such statute is to such extent "an act pertaining to common schools," and that the trustees of such funds are, so far as their apportionment of such funds among different school districts is concerned, subject to the general supervisory powers of the Superintendent of Public Instruction.

Decided June 7, 1888

Asa Bird Gardner, attorney for petitioners
A. N. Weller, attorney for respondents

Draper, *Superintendent*

Prior to April 1886, the village of Garden City constituted a part of school district no. 1 of the town of Hempstead, Queens county. By act of the Legislature, the village then became a separate school district, known as district no. 25 of the town of Hempstead. It was duly organized and officers elected in August following. Prior to the setting off of the village into a separate school district, there had been maintained there a branch school. In the apportionment of public school moneys in the school year 1885–86, district no. 1 of Hempstead received such share as would have been payable to it if no separation had been made, while the new district received nothing. The matter was brought before me on appeal, and it was held that the new district was equitably entitled to share in the apportionment; that the statute gave the Superintendent power to adjust the matter if the facts were proved upon which he could do it intelligently and correctly, and that such a state of facts was proved. It was therefore ordered that district no. 1 should pay over to district no. 25 the proportional share of public moneys found to be due said district, or that said amount should be withheld from the share of one district and added to that of the other in the next annual apportionment.

At the time of the presentation of the matter referred to the petitioners also asked that district no. 1 should be required to pay over to no. 25 a like proportional share in the income of a certain trust fund arising from the sale or rental of common lands of the town, of which the board of town auditors were trustees, and which chapter 591 of the Laws of 1870 directed should be distributed to the several school districts of the town of Hempstead " in the same manner and upon the same basis as the public school moneys of the State are apportioned." They showed that two apportionments from this trust fund had been paid to district no. 1 after Garden City became a separate school district and before the commencement of these proceedings, and that, in said apportionments, the old district received the share which seems equitably to belong to the new one, while the new district received nothing.

The relief which was asked in connection with such trust fund was not afforded in the decision and order in the proceedings referred to, for the reason that it seemed to me that up to that time the board of town auditors had made no mistake. They had made their apportionment in the same manner and upon the same basis as the public school moneys of the State are apportioned, so far as they could be expected to know. It was assumed, when a decision was made by authority competent to make it, that an erroneous apportionment of public moneys had been made among the school districts of the town, and that after such error was corrected and set right, that the board would perceive that it also was in error in the apportionment of the trust fund, and that it would, after being apprised of the matter, also proceed to set the matter right. A doubt was also expressed of the power of the Department over the trust fund referred to.

It is now shown that the order of the Department in relation to the public moneys has been brought to the knowledge of the board of town auditors, and a demand has been made that the share of district no. 25 in the apportionments

from the trust fund on December 21, 1885, and June 5, 1886, which was paid to district no. 1, shall be paid over to no. 25, but that such demand has been refused. Thereupon the matter has been brought here and relief is asked.

After hearing the argument of able counsel, I have given the matter very full examination. I find that section 8, chapter 591, Laws of 1870, provides that two-thirds of the accruing interest of the moneys arising from the sale of the common lands in the town of Hempstead, or so much thereof as may be necessary, shall be devoted to the support of the common schools of the town. Exactly how much, is to be determined by the board of town auditors after examining the last annual reports of the trustees and boards of education of the town, and whatever amount is devoted to such purposes is apportioned among the several districts in the same manner and upon the same basis as the public school moneys of the State are apportioned. My reading of the section leads me irresistibly to the conclusion that the only discretion vested in the board of town auditors is the fixing of the amount, within the limit named by the statute, which shall go for school purposes. They are to be guided in doing so by the reports of the trustees. When they have determined the amount, the law says just how it shall be distributed, namely, in the same manner and upon the same basis as the State school moneys.

It is a fact, which is undeniable, that the two sums devoted to school purposes by action of the town auditors on the 21st of December 1885, and the 5th of June 1886, respectively, have not been, so far as districts nos. 1 and 25 are concerned, apportioned in the same manner and upon the same basis as the State school moneys have been apportioned in said districts. It is true that these sums have been distributed in the same manner and upon the same basis as the public school moneys were at first apportioned by the local officers charged with the duty of such apportionment, but it has been determined by authority, which all now concede was charged with the responsibility and duty of determining the matter, and that such apportionment was in justice and equity erroneous, and ought to be corrected. Such correction has not only been made by a reapportionment, but the payments to the respective districts have, in fact, been readjusted in accordance with such reapportionment.

This being so, it seems clear to me that the directions of the statute, concerning that part of the income of moneys arising from the sale of public lands which has been devoted to school purposes, have not been complied with, and will not be until such moneys shall be reapportioned and readjusted in the same manner as has been done in relation to the State school moneys. This being so, it is no less clear to me that it is the duty of the board of town auditors to make such reapportionment and readjustment. I observe their allegations that they have no power in the premises; that they can neither compel district no. 1 to pay over to no. 25 what may belong to the latter, nor in their next apportionment withhold enough from the share of one and add it to that of the other to set the matter right. I can not adopt this view. It seems to me entirely too technical. The right to correct a manifest error, capable of correction, is inherent

and always present. Suppose the auditors had ascertained that, through a mistake in computation, a mere arithmetical blunder, they had paid a larger sum to one district and a correspondingly smaller sum to another district than each should have received. Would they contend in that case that they had no right to correct the mistake, no power in a subsequent apportionment to withhold from one and add to the other enough to set the matter right? If they had no power to right the wrong, why would they not be personally liable for the amount to which the district was entitled, and which it had not received through their mistake? But there would be no doubt of their power to correct the error. If they could do it in that case, they can in this.

Can they be required to do it? I entertain no doubt of it. What the law directs to be done and may be done, may be required to be done. Have the appellants or petitioners taken the proper steps to compel them to do it, when they come to this Department? The respondents say that the Superintendent of Public Instruction has no power to do anything in the premises. With a desire neither to assume any authority which the office does not possess, nor to avoid any responsibility which the law does place upon it, I have endeavored to consider that question with care.

No one can examine the general school laws of the State without being convinced that it is the purpose of the Legislature to provide an inexpensive, expeditious and conclusive way for determining all controversies in which school interests may become involved. This way lies in the statutory right of appeal to the Superintendent. The right is broad, extending to all school controversies. Title 12, section 1 of the Consolidated School Act, provides that "any person conceiving himself aggrieved in consequence of . . . any other official act or decision *concerning any other matter* under this act, or *any other act* pertaining to *common schools,* may appeal to the Superintendent of Public Instruction, who is hereby authorized and required to examine and decide the same." Is not chapter 591 of the Laws of 1870, an act pertaining to common schools, when it directs the distribution of certain moneys in a certain way, among certain schools? The school system may be administered in different ways and by different officers in different localities. Is not the apportionment of moneys, devoted to schools of the town of Hempstead, by certain town officers, no matter by what title they are called, an official act under a statute pertaining to schools? In my judgment, it is as much so as is the annual apportionment of the State school moneys by the school commissioners of the county of Queens. If so, then the act is one which may be brought up before the Superintendent upon appeal, and the statute not only authorizes, but requires him to examine and decide whether or not it was rightfully and properly performed.

But there are statutory provisions specially treating of funds held in trust for the benefit of common schools. Title 3, sections 15, 16 and 17 of the Consolidated School Act, after providing for the establishing of such trusts, and that no such trusts shall become invalid for want of a trustee, and that the Legisla-

ture may control and regulate the execution of all such trusts, contains this direction, viz: "And the Superintendent of Public Instruction shall supervise and advise the trustees and hold them to a regular accounting for the trust property and its income and interest at such times, in such forms and with such authentications as he shall from time to time prescribe."

The board of town auditors is the custodian of certain funds. The law directs that a certain part thereof shall be devoted to school purposes, and leaves it to them to say how much, within specified limits. They say how much. The law says they shall then distribute it in a specific way. From the moment they have voted moneys to the schools as provided by law, such moneys belong to the schools, and until actually paid over to the school officers, they are held in trust for the schools by the board of town auditors. It seems clear to me that during such period the members of such board occupy the position of trustees of such funds for the use of the schools, and are subject to all provisions of law governing such officers. The statute says that the Superintendent shall supervise and advise such trustees and hold them to an accounting, etc.

In view of these considerations, I come to the conclusion that, in the apportionment and distribution of town moneys to schools of the town of Hempstead by the board of town auditors on the 21st day of December 1885, and the 5th day of June 1886, errors were committed by said board by reason of which school district no. 1 received more and school district no. 25 received less than they were respectively entitled to receive; that it is the duty of the board of town auditors to correct such error in the apportionment and distribution, in the same manner a similar error in the apportionment and payment of the State school moneys has been directed to be corrected by order of this Department, made on the 30th day of November 1886, and filed in the office of the town clerk of said town; that said board has ample power to make such correction; that upon their failure to discharge such duty, to the injury of school district no. 25, that district had the right to bring the matter before the Superintendent on appeal, and is entitled to the exercise of his official powers in the premises.

The appeal is therefore sustained, and it is

Ordered, That the board of town auditors of the town of Hempstead shall, within twenty days from the date hereof, convene and correct an error in their apportionments of town moneys to schools made on the 21st day of December 1885, and on the 5th day of June 1886, respectively, so that said apportionments of town moneys shall be in the same manner and upon the same basis as the public school moneys of the State have been apportioned among the districts of said town, pursuant to an order made by the Superintendent of Public Instruction on the 30th day of November 1886, and filed in the town clerk's office of the town of Hempstead on the 6th day of December 1886, and that, unless the payments to the school districts affected by such reapportionments shall sooner have been adjusted between such districts in accordance with such reapportionments, that said board, at the time of the next apportionment and distribution by

them of town moneys to schools, shall withhold from any district which has been paid a larger sum than properly belongs to it, as shown by such reapportionments, the excess so paid, and shall pay to any district which has received less than its share, as shown by such reapportionments, the sum to which it may thereby be shown to be entitled.

4995

In the matter of the appeal of Smith Lent from certain proceedings of annual meeting held August 6, 1901, in school district no. 1, Ossining, Westchester county.

The members of a committee appointed at the annual meeting of a school district to examine the annual report of the trustees of the district, and in performing such duty and reporting therein at an adjourned school meeting, do not act as the agents of the district, nor as district officers. Action of the adjourned school meeting in receiving the report and discharging the committee, was not an adoption of the report by the meeting. The action of a subsequent annual meeting of the district in appropriating the sum of $2278.99 for the payment by members of such committee for costs etc., alleged to have been incurred by them in defending actions in the Supreme Court brought by two of the trustees against them for libel alleged to have been contained in such report, and authorizing the trustees of the district to levy a tax to collect such sum, was without authority of law.

Decided March 11, 1902

Griffin & Young, attorneys for respondents Underhill, Ryder and Sheehan.

Skinner, *Superintendent*

This is an appeal from certain proceedings and decision of the annual school meeting held August 6, 1901, in school district 1, Ossining, Westchester county, in the adoption of a resolution appropriating the sum of $2278.99 to pay the costs, charges and expenses of Abram C. Underhill, Edgar L. Ryder and Edward F. Sheehan in defending actions for damages for libel brought against them by the appellant herein in the Supreme Court of this State.

The appeal herein was filed in this Department September 5, 1901; on September 13, 1901, Messrs Sherwood, Palmer and Crow, trustees of such district, filed their answer to the appeal, and on September 24, 1901, Messrs Underhill, Ryder and Sheehan filed their answer to the appeal. On November 26, 1901, upon application, I named December 4, 1901, at ten o'clock a. m., at the Department of Public Instruction, in the capitol, in the city of Albany, N. Y., as the time and place I would hear oral arguments on behalf of the respective parties in the appeal herein. On December 4, 1901, an oral argument was made on behalf of the respondents, Underhill and others, who also furnished a written brief, but there was no appearance on the part of the appellant or the trustees of the district. On December 13, 1901, the appellant filed a brief, and on January 3, 1902, he filed an additional brief.

It is in proof that at the annual meeting held August 1, 1899, in said school district, the appellant herein, then one of the trustees, read the capitulation of the annual report of the board of trustees, and stated the sum of $8000 would be necessary to be voted in addition to the amount that could be raised by law in order to carry on the schools for the ensuing year, and moved that said sum be appropriated, but the motion was, by the chairman of the meeting, ruled as out of order at that time; that a motion was adopted that when said meeting adjourned it be to August 22, 1899, at 7.30 p. m.; that a motion was adopted that the report of the trustees be referred to a committee of five to report at the adjourned meeting to be held on August 22, 1899, and the chairman of the meeting appointed as such committee Messrs Abram S. Underhill, Edgar L. Ryder, Edward F. Sheehan, Wilbur Foshay and Randolph Acker; that a ballot was taken for a trustee of the district in the place of the appellant herein, whose term of office expired, and Edward B. Sherwood was elected; that after the transaction of other business the meeting adjourned to August 22, 1899; that on August 22, 1899, said adjourned meeting was held and the respondent, Edgar L. Ryder, read the report of the committee appointed to examine the annual report of the trustees, which report was signed by Messrs Underhill, Sheehan, Acker and Ryder, Mr Foshay of the committee not having acted; that after the reading of the report Mr W. W. Ryder moved that the report be *received and placed on file,* and Justice Valentine having moved as an amendment that the committee *be discharged,* the motion was adopted; that a motion was adopted that the board of trustees be authorized to take necessary steps to recover any shortage in the school funds, and that the sum of $29 be paid to the expert employed by the committee in the examination of the accounts referred to such committee.

It is also in proof that in the month of September 1899, the appellant herein and one Many each brought actions in the Supreme Court of this State against Underhill, Ryder and Sheehan, severally, for libel. Before the three actions brought by Many came on for trial he died, and thereupon each of said actions abated. The action brought by appellant against Underhill came on for trial in said court before Judge Marean and a jury on April 4, 1900, and the complaint of the appellant was dismissed, and thereupon said Lent appealed to the appellate division of the Supreme Court of the second department, and at the November term, 1900, the judgment of the trial term was affirmed. The two actions brought by the appellant against Messrs Ryder and Sheehan, respectively, were tried in the Supreme Court in June 1901, before Justice Smith, who directed a verdict on the merits for each of the defendants therein.

It appears that the complaint in each of said actions asserted *two* causes of action, one for the original report made by the committee and read at the school meeting, and subsequently published, and the other for the statements contained in an article of the defendants published in a newspaper replying to a newspaper article by the plaintiff criticizing the original report.

On August 5, 1901, the respondents, Underhill, Ryder and Sheehan, delivered to Trustee Sherwood a verified account, of which the following is a copy:

Ossining, N. Y., July 23, 1901

SING SING FREE SCHOOL DISTRICT NO. 1 OF THE TOWN OF OSSINING, TO MESSRS UNDERHILL, RYDER AND SHEEHAN, DR.

To expenses incurred in the defense of the actions, Lent v. Underhill, Lent v. Ryder, Lent v. Sheehan, Many v. Underhill, Many v. Ryder and Many v. Sheehan, as follows:

Griffin & Young, cash disbursements	$204 49
Griffin & Young, for legal services	765 00
Hon. J. Rider Cady, for legal services	650 00
Henry C. Henderson, for legal services	500 00
Edgar L. Ryder, personal expenses to Poughkeepsie to obtain order	3 50
Romine Williams, serving papers	3 00
Mahlon Gobel, serving subpoenas	3 00
Morgan & Seabury, special counsel for Edgar L. Ryder	50 00
Benjamin Fagen, special counsel for E. F. Sheehan	100 00
Total	$2278 99

At the annual meeting held on August 6, 1901, in school district 1 of Ossining (formerly Sing Sing) Trustee Sherwood stated that he had received a bill or account of Messrs Underhill, Ryder and Sheehan, amounting to $2278.99, but no action would be taken thereon until the meeting had acted upon the matter, and the following resolution was presented to the meeting and adopted by a vote of 87 for and 45 against.

Resolved, That an appropriation of $2278.99 be made to pay the costs, charges and expenses of the special investigating committee appointed at the school meeting of 1899, consisting of Abram S. Underhill, Edgar L. Ryder and Edward F. Sheehan, in defending themselves in the six suits for an alleged libel brought against them by Smith Lent and Joshua G. Many; and that the trustees of Sing Sing free school district 1, Ossining, cause the said sum of $2278.99 to be assessed upon and collected of the taxable property of said district, in the same manner as other taxes are by law assessed and collected.

The principal ground alleged by the appellant for bringing his appeal is, that said school meeting had no power or authority to appropriate said sum of money or any other sum for the purposes stated in said resolution, or to levy a tax to collect said sum.

The respondents, Underhill, Ryder and Sheehan, contend that as members of the committee appointed at the school meeting held in August 1899, to examine the report of the trustees, they were district officers, or if not district officers, were agents of the district, and under the provisions of the Consolidated School Law of 1894, the annual school meeting had authority to appropriate money to pay the expenses incurred by district officers in defending suits brought against them, or in prosecuting suits.

Under the provisions of chapter 314 of the Laws of 1864, the then village of Sing Sing was formed into a permanent school district, which district is now designated as school district 1, Ossining, Westchester county. Said chapter 314 of the Laws of 1854, was amended by chapter 325 of the Laws of 1857, chapter 199 of the Laws of 1857, chapter 269 of the Laws of 1863 and chapter 687 of the Laws of 1900.

Under the provisions of said acts the district is a common school district and its officers consist of three trustees, a district clerk and a treasurer of the trustees. The trustees are authorized to raise by tax annually moneys for the purchase of fuel, ordinary repairs and improvements of school property, and for the enlargement, rebuilding of school buildings or the erection of new buildings.

Said act does not, nor does any amendment thereof, authorize the appropriation of money to pay the expenses of district officers, or of any agents of the district, in bringing or defending suits brought by or against such officers or agents.

Under subdivision 15 of section 14, article 1, title 7, of the Consolidated School Law of 1894, the qualified voters at district meetings in common school districts have the power to vote a tax to pay reasonable expenses incurred by district officers in defending suits or appeals brought against them for their official acts, or in prosecuting suits or appeals by direction of the district against other parties.

Sections 4, 5, 6, 7 of article 1, title 15, of the Consolidated School Law, cited by the respondents, Underhill, Ryder and Sheehan, do not authorize the adoption of the resolution appealed from as such sections are applicable only in actions brought by or against district officers.

I decide that the respondents, Underhill, Ryder and Sheehan, in the examination of the report of the trustees of school district 1, Ossining, Westchester county, referred to them and Messrs Foshay and Acker, as a committee, at the annual meeting held August 1, 1899, and in reporting thereon to the adjourned school meeting were not acting as district officers or agents of such district.

The report made by such committee to the adjourned school meeting held August 22, 1899, was received but not adopted at such meeting, and such committee was discharged by the meeting. The actions commenced in the Supreme Court by the appellant against the respondents, Underhill, Ryder and Sheehan, were not based wholly upon statements contained in said report but also from statements contained in an article published by them in one or more newspapers in the school district.

The adoption at the annual meeting in school district 1, Ossining, Westchester county, held August 6, 1901, of the resolution appealed from, appropriating the sum of $2278.99 to pay the costs etc., of the respondents, Underhill, Ryder and Sheehan, in defending six suits for libel brought against them by Smith Lent and Joshua G. Many, and that the trustees of the district cause said

sum to be assessed and collected of the taxable property of the district as other taxes are assessed and collected, was without authority of law.

The Legislature has the power to legalize the action of the annual meeting of such district in appropriating said sum of money and the assessment and collection thereof by tax upon the taxable property of the district.

The adoption of such resolution was a decision of a school meeting, and under the provisions contained in title 14 of the Consolidated School Law of 1894 any person considering himself aggrieved in consequence of any decision by any school meeting may appeal to the State Superintendent of Public Instruction, who is authorized and required to examine and decide the same.

The appeal herein is sustained.

It is ordered that the action of the annual meeting, held August 6, 1901, in school district 1, Ossining, Westchester county, in the adoption of the following resolution: "Resolved, That an appropriation of $2278.99 be made to pay the costs, charges and expenses of the special investigating committee appointed at the school meeting of 1899, consisting of Abram S. Underhill, Edgar L. Ryder and Edward F. Sheehan, in defending themselves in the six suits for an alleged libel brought against them by Smith Lent and Joshua G. Many; and that the trustees of Sing Sing free school district 1, Ossining, cause the said sum of $2278.99 to be assessed upon and collected of the taxable property of said district, in the same manner as other taxes are by law assessed and collected," be and the same hereby is vacated and set aside.

3837

In the matter of the appeal of J. F. Tracy v. John S. Moot, trustee of district no. 33, of the town of Hector and county of Schuyler.

Appellant alleges that the supervisor of the town of Hector did not comply with the statute in apportioning the income or proceeds of the sale of gospel and school lands among the schools of Hector. *Held,* that the appellant, not being a resident of the town, nor interested therein, can not be aggrieved thereby, and the complaint will not be considered.

The trustee deducted from a certain tax to be collected from the inhabitants of a town in a joint district an amount which had already been paid from moneys belonging to the schools of said town; *held* to be at least equitable and not a sufficient ground of appeal.

Supervisors have no authority under the statute to equalize an assessment upon personal property in districts composed of parts of two or more towns.

Decided December 8, 1889

Draper, *Superintendent*

This appeal is brought by a resident taxpayer of that portion of the town of Catharine which is included with a part of the town of Hector in school

district no. 33, of the towns of Hector and Catharine, Schuyler county. The grounds of appeal I find to be as follows:

1 The supervisor of the town of Hector did not apportion the income or proceeds of the sale of gospel and school lands as the statute contemplates.

2 That the trustee of said district had no authority to deduct from the amount of a certain tax, to be collected from the inhabitants of Hector in said district for district expenses, an amount which had been paid by the supervisor of said town of Hector for teachers' wages, upon an order of the trustee of said district from the income or proceeds of the sale of gospel and school lands.

3 That the trustee did not comply with the statute in assessing personal property in said district, having assessed the same as real estate, the tax upon which had been equalized by the supervisors as between the towns, they having found that the town valuations were not substantially just as compared with each other.

The allegations of the appellant are not squarely controverted by the respondent. The first ground of appeal I do not propose to consider. The supervisor is presumed to have complied with the law, and whether he has properly apportioned the school lot funds among the schools of Hector, I am unable to determine from the data before me. No resident of the town of Hector complains, and the appellant, being a resident of another town, can not be aggrieved thereby.

To the second ground of appeal, I am of the opinion that the action of the trustee was at least equitable. The money paid by the supervisor, for the debt of the district, belonged to the town of Hector, and the action of the trustee was simply to give the inhabitants of Hector the benefit of the same.

The tax list, referred to in the third ground of appeal, was clearly defective. There is no warrant for taxing personal property except at its assessed valuation.

It appears by the answer of the respondent that the supervisors who met to equalize the values of real estate, and determine what proportion of a tax each town of the district should pay, reached the conclusion by including personal as well as real, at the suggestion of a resident of Catharine. This action was unwarranted but no appeal therefrom was taken.

From an examination of the tax list in question, I find but two items of personal assessed, one of $4000 in Hector part, and one of $1200, to appellant, in Catharine.

If the tax had not been collected and the warrant returned, I should require a correction to be made of the same. As it is, I have computed the tax of the appellant as it should have been, and find it to be $4.65 instead of the amount in the tax list of $5.68. The amount in dispute is small, but I have concluded to dismiss the appeal, upon the refunding by the district, to appellant, of the sum of $1.18, overpaid as stated.

3543

In a school district in which a branch school has been maintained, and subsequently that part of the district where the patrons of the branch school reside is formed into a separate district; *held*, that so much of the public moneys apportioned to the old district upon the statistics of the branch school will be ordered paid to the new district.

Taxes levied and collected before the formation of the new district will not be so apportioned.

There is no provision of law for a division of common property when a new district is set off from an old one.

Decided November 30, 1886

Draper, *Superintendent*

Prior to April 1885, the village of Garden City constituted a part of school district no. 1 of the town of Hempstead, Queens county. On the 20th of April 1885, the Legislature passed an act making the village of Garden City a separate school district, to be known as district no. 25 of the town of Hempstead. No meeting was held for the purpose of electing officers and organizing the new district until August 11, 1885. For several years prior to this, district no. 1 had maintained a school at Garden City, and, notwithstanding the act of the Legislature in April, this was continued and supported at the expense of district no. 1 till the end of the school year. At the close of the school year 1884–85, district no. 1 reported the maintenance of the school at Garden City during the preceding year, and in the annual apportionment of school moneys in the school year 1885–86, said district received such sum as would be payable in consequence thereof, while the new district no. 25, received nothing. District no. 25 brings the matter before this Department, and demands that district no. 1 shall be required to pay to it such sum of money as was apportioned to it in consequence of the maintenance of a school at Garden City during the preceding school year.

It also appears that in February 1885, the board of education of district no. 1 levied a tax of fifteen cents on the hundred dollars, which amounted to the sum of $1351.35, of which sum Garden City paid her proportionate share, which was $229.20. Having parted company, Garden City now thinks and demands that the part which she has paid of this tax should be paid back to her.

Again, chapter 591, Laws of 1870, provides for the distribution to the several school districts of the town of Hempstead of a certain portion of the income of a fund which has arisen from the sale or rental of common lands of the town, and directs that such distribution shall be calculated and determined "in the same manner, and upon the same basis as the public school moneys of the State are apportioned." After Garden City became a separate school district, and before the commencement of this proceeding, there were two of these apportionments; the first for the six months ending November 1, 1885, and the second for the period ending May 1, 1886, and at each time the sum of $6000 was distributed. Of these apportionments from this trust fund, district no. 25

received only such an allotment as was based on school population, and nothing on account of "pupil attendance" or the "district quota," that share going to district no. 1, pursuant to the school reports made at the close of the school year ending August 20, 1885. District no. 25 demands that district no. 1 shall be directed to pay over to her such sums as she received from these two distributions from this fund on account of the maintenance of a school at Garden City during the preceding school year.

District no. 1 resists these several demands with energy. The trustees of that district in answering say that the school which they maintained at Garden City was only a branch of the school at Hempstead, and that they were not obliged to open, and that it was done only for the convenience of the former place, and that the report which they made at the end of the school year 1884–85 was such as they were required to make by law, and that the school moneys based upon such report which they have received are such and only such as the law gives them. In relation to the tax collected in February 1885, of which district no. 25 demands that the share which it paid shall be paid back, they say it was levied to meet current expenses for the ensuing year, and that Garden City received back her share in school privileges. They urge, also, that when a new district is set off from an old one, the property of the old district can not be divided; that here the new district was set off at its own desire, and that it must support itself as best it can until the time when its school reports, made pursuant to law, entitle it to share in public moneys. In illustration, it urges that when it opened the school at Garden City it was obliged to maintain it the first year with no apportionment of public moneys based on the report of a previous school year, and that now this district must do the same.

The public moneys, apportioned on or before the 20th day of January in each year, are intended for teachers' wages for the school year in the middle of which the apportionment is made. The apportionment is made upon the school statistics for the preceding school year, for the reason that that is apparently the most reasonable basis for a general apportionment. Ordinarily, when a new district is set off, it is impossible to make any allotment to it during the first year of its existence, because there is no preceding year's statistics for a basis. That is not so in this case. The school at Garden City had been in operation for years. It had an individuality of its own. For statistical purposes it was the same school, was as perfectly and completely organized and was as separate and distinct from the Hempstead school before the new district was erected as afterward. Its register of attendance for the year 1884–85, kept as required by law and duly verified, is produced here. It shows that school was kept more than 28 weeks. Here is the basis upon which to determine what amount of public money belonged to it, equitably at least, for the year 1885–86. There can be no doubt but that any new district is, in equity, entitled to share in the State school moneys, even during the first years of its organized existence. The difficulty is that the means of determining how much it should have are usually wanting. That difficulty does not exist in this case. District

no. 1 received at the apportionment in 1886 more than it was entitled to for the year 1885–86, and district no. 25 received less than its share, because the Garden City statistics were included in the report of district no. 1 at the close of the preceding year. This being so, and there being at hand the data from which to determine, with exactness, *how much* was paid to no. 1, which should, in fairness, have been paid to no. 25, the matter should be set right if there is lawful authority for so doing.

The State school moneys are apportioned by the Superintendent of Public Instruction in the manner provided by title 3 of the Consolidated School Act of 1864. It was impossible to provide by statute for all exigencies which might arise, and it was necessary to vest some discretion in the Superintendent for the purpose of meeting exceptional cases. For instance, section 10 of title 3 directs the Superintendent to make a special apportionment to a district which has been excluded from participation in the general apportionment by reason of its failure to comply with some provision of law or requirement of the department when such omission was accidental or excusable. Section 11 authorizes him to withhold from any district in a subsequent apportionment any sum which has been given to it in excess of what it should have had at a prior apportionment. Section 12 provides that "if a less sum than it is entitled to shall have been apportioned by the Superintendent to any county, part of county or school district, the Superintendent may make a supplementary apportionment to it of such sum as shall make up the deficiency," etc. Reading the different sections together and having in view the general plan of apportionment which the Legislature was setting in operation, it is manifest that it was intended to clothe the Superintendent with authority to meet and adjust an inequality like the one here presented. Although the precise question here involved has never before been passed upon by the Department, the general authority requisite to meet it has always been exercised by it.

I shall, therefore, direct that district no. 1, Hempstead, pay over to district no. 25 such sum as it received in the apportionment of 1886, on the basis of the Garden City statistics; or, in case of failure to do so before the apportionment of 1887, that the same be deducted from the allotment to no. 1, and added to that of no. 25.

The demand of district no. 25, that it be repaid so much of the tax levied in February 1885, as was paid by Garden City, must be denied. This tax was raised before district no. 25 was set off. It was used, in part at least, to meet common expenses in which was included the expense of the school at Garden City. What was not so used, was district property at the time of the separation. There is no provision of law for the division of common property when a new district is set off from an old one, and in the nature of things there can not be.

There is some reasonable question of the power of this Department to correct the apportionment of the local trust fund applicable to school purposes as provided by chapter 591 of the Laws of 1870. The appellants cite section 17,

title 3 of the Consolidated School Act, which treats of trusts for school purposes, and provides that "the Superintendent of Public Instruction shall supervise and advise the trustees, and hold them to a regular accounting," etc. On the other hand, it is urged that the special act governing this particular fund takes it out of the provisions of the general statute. It is not necessary to determine this question at present, at least. The board of town auditors of Hempstead have, as yet, committed no error. They have complied with the law and followed the State apportionment. It is fair to assume that they will continue to do so, and will make the correction which the State now makes, and it will be time to consider what course must be taken for relief in that direction when it shall have become certain that some steps are necessary.

It is accordingly ordered that the board of education of district no. 1, Hempstead, pay over to district no. 25, Hempstead, known as the Garden City district, the sum of $66.12, the same being the amount of one district quota apportioned to no. 1, Hempstead, in the annual apportionment made by the Superintendent of Public Instruction to January, 1886, and reapportioned by the school commissioner of the second commissioner district of Queens county, in March 1886, for the year 1885–86, on the basis of one duly qualified teacher employed for the legal term of school in the Garden City school for the school year beginning with August 21, 1884, and ending August 21, 1885; and such further sum as shall be certified by the said school commissioner that district no. 1, Hempstead, received for the Garden City schools for the year 1885–86, on the basis of the number of resident children, the daily average attendance of such children, and for libraries, for the school year 1884–85. But in the event of there being no moneys in the hands of the board of education of district no. 1, Hempstead, or under their control, and available for this purpose, then the said school commissioner shall deduct for district no. 25, Hempstead, in the annual apportionment to be made by him in March 1887, from the school moneys to be apportioned to said district no. 1, for the year 1886–87, the total amount of public school money said district no. 1 received from Garden City school in the annual apportionment of 1886, and apportion the same to district no. 25, together with the amount that no. 25 is to receive for the year 1886–87.

SCHOOL FURNITURE

4629

In the matter of the petition of James F. Ryther, as school commissioner of the second district of Erie county, for the removal of F. B. Abbott from office as sole trustee of school district no. 2, East Hamburg, Erie county.

School commissioners, in orders made by them under the provisions of subdivision 3, section 13, title 5, of the Consolidated School Law of 1894, requiring trustees of school districts to provide new furniture for the schoolhouse, may designate the kinds of furniture to be provided, and that it shall be new and of modern style.

When new desks are ordered, trustees have the authority to decide as to the number necessary to furnish adequate accommodations for all the scholars attending the school, and whether such desks shall be single or double.

The proper course to be taken by a school commissioner when trustees neglect or refuse to obey a proper order to purchase new furniture, is to apply, by petition, to the State Superintendent of Public Instruction, setting forth the facts, for an order for such trustees to show cause before him why such order should not be obeyed. If no sufficient cause is shown the Superintendent may, by his order, direct that if such order of the commissioner is not obeyed within the time fixed therein, such trustees will be removed from office.

Decided January 28, 1898

Skinner, *Superintendent*

This is a petition by James F. Ryther, as school commissioner of the second commissioner district of Erie county, for the removal of F. B. Abbott from office as sole trustee of school district 2, East Hamburgh, Erie county, for neglect of duty and wilful violation of an order made by the petitioner as such school commissioner on August 28, 1897, for the purchase of new furniture for the schoolhouse in such district.

Such order of commissioner Ryther directed trustee Abbott to purchase new *single* desks, teacher's desk and blackboard for the schoolhouse in such district at an expense not to exceed $100.

Trustee Abbott has answered the petition herein, and to such answer the petitioner has replied, and to such reply the respondent has filed a rejoinder. Many exhibits have been filed by the respective parties, and the papers filed are quite voluminous.

The respondent admits that he has not complied with such order of the petitioner in the purchase of new *single* school desks, but alleges that he has purchased about twenty double second-hand school desks; that desks should be provided for forty scholars, and that forty new single desks can not be placed in the schoolroom without the closing of necessary passageways, etc. nor could

such desks, with a teacher's desk and blackboard, be purchased at an expense not exceeding $100.

The contention of the petitioner is that from the average attendance at the school in such district desk room for forty pupils is not required, and that a sufficient number of single desks can be placed in such schoolroom without obstructing any passageways, and such new desks, teacher's desk and blackboard of the latest style could be purchased for $100.

I am unable, from the proofs presented, to decide which of such contentions is well taken.

It appears that at the time the petitioner herein made his order directing the respondent to purchase such new single desks the furniture or desks in use were carpenter made, of old style, and not such as are in general use in the schools in the State. The petitioner herein very properly deemed it best that new, modern furniture should be purchased by the respondent for use in the schoolhouse in the district of which he was trustee.

I am of the opinion that, under the provisions of subdivision 3 of section 13, title 5 of the Consolidated School Law, the petitioner did not have authority to designate in his order that the desks to be purchased should be either single or double desks, but that they should be new and of modern style, provided that the expense of such new furniture should not exceed $100; that the respondent had authority to determine the number of desks necessary to furnish adequate accommodation for all the scholars attending such school, and whether such desks should be single or double.

When, under the provisions of the school law, a school commissioner directs the trustee or trustees of a school district to purchase new furniture for a schoolhouse, such trustee or trustees, if aggrieved by such order, may apply to him to modify or revoke such order or appeal from such order to the State Superintendent of Public Instruction under title 14 of the Consolidated School Law.

The proper course to be taken by a school commissioner when such trustee or trustees refuse or neglect to obey a proper order for the purchase of new furniture for a schoolhouse is to apply by petition to the State Superintendent of Public Instruction, setting forth the facts, for an order for such trustee or trustees to show cause, if any there be, before the State Superintendent, why such order should not be obeyed. If, upon the hearing before the State Superintendent, no sufficient cause can be shown, he may make an order that if such order is not obeyed within a time to be therein stated, that such trustee or trustees be removed from office.

The petitioner herein asks that I remove the respondent from office as trustee of such district for not obeying such order of the petitioner for the purchase of new furniture, and for neglect of duty.

Under section 13, title 1 of the Consolidated School Law, I have power, when proved to my satisfaction that a school commissioner or other school officer has wilfully disobeyed any decision, order or regulation made by me, to remove such school officer from office. I have also power to remove any

school officer who it is proved to my satisfaction has been guilty of any wilful violation or neglect of duty. This Department and the courts have held that "wilful" means "intentional," and not a "mistake," "misapprehension," "inadvertence," "error in fact," "lack of judgment," etc. etc.; that the officer must fully know and understand what his duty under the law is, and knowingly and wilfully does directly the reverse.

I can not find, from the proofs herein, that trustee Abbott has been guilty of wilful neglect of duty.

The petition herein is dismissed, but such dismissal shall not operate to preclude the petitioner herein, as such school commissioner, if he shall deem the furniture in the schoolhouse in school district 2, East Hamburgh, Erie county, unfit for use and not worth repairing, from directing that new furniture shall be provided as he may deem necessary, provided that the expense of such new furniture shall not, in any one year, exceed the sum of $100.

4197

In the matter of the appeal of F. S. Pond, trustee of school district no. 18, town of Tompkins, Delaware county, v. E. E. Conlon, school commissioner, first commissioner district, Delaware county.

An order of a school commissioner, condemning desks and seats in schoolhouse and directing the trustee to purchase new desks and new seats, will be sustained upon an appeal unless it is shown either that it was not made with authority and that he proceeded irregularly or else that it was clearly unjust and opposed to the best educational interests of the district.

Decided November 2, 1893

Crooker, *Superintendent*

This is an appeal from an order made by the respondent, as school commissioner of the first commissioner district of Delaware county, dated September 5, 1893, condemning the desks in the schoolhouse in district no. 18, town of Tompkins, Delaware county, and directing the appellant, as trustee of said school district, to remove from the said schoolhouse all the desks that are by said order condemned, and to purchase for and seat said schoolhouse with a sufficient number of suitable desks of modern design to duly accommodate all pupils who shall attend said school, at said schoolhouse, the amount to be expended not to exceed the sum of $100, and ordering that said order shall be fully obeyed within thirty days from the date thereof.

The appellant alleges that the assessed valuation of the taxable property in said district is $27,325, made up of farms and small holdings; that there are about thirty-five pupils of school age who reside in the district; that there is a fair school building on the schoolhouse site, and in good repair; that the seats complained of are ordinary wooden seats and desks, and need but slight repairs to make them suitable for use, and to put them in good condition, and that an

outlay of ten dollars in material and work would put them in as good condition for school work and practical service as desks of modern design. That the estimated cost of taking out the present seats and desks and putting in new ones would be in the neighborhood of $150, and that the taxation of such a sum upon the district would be a great burden and extravagance in the present hard times. That at the annual school meeting, in said district, the question of a change of desks was discussed, and a vote taken which resulted in 5 votes for a change and 16 votes against. That at a special meeting of the district, held on September 21, 1893, by a vote of 14 to 5, the appellant was directed to appeal from such order of Commissioner Conlon. The appellant avers that he has always been ready to repair said desks and would have repaired them before had he not been stopped by the service upon him of said order of said Conlon.

The respondent shows that for the past three years he has watched the proceedings of the voters of said district in the matter of reseating the schoolhouse, hoping that the district would, of their motion, reseat said schoolhouse without requiring him to act in the matter. That on June 15, 1893, he visited the schoolhouse in said district and made a careful and critical examination of the seats and desks therein, made measurements, tested the seats by sitting in various ones, and while there, made the following record: "Schoolhouse must be reseated; old seats are loose from floor; made of plain boards and posts nailed together; seats too high; small children's feet do not touch the floor; seat part seventeen and one-quarter inches high; desk part so high that small children can not reach to work thereon, while sitting; too high for an adult to write with convenience or comfort; back of desk about vertical, and all seats are badly cut, marred and disfigured, and some of them are falling to pieces; there are twenty-one double desks in schoolhouse." The respondent avers that the foregoing statement so made by him is true. That the respondent on August 3, 1893, addressed a letter to the then trustee of said district, requesting him to call up the matter of reseating said schoolhouse and have vote taken thereon at the annual meeting of the district on August 22, 1893. The respondent avers that the statement of appellant, that it will cost $150 to reseat said schoolhouse is erroneous; that first-class double desks can be purchased for from three dollars and fifty cents to three dollars and seventy-five cents each, and that twenty such desks will be ample to accommodate all the pupils who will attend said school, and that eighty-five dollars will cover all necessary expenses incurred in carrying out the order made by him.

To the answer of respondent are annexed the affidavits of four qualified voters of the said district, sustaining the statements of the respondent as to the character and condition of the desks, and averring their judgment to be that such conditions can not be overcome or removed by repairing such desks. There are also annexed to said answer the affidavits of Alice M. Skinner and Sadie B. List, each of whom has taught the school in said district, affirming the statements of the respondent as to the condition of said desks, and the repairing of the desks will not make them suitable or comfortable for the pupils attending said school.

The appellant has filed a reply to the answer of the respondent in which he states that he believes that the respondent is an interested party in compelling the appellant to reseat said schoolhouse, for the reason that when the respondent served the order appealed from, by mail, he inclosed with it a copy of a circular of the United States School Furniture Company, having written upon it the following: "A. J. Devereaux, Agent, Binghamton, N. Y.," which the appellant says he believes was a suggestion to buy of a party with whom the respondent was financially interested, etc. The respondent in his rejoinder to such reply, alleges, under oath, that he has never received, either directly or indirectly, any money or valuable thing, emolument, reward or promise of reward of any kind or nature, whether as a consideration for his influence in the sale or use of any furniture of any kind whatever for use in any school, and that his purpose in sending the circular was for the purpose of assisting the appellant in obeying said order and giving him information where such furniture might be purchased, and for no other purpose.

To the reply of appellant is annexed an affidavit of himself and ten other voters of said district, containing statements to the effect that the desks and seats in the schoolhouse are not, in their opinion, in so bad a condition as shown by respondent and can be repaired at a small expense so as to be just as good as new seats, etc. There are also annexed the affidavits of two teachers and a carpenter to the same effect.

In his reply the appellant alleges that the teachers, List and Skinner, whose affidavits are annexed to the answer herein, are disappointed applicants for positions as teachers in the school. Both Miss List and Miss Skinner deny, under oath, that they are disappointed applicants as teachers in said school. It can not be assumed that even if they were disappointed applicants, that for this reason they would swear to anything they did not know or believe to be true.

The order of the commissioner should be sustained unless it is shown, either that it was not made with authority, and that he proceeded irregularly, or else that it was clearly unjust and opposed to the best educational interests of the district. The burden of proof is upon the appellant to show this, if he can.

After a careful examination and consideration of the papers filed in this appeal, I do not find that appellant makes such a case as will justify me in setting aside the order appealed from. There is no allegation that the proceedings of the commissioner have not been regularly taken, and it is certain that he had full statutory authority to make just such an order as he has made. It is impossible for me to say that he has not exercised a sound discretion in the premises.

Acting, as I believe, for the best interests of education in said school district, and in harmony with the spirit which demands better school accommodations in the public schools of this State, I dismiss the appeal herein, and confirm the order of Commissioner Conlon, appealed from, and do hereby order and direct the said trustee of school district no. 18, town of Tompkins, Delaware county, to comply with the terms in said order contained, extending the time, however, for the completion of said work until December 15, 1893.

3848

In the matter of the appeal of Charles A. Sly, sole trustee of school district no. 2, of the town of Nanticoke, in the county of Broome, v. James L. Lusk, school commissioner of the second commissioner district of Broome county.

An order of a school commissioner requiring the reseating of the schoolhouse will be upheld unless it is clearly unjust and opposed to the educational interests of the district, or was made without authority, or that the proceeding was irregular.

Decided December 31, 1889

Draper, *Superintendent*

This is an appeal against an order of the commissioner, requiring the reseating of the schoolhouse in the district above named, made on the 5th day of October 1889. The trustee alleges that the seats now in use are sufficient, and that the order of the commissioner is unnecessary and oppressive. He presents a lengthy statement touching the affairs of the district, and also the affidavits of several persons whose credibility I do not doubt, to the effect that the desks in the schoolhouse are in fair condition, and sufficient for the needs of the school.

On the other hand, the school commissioner shows, not only by his own statements, but by the statements of teachers who have heretofore been employed in the district for a long time, to the effect, that the desks are made of plain boards, are straight in the back, and some of them coming to pieces, and also that they are very badly marred and disfigured. The commissioner states that he has visited the district twice recently, and has personally and critically examined the building and its furnishings. He shows that the district has an assessable valuation of $55,000, and is, therefore, abundantly able to provide desks of modern construction.

The order of the commissioner is to be upheld unless it shows, either that it was made without authority, and that he proceeded irregularly, or else that it was clearly unjust, and opposed to the best educational interests of the district. The burden of proof is upon the district to show this, if it can. After reading the papers with care, I do not find that the district makes such a case as will justify me in setting aside the order of the commissioner. There is no allegation that his proceedings have not been regularly taken, and it is certain that he has full statutory authority to make just such an order as he has made.

It is impossible for me to say that he has not exercised a sound discretion in the premises. It is more than likely that, after the order shall have been carried out, the entire district will congratulate itself upon the fact that it was made.

The appeal is dismissed.

3744

In the matter of the appeal of Harvey Folts and others v. E. B. Knapp, school commissioner of the second district of Onondaga county.

An order of a school commissioner directing the reseating of a schoolhouse will be upheld in a proper case, even though the objectors constitute the larger portion of the taxpayers.

It was alleged that the seats in use had been recently repaired, and of the same size and construction as those in other districts. *Held,* that repairs to unsuitable furniture might not remove the objections thereto.

It is argued that no scholar has ever complained of the condition of the seats as uncomfortable. *Held,* untenable. Pupils are not the best judges of what the school accommodations should consist.

Decided December 31, 1888

C. R. Milford, attorney for appellants
E. B. Knapp, attorney in person

Draper, *Superintendent*

This is an appeal by several inhabitants of school district no. 9, of the town of Skaneateles, Onondaga county, from an order of School Commissioner E. B. Knapp, bearing date November 12, 1888, directing that the schoolhouse in said district be reseated, and condemning the seats and desks in use as unfit for use and not worth repairing.

The objections to the order on the part of the appellants are:

1 That within the period of fifteen months the seats and desks in use had been remodeled and changed at the suggestion of the respondent, and that at the time of the order referred to, they were in as good condition as they were immediately after the repairs were made.

2 That no scholar has ever complained of the condition of said seats as being uncomfortable.

3 That the seats are, in the judgment of the appellants, as good for school purposes as those directed to be furnished by the order of the respondent.

4 That to remove the present seats and desks would greatly injure and destroy in part a new floor which has recently been placed in the school building.

5 That the seats and desks now in use are of the same general size and construction as those in use in most of the district schools, and that they are in better condition than those of other district schools in the vicinity.

6 That other repairs to the schoolhouse which were more necessary for the comfort and health of the pupils than the patent seats would be, had been ordered at the last annual meeting, and that to add to that expense the sum of $100 for new seats would be a hardship and burden to the taxpayers of the district; that there are several other objections which my decision of this appeal will obviate.

The respondent has filed an answer and also the affidavits of several residents of the district, controverting some of the allegations of the appeal.

After carefully considering the objections set forth herein, I have concluded to sustain the commissioner's order. The Legislature has wisely conferred upon school commissioners the authority to order new school furniture at a cost not

to exceed the sum of $100, whenever he considers the furniture in use as unsuitable and not worth repairing. The objection that repairs had been made to the furniture at the suggestion of the commissioner, is controverted; but assuming that some repairs were made to unsuitable furniture, I can readily understand that such repairs might not remove the objection thereto.

The ground alleged that no pupil has complained of the furniture I do not consider of moment. The pupils of a school are not the best judges of what the school accommodations should consist. It is not a tenable ground of objection that the seats condemned are as good as those in use in many of the district schools, for it is generally understood that a large number of the public schools are not provided with suitable furniture and the knowledge of this fact was the inducement for the adoption of the law which conferred the power upon school commissioners to order the purchase of suitable furniture. I can not understand why the removal of those old seats and desks and the substitution of others would necessarily injure to any great extent, the flooring of the building; neither do I consider the tax of $100 in the district having $115,000 worth of taxable property to be a very severe burden.

The objection that the electors of the district who favor the substitution of new seats pay a very small portion of the tax, is not a tenable objection.

This appeal is from the action of the commissioner acting within the scope of his authority, and not the action of the inhabitants of the district. Acting, as I believe, for the best interests of education in the district, and in harmony with the spirit which demands better school accommodations in the public schools of the State of New York, I overrule this appeal and the objections made to the commissioner's order, and hereby direct the trustee to comply with the terms therein, extending the time, however, for the completion of said work until the 15th day of January 1889.

3772

In the matter of the appeal of David M. Vunk v. Jacob Shults, as trustee of school district no. 18, of the town of Virgil, in the county of Cortland.

A public officer can not be in any wise personally interested in the performance of work with which he is officially charged.

Held, that a school trustee clearly has no right to charge for his personal services rendered upon district work.

The right of a school trustee to cause repairs to or purchase furniture for a school building to the extent of $100, when ordered to do so by a school commissioner, sustained.

A tax list which does not specify in the heading thereof the items for which the tax is to be collected, *held* defective, and the trustee directed to withdraw and correct the same.

Decided March 27, 1889

William D. Tuttle, attorney for appellant
H. A. Dickinson, attorney for respondent

Draper, *Superintendent*

This is an appeal from the action of the respondent in making and placing in the hands of the collector, a tax list for the collection of the sum of $357.87,

expended by the trustee in repairing the schoolhouse and purchasing furniture for the same. The appellant claims that the trustee proceeded to repair the schoolhouse without due authority from the district meeting; that he performed services upon the building personally and charges for his time, and that he has purchased furniture without authority. He also alleges that the tax list is incorrect in form, inasmuch as it does not specify, in the heading, the purposes for which the tax is to be used.

The respondent, in his answer, claims that the repairs were authorized by the district meeting. He admits that he performed some personal service in connection with the work, for which he charged a reasonable sum. He alleges that the furniture was purchased under the order of the school commissioner, who had legal authority to direct such purchase. He admits also that the tax list may be incorrect in form. The action of the district meeting concerning repairs to the schoolhouse was not clear, but I am satisfied that the trustee acted in good faith in making the repairs, and there appears to have been no objection raised to his course until after the work was completed, and at a time when such objections, under all the circumstances, must be held to be too late to be availing. The action of the district meeting clearly shows that the district intended to repair the schoolhouse, and I think also that it may be said that they intended to leave the extent of the repairs to be determined by the trustee. As in all similar cases it is probable that he found more repairs necessary, after commencing operations, than had been anticipated. I think the action of the district meeting was sufficient to justify him in repairing the building, and can not find that he did so to an unreasonable or unnecessary extent.

The trustee clearly has no right to charge for his personal services in connection with that work. A public officer can not be in any wise interested in the performance of a work with which he is officially charged. The trustee should not have had anything to do with the work except to bargain for its proper performance and see that the agreement was carried out and all the interests of the district protected.

The school commissioner had the authority to direct the trustee to repair or purchase furniture to the extent of $100. That authority is expressly conferred upon him by the statute.

The tax list is probably defective in its form and should be withdrawn and corrected.

The trustee is therefore directed to withdraw the tax list from the hands of the collector, deduct from it the amount charged for his personal services, correct the heading so that it will conform to the requirements of the statute, and again take measures to secure the raising of the tax necessary to meet the other expenses involved.

Except as to matters about which specific direction is given, the appeal is dismissed.

3978

In the matter of the appeal of Gustav A. Schmidt, August Ressiga and Edward Rooney, school trustees of the fifth ward of Long Island City v. the board of education of Long Island City.

Appeal from the action of a board of education in entering into a contract for heating and ventilating a school building.

Dismissed for the reason that the appeal was not timely taken. The work under the contract objected to had been substantially completed.

Decided May 7, 1891

Frank E. Blackwell, attorney for appellants
W. J. Foster, Corporation Counsel, attorney for respondent

Draper, *Superintendent*

A new school building has recently been erected in the fifth ward of Long Island City. The heating and ventilating apparatus in said building was supplied by the Pierce, Butler & Pierce Manufacturing Company, under a contract entered into between the board of education of Long Island City, and said company. This appeal is brought to restrain the city authorities from paying the contractors for such apparatus, on the ground that, under the statutes applying thereto, such contract could only have been made by the appellants as trustees of the fifth ward with the approval of the board of education. It is claimed by the appellants that the contract assumed to be made by the board of education, is wholly void, as being without authority, and that any payment under such contract is unlawful.

The case has been carefully presented and closely argued by able counsel. I have given it such consideration as I have been able. It is apparent that the provisions of the charter of Long Island City, of the general school laws relating to the duties of trustees and of the special acts providing for the erection of new school buildings in said city, are somewhat incongruous. It is somewhat doubtful whether, by any process of logical reasoning, these several statutory provisions may be brought into harmonious relations with each other. In any event, I do not deem it necessary to undertake to do so in order to dispose of the pending case.

The rules of the Department require that appeals shall be brought within thirty days from the time of the action appealed from. The contract entered into by the board of education was awarded on the 12th day of September 1890. If the board of trustees of the fifth ward felt that their functions were being usurped by the city board of education, and desired to bring the matter before the State Superintendent for review, it should have been done within thirty days from the awarding of the contract. Even though it be claimed that the appellants had no actual notice of the awarding of the contract, it is in proof that the work was commenced in the latter part of December, and that the members of the board of trustees were in the building and saw the work in

progress, and talked with the workmen during the month of January. They did not bring their appeal until the middle of March. By that time the work of the contractors had been substantially completed. The appeal is, therefore, too late to claim the consideration of very complicated law questions at this time.

I have, however, deemed it well to look into the matter far enough to see whether any fraud is claimed by the appellants as against the contractors. There is no such claim advanced. It appears in the papers that the plans for heating apparatus were approved by both the board of education and by the appellants, in connection with the general plans for the erection of the building, and that no change has been made. It is also shown that the board of education duly advertised for bids for the performance of the work; that the board requested the appellants to meet upon two different occasions and open the bids, but that appellants refused to so meet with the respondents. It is also shown that there were several bidders, and that the Pierce, Butler & Pierce Manufacturing Company was the lowest bidder. It is not pretended that the work has not been properly performed.

In view of these facts and of the lateness of the appeal, I do not deem it necessary to more fully consider the matter.

The appeal is dismissed, and the injunction granted upon the 17th day of March 1891, is hereby revoked.

3729

In the matter of the appeal of Ezra Whedon, Isaac Sherwood and others v. Willis A. Parsons, trustee of school district no. 10, town of Camillus, Onondaga county.

An order of a school commissioner directing that a furnace be purchased in order to render a schoolhouse comfortable and fit for use, upheld.

Decided November 16, 1888

Driscoll & Goold, attorneys for the appellants
Jones & McGowan, attorneys for the respondents

Draper, *Superintendent*

It appears that at the annual school meeting held in the above named district on the 28th day of August 1888, it was decided that $400 be raised by tax for repairs to the schoolhouse and outbuildings and for necessary expenses for maintaining the school during the coming year. A question was then raised as to providing a better method of heating the schoolhouse. Some were in favor of providing a furnace and some were opposed to such step. Without reaching a determination an adjournment was taken until the Friday evening following, when they reconvened and by a vote of 17 in the affirmative and 18 in the negative determined that the furnace should not be procured. Subsequently the school commissioner of the district investigated the matter and concluded that

the heating apparatus was entirely inadequate to the needs of the school and that something must be done to provide for the comfort of teachers and pupils, and he made an order dated October 8, 1888, in which he recited that upon an inspection of the building he found it in bad condition and unfit for occupation, and that he deemed the amount provided for repairing the building to be inadequate and ordered that the sum of $200 in addition to the sum directed to be raised by the district meeting, should be raised — $100 for repairs upon the building and outbuildings and $100 for school furniture. Under the authority thus conferred upon him the trustee proceeded to procure a furnace for heating the building, and in his answer to the appeal states that the same is now in place and operating satisfactorily. From this action this appeal is taken.

The only question involved is whether the school commissioner had authority to make the order upon which the trustee relies. Section 3 of title 2 of the Consolidated School Act confers upon the school commissioner power to direct trustees to make any alteration or repairs on the schoolhouse or outbuildings which shall in his opinion be necessary for the health or comfort of the pupils, provided the expense thereof does not exceed the sum of $200 in any one year, unless an additional sum shall be voted by the district. The same section also empowers the commissioner to direct the trustee to make any alterations or repairs to school furniture, or to direct that new furniture shall be provided when he deems necessary, provided that the expense of such alterations, repairs or additions do not in any one year exceed the sum of $100. It seems to me that these provisions of the statute are adequate to confer upon the commissioner the power which he exercised in the present case. It was unmistakably the purpose of the Legislature to empower school commissioners to see to it that adequate and convenient accommodations are provided for the health and comfort of the teachers and pupils in the public schools.

After fully reading the papers submitted in the present case I am unable to say that the power conferred upon the commissioner was not properly exercised.

From the foregoing considerations I find it necessary to dismiss the appeal.

SCHOOL GROUNDS, ETC.

5305

In the matter of the appeal of Charles Decker et al. from the action of the annual meeting and of the trustee of school district no. 1, town of Rotterdam, county of Schenectady.

School authorities should aid in the preservation of trees upon school grounds and should plant trees upon such grounds whenever there is opportunity to do so and when additional trees will add to the beauty and attractiveness of the grounds. School authorities will be prohibited from cutting trees upon school grounds unless good cause exists therefor.

Decided January 31, 1907

A. T. Blessing, attorney for appellant
A. T. G. Wemple, attorney for respondent

Draper, *Commissioner*

School district no. 1, Rotterdam, has a large district site containing about two acres and on this site are about one hundred and thirty natural trees. The annual meeting of this district held in August 1906, adopted a resolution authorizing the trustee to dispose of the wood on the school ground as he deemed for the best interest of the district. The trustee advertised to sell part of the timber standing upon the school grounds. Appellants thereupon brought this proceeding and petitioned for an order restraining the trustee from cutting such timber until this appeal could be determined. The order was granted.

Appellants allege that the annual meeting was not well attended and that a majority of the voters of the district are opposed to cutting these trees. They allege, in substance, that these trees protect the building from severe winds in the winter, afford shade in the warm weather, and contribute largely to the ornamentation and attractiveness of the grounds.

Respondent asserts that it was not his intention to cut all the trees but claims that in one section of these trees there are several liable to fall because of old age; that some have been blown down and that others are so near the schoolhouse and are so tall that it is unsafe to permit such trees to remain standing and that as a protection to the building and the children these trees should be cut.

For several years this Department has not only encouraged all school districts in the State to plant trees but has endeavored to interest the public generally in relation to the utility and beauty of trees along public highways and in other public places. School authorities should aid in the preservation of trees upon school grounds and should plant trees upon such grounds whenever there

is opportunity to do so and when additional trees will add to the beauty and attractiveness of the grounds.

I directed an inspector of this Department to meet the parties to this proceeding at the school grounds and determine whether or not it appeared advisable to cut any of the trees in question. The report of such inspector shows that it is advisable to cut some of these trees. An agreement was reached between all parties as to the trees which should be cut, and the trees which are not to be cut were properly marked. None of the ninety-five trees indicated in the map of appellants are to be cut. In the northeast corner, the section shown on the map of respondent, it appears as though all trees might be cut except the following: the chestnut tree on the line between the school grounds and the Wemple farm, the oak tree between the schoolhouse and the said chestnut tree and which oak tree is also near one of the new outbuildings, the three hemlock trees near the rear line and the five pine trees which were marked. These trees which are not to be cut would be greatly improved if the dead limbs and branches were cut out. The whole appearance of the grounds would also be greatly improved if the underbrush and dead material among the trees should be cut, carried out and burned.

As to the limitations herein expressed, the appeal is sustained. As to all other matters involved, it is dismissed.

3895

In the matter of the appeal of Fred C. Hodges v. R. F. Brown, as trustee of school district no. 12, town of Adams, Jefferson county.

School districts are governed by the same rule regarding the construction and maintenance of division fences, that all other owners of property are. The owners of adjoining lands if inclosed, can be required to construct one-half of the dividing fence, or contribute in that proportion toward the same.

Decided July 26, 1890

Draper, *Superintendent*

At the annual school meeting held in district no. 12, town of Adams, county of Jefferson, August 6, 1889, a resolution was adopted to fence the schoolhouse lot on three sides, and the sum of twenty-five dollars was appropriated to meet the expense thereof. The trustee has neglected to include the amount so voted in a tax list and has neglected to cause the fence to be constructed.

No answer has been interposed. The trustee, however, makes certain requests to find, in determining the appeal, namely:

1 Is a tax to raise money to build a fence around a school lot legal, when the site has never been inclosed?

2 If such a tax is legal, is the trustee required to build the entire fence or only one-half thereof?

Appellant asks that the trustee be required to carry out the directions of the district meeting.

The allegations of the appellant, not being denied, are presumed to be admitted. The item voted at the annual meeting is perfectly legitimate.

Upon the second request to find of the trustee, my decision is that school districts are governed by the same law in regard to division fences between the school lot and adjoining owners as are all other property owners.

The owners of adjoining lands, if inclosed, can be required to construct one-half of the dividing fence, or contribute toward the same, and it is the duty of the trustee to see that the rights of the district in this respect are protected. Because a fixed sum has been voted, it would not necessarily follow that the entire amount must be expended. The trustee is to expend so much thereof as may be necessary.

The appeal is sustained.

3790

In the matter of the appeal of George A. Signor v. George T. Dan, trustee of school district no. 13, of the town of Colchester, county of Delaware.

A trustee has no authority to purchase land, or to bind a district to maintain a division fence, nor to charge for personal services in making repairs.

Decided April 25, 1889

Draper, *Superintendent*

This is an appeal by a resident taxpayer of school district no. 13, of the town of Colchester, Delaware county, N. Y., from the action of the trustee in issuing a tax list and warrant for the collection of certain items which the appellant alleges are neither authorized by law nor by the vote of a district meeting.

It appears from the papers that the entire tax list has been paid with the exception of the appellant's tax, and that he delayed taking an appeal until nearly one month after the tax list had been placed in the collector's hands. This delay, on the part of the appellant, has made the decision of the appeal very embarrassing to me, for the reason that if any of the items of the tax list were found to be unauthorized, it would necessitate the refunding of the portion of the tax paid by each of the taxpayers of the district, who had paid.

The appellant alleges that the trustee has made repairs to the water-closet and built a new one on land which did not belong to the district; that he did a portion of the work himself, has charged an exorbitant price for the same, and that the work has been imperfectly done; that the school commissioner of the district does not approve of the expenses incurred in providing suitable water-closets for the school district; that the trustee has constructed a fence for the district, which should have been paid for in part, by adjoining owners; that he did so without the vote of a district meeting; that for some repairs made to the schoolhouse by the trustee, the charge is exorbitant.

The trustee for answer, alleges that he has acted in perfect good faith, and, as he believes, in accordance with the law which required the construction of several privies; that it had been customary in the district for the trustee to do work of the kind he did, and it was almost a necessity for him to do so because of his inability to secure other help. It is also made to appear that the work upon the privies and repairing was done by direction of the school commissioner, and that he, as trustee, has acquired title to the land along which the fence was built, and the condition of the deed was that the district should build and maintain the fence; that additional land was absolutely necessary in order that the law in relation to separate privies could be complied with. A copy of the deed is shown among the respondent's papers, and also evidence that the same has been recorded in the county clerk's office of Delaware county. It does appear that the commissioner has not approved of the bill for repairs, and that the present commissioner deems the charge exorbitant.

I am satisfied that the trustee has acted in good faith in his attempt to comply with the provisions of the law, but that he has exceeded his authority, namely: in contracting for and purchasing land for the district, and agreeing to construct and maintain as a consideration for the purchase, a division fence 255 feet in length. All this would have been entirely proper if a district meeting had authorized it, and repairs to any extent could have been voted by a district meeting. The trustee had authority to make repairs upon his own motion to the schoolhouse, the expense of which, in any one year, should not exceed $20, and he could make repairs by direction of the school commissioner, both to the outhouse and the schoolhouse property, the expense not to exceed $200 in any one year.

I have concluded to make this disposition of the case: The present trustee of district no. 13, Colchester, is hereby directed to at once call a special meeting of the inhabitants, the meeting to be held within fifteen days from the date of this decision, to act upon the question, "Shall the action of the respondent, in entering into a contract with A. L. Signor, and the acquiring of title thereunder of certain land for an addition to the schoolhouse site, be ratified and approved and the property accepted by the district upon the condition contained in the deed, which requires the construction and maintenance of a division fence?"

If the meeting will approve of the action of the respondent, then I direct that the tax list and warrant be so amended as to deduct from the amount to be raised, any amount which the respondent has charged for his personal services while filling the office of trustee. The items charged for members of his family who also worked for the district, I do not deem exorbitant, and they may be included in the tax. If the district meeting will not approve of the action of the trustee in purchasing the real estate on the condition mentioned, that item also will have to be omitted from the tax list. This will necessitate the establishment of a new rate of taxation, and any amount which may have been paid by the

taxpayers in excess of the amount which will be so established, must be refunded. The trustee of the district will deliver the corrected assessment list and warrant, after renewal, to the collector, with directions to enforce the same against the appellant.

DIVISION FENCES

Decided October 26, 1866

Rice, *Superintendent*

In regard to division fences, a school district is subject to the same liabilities as any other owner of real estate. If the district chooses to let the site lie open to the highway, you can not compel them to build or maintain any portion of a division fence. If, however, you build such fence, and the district afterward incloses the school lot, you can compel the inhabitants to refund half the expense of building the line fence.

3101

FENCING SITE

Decided June 13, 1881

Gilmour, *Superintendent*

The discretionary powers conferred upon the trustee do not include the right to fence the schoolhouse site.

SCHOOLHOUSES

The president and directors of the Bank of Orleans v. the trustees of school district no. 1 in the town of Barre.

There can be no partnership in the erection of a district schoolhouse.
The facts of this case are stated in the Superintendent's order.
Decided January 12, 1835

Dix, *Superintendent*

The Superintendent of Common Schools has examined the statement of facts agreed on by the trustees of school district no. 1 in the town of Barre, and the president and directors of the Bank of Orleans, in relation to the assessment of a tax on the property of said district for the purpose of erecting a schoolhouse.

The proposed schoolhouse is intended to be part of a building to be used as an academy as well as a schoolhouse, and the sum of $2000 is intended to be raised by subscription to complete it.

Much as the Superintendent is disposed to confirm the proceedings of the inhabitants of the district, by whom they have been adopted with great unanimity, he is constrained to set them aside by a rule which can not, in his opinion, be safely departed from in any case, without authority from the Legislature. By a decision of the Superintendent heretofore published with the school laws, it is settled that there can be no partnership in the erection of a schoolhouse which will prevent the district from controlling it entirely for the objects of the district school. This principle he feels bound to enforce in all cases which come before him. To sanction a departure from it would establish a precedent which might lead to great embarrassment and possibly to abuse. If in any case the interest of a district should require such an arrangement as is contemplated by the inhabitants of this district, application must be made to the Legislature for the proper authority.

The Superintendent deems it proper to add, that he should have confirmed the tax but for the single fact that the schoolhouse is proposed to be united with an academy. The wealth of the district justifies the amount of the proposed expenditure; and it is no objection, in his mind, that a large proportion of the tax falls on a moneyed institution, which not only has the ability but the directors of which express a willingness to contribute to the erection of a schoolhouse for the district.

It is hereby ordered, that so much of the proceedings of the special meeting in school district no. 1, on the 23d of December last, as authorizes a tax of $1500 to be levied, with a view, as is admitted, to be applied to the erection of a building for a schoolhouse and academy, in pursuance of a resolution passed at a meeting of said district on the 7th of October last, be and it is hereby set aside.

This decision is not intended to affect the right of the inhabitants of said district, by virtue of the certificate of the commissioners of common schools heretofore given, to meet again and vote the same amount for the purpose of erecting a building to be used solely as a district schoolhouse.

Trustees will not be required to let the building of a schoolhouse to the lowest bidder, unless so instructed by a vote of the inhabitants.
Decided January 30, 1860

Van Dyck, *Superintendent*

By a vote of the inhabitants at a meeting duly convened, the trustees were directed to build a new schoolhouse. They accordingly gave notice that they would receive proposals for building a house of given dimensions. The appellant put in a bid at $340. Other bids were put in, among them one by Mr Davis at $350, which was accepted by the trustees. The appellant asks that the award be set aside, it not being given to the lowest bidder.

Had the district directed the trustees to let the contract for building the house to the lowest bidder, there would appear on the part of the trustees a departure from the authority with which they were vested, which would demand interference. But such is not the case, the trustees being left free to make such contract as they might deem most advantageous to the district. Nor did the notice which they gave place them under any obligation to the appellant in consideration of his bid being lower than that of any other. They were left free to make the award as they should deem most advantageous. It devolves upon the appellant to show either a legal claim by virtue of the notice given, or that the district is likely to suffer injury from the action of the trustees.

A district can not be compelled to rebuild where schoolhouse has been destroyed; but where it for a long time refuses to do so, may be annulled and attached to others adjoining.
Decided February 7, 1866

Rice, *Superintendent*

There is no law by which a district can be compelled to rebuild, where the schoolhouse has been destroyed; but a trustee is empowered to hire rooms temporarily, for the accommodation of the children, whenever he shall deem it necessary. This he can do without a vote of the district. If the district refuses to build for an unreasonable length of time, the school commissioner of the district will examine into the case, and report, as to the expediency of annulling the district and attaching it to those adjoining.

4845

In the matter of the appeal of Edward Posson v. board of education of union school district no. 12, Ridgeway and Shelby, Orleans county.

Under the Consolidated School Law of 1894 and the amendments thereof, it has been the settled policy of the State that each of the school districts therein should become the owner, either by purchase or by building upon a suitable site or sites, the schoolhouse or houses, or school building or buildings thereof; that the leasing and renting of rooms and buildings for school purposes, are not authorized except under extraordinary conditions and to provide for emergencies.

Decided March 15, 1900

Simonds & L'Hommedieu, attorneys for respondent

Skinner, *Superintendent*

This is an appeal from the action of the board of education of union free school district 12, Ridgeway and Shelby, Orleans county, in hiring for the school year of 1899–1900, a certain building for school purposes, as is claimed by the appellant, in violation of the powers and authority possessed by said board under the provisions of the Consolidated School Law. Issue has been joined herein and the pleadings and proofs are voluminous.

It is admitted by the parties to this appeal that on August 7, 1899, the board of education adopted, by a majority vote, the following resolution: "Whereas the necessity of again hiring the Eagle street school building still exists, because of the expected crowded condition of the Central school during the coming school year, be it, and it is hereby resolved, that the board of education hire the Eagle street school building during the school year of 1899 and 1900 at the annual rent of $150, on the condition that it be put in repair satisfactory to the board." It is also admitted that on October 20, 1899, the following resolution was adopted by said board: "Resolved that the resolution appealed from by Edward Posson, adopted by this board August 7, 1899, be amended by striking out the figures $150 and substituting therefor the figures $1." It is also admitted that subsequent to the adoption of such resolutions, the board of education had entered into a lease of the building described therein with the owners and representatives of the owners of such building for the school year of 1899–1900, and that a school under the control of such board is being conducted therein as one of the public schools of district 12.

The Eagle street school building described in these resolutions is the building the leasing of which is the subject of this appeal.

It appears from the proofs herein that the "Eagle street school building" is a wooden building situated near an alley with horse sheds on one side and barns on the other, having been moved to its present location in 1836, and that a portion thereof has been hired by various boards of education of district 12 since about August 25, 1885, and that for the past fourteen years, during which time it has been leased by successive boards of education, a public school, under

the charge of such board, has been conducted therein; that such building is not properly ventilated, heated or lighted, and the seats therein are uncomfortable.

The board of education of said union school district 12 are limited in their power to lease property for school purposes by subdivision 6 of section 15 of article 4, title 8 of the Consolidated School Law, which provides as follows:

"The board of education of every union free school district shall severally have power, and it shall be their duty, to hire any room or rooms in which to maintain and conduct schools when the rooms in the schoolhouse or houses are overcrowded, or when such schoolhouse or houses are destroyed, injured or damaged by the elements, and to fit up and furnish such room or rooms in a suitable manner for conducting a school or schools therein."

This statute became operative June 30, 1894, and from that date all boards of education in union school districts organized under the general law could not legally hire any rooms or buildings in which to maintain and conduct a school unless at the time of such hiring the existing school buildings owned by the district were overcrowded or some of its school buildings had been injured or destroyed by the elements. Such is clearly the limitations upon their power contained in the statute herein referred to. Since the enactment of that statute it has been the settled policy of the State that all localities must own the school buildings in which their schools are conducted and that the leasing and renting of property for school purposes was not authorized except under extraordinary conditions, and those conditions must be such as are enumerated in the statute. Numerous decisions to that effect have been made by this Department.

The proofs herein show that in the year 1897–98 additional school buildings were built and furnished to this district at an expense of about $28,000, and it may fairly be assumed that in 1898 the district owned ample school rooms to accommodate all the children of school age residing in the district, and hence no emergency existed that required the hiring of the building in question.

It is also clear from a careful reading of the resolution adopted August 7, 1899, that in the opinion of the board of education the emergency which would authorize the hiring of property for school purposes by the board of education in this district did not then exist; indeed, the respondents in their answer state that the "special emergency occurred soon after the appeal herein was taken."

The testimony relating to the overcrowding of the schoolhouses owned by this district is so conflicting, especially taken in connection with the fact that the leasing of this property has been continuous since 1885, that I can not bring myself to believe that the school buildings owned by such district were so overcrowded as to require or authorize the leasing of this building for school purposes.

It appears from the proof herein that there is a room in one of the schoolhouses in this district at present leased by the board of education to two young ladies in which a private kindergarten school is conducted, and that there is also a large assembly hall in the Central school building owned by the district, which if fitted up and furnished would provide rooms to accommodate all the

children residing in this district without any necessity of leasing property for school purposes.

The assessed valuation of this district from the last annual report made by its officers appears to be $2,218,185. A community of such recognized intelligence and abundant financial ability should provide adequate and commodious school buildings owned by the district, and not be a tenant of individual landlords, and certainly not when it possesses property which it is itself leasing to other tenants. Ample provision exists in the school law for providing school facilities adequate to the needs of this district.

I therefore decide:

1 That union school district 12, Ridgeway and Shelby, Orleans county, must, in accordance with the provisions of the Consolidated School Law, own the buildings in which the schools therein are conducted, save only when temporary hiring of rooms or buildings is made necessary by some emergency provided for in the school law.

2 That the board of education should not continue the leasing of buildings for school purposes beyond the present school year, and that it is their duty, and they are hereby ordered and directed, to prepare and submit to a special meeting of the district duly called, or to the annual meeting to be held on the first Tuesday of August 1900, resolutions authorizing the construction of any additional school buildings and furnishing the same, which in their judgment, may be necessary to properly accommodate the children of school age residing within such district.

373[1]

In the matter of the appeal of Charles McCoy and Chauncey J. Fox v. union free school district no. 1, town of Ellicottville, county of Cattaraugus.

The action of a district meeting granting an extra allowance to contractors who have built a new schoolhouse can not be sustained, unless notice by the board of education stating that such tax will be proposed, and specifying the amount and object thereof, shall have been published, etc.

Decided November 17, 1888

Scott, Laidlaw & McNair, attorneys for the appellants
Armisah Ward, attorney for the respondent

Draper, *Superintendent*

It seems that the district above named has recently erected a new schoolhouse, the work being done by Messrs Stokes & McMahon as builders, under an agreement to perform the same for the sum of $12,749. The work was completed and the builders were paid the contract price in July last. At the time of this settlement the builders presented a claim against the district amounting to $613.68 for extra labor and materials, over and above such as they were required to supply under their contract. The board of education paid them the

sum of $166.82 and they delivered to the board their receipt in full, covering both the contract price and their claim for extra services, and material. They insist, however, that it was understood that they should present their claim for the balance, amounting to $446.86 to the annual school meeting, to be held in the district on the 28th day of August 1888. That there was such an understanding is disputed by the appellants, but I do not consider the point material. They, in fact, did present their claim to the annual meeting, and the meeting resolved to pay the same and directed a tax should be levied in order to raise the money. From this action of the district meeting this appeal is taken. The appellants urge that the appeal should be sustained for the following reasons: (1) that the items charged were not extras; whatever was done, was done under contract; (2) that there had been a full and satisfactory adjustment and final settlement between the parties; (3) that the district owed them nothing; (4) that no notice was given prior to the district meeting, stating that such tax would be proposed at such meeting, and specifying the amount or object thereof.

I shall first consider the last objection raised by the appellants. If it is valid it will be unnecessary for me to go into the merits of the controversy. Section 10 of title 9 of the Consolidated School Act provides that "A majority of the voters of any union free school district other than those whose limits correspond with an incorporated city or village present at any annual or special district meeting, duly convened, may authorize such acts and vote such taxes as they shall deem expedient for making additions, alterations or improvements to or in the sites or structures belonging to the district, or for the purpose of other sites or structures, or for a change of sites, or for the erection of new buildings, or for buying apparatus or fixtures, or for paying the wages of teachers and the necessary expenses of the schools, or for such other purpose relating to the support and welfare of the school as they may by resolution approve; and they may direct the moneys so voted to be levied in one sum or by instalments but any addition to, or change of, site or purchase of a new site, or tax for the purchase of any new site or structure, or for the purchase of an addition to the site of any schoolhouse, or for building any new schoolhouse, or for the erection of an addition to any schoolhouse already built, shall be voted at any such meeting, unless a notice by the board of education, stating that such tax will be proposed and specifying the amount and object thereof, shall have been published once in each week for the four weeks next preceding such district meeting, in two newspapers if there shall be two, or in one newspaper if there shall be but one published in such district; but if no newspapers shall be published therein, the said notice shall be posted up in at least ten of the most public places in said district, twenty days before the time of such meeting."

It is not pretended that such notice as that contemplated in this statute was given prior to the action of the district meeting. It seems to me that this statute is fatal to the action of the district meeting. It may be true that the action appealed from was not technically for any one of the purposes enumerated in this statute, but that it comes within the general scope and intent of the

statute, it seems to me there can be no doubt. The money ordered to be raised was for the payment of a claim growing out of the erection of a new schoolhouse. I think the people of the district were justified in relying upon this provision of the statute to prevent any action of that nature without such preliminary notice as the statute prescribes. It therefore follows that I must sustain the appeal and perpetually enjoin the board of education from levying or collecting a tax pursuant to the action appealed from.

My arriving at this conclusion will not bar the claimants against the district from procuring a determination of the justice of their claim. They can either present the same to a special district meeting after proper notice, or they can bring an action against the district in the courts. The appeal is sustained and the action of the district meeting is declared null and void.

5194

In the matter of the appeal of Jeremiah P. Conklin, J. Whitman Baker and Joseph M. Edwards, trustees of school district no. 3, town of East Hampton, Suffolk county, from the action of a special meeting of said district held June 29, 1905, in voting to rescind the action of a previous meeting in voting $5000 for repairs etc.

A district meeting voted to repair a schoolhouse but the trustees had awarded no contracts and a district liability had not been created. Such district could legally change its plans and vote a tax for the erection of a new building.

If a district meeting votes a tax for the purpose of repairing a schoolhouse such action can not be reconsidered after the expiration of 30 days unless the district votes in good faith to erect a new building and authorizes a tax therefor.

Decided August 15, 1905

Draper, *Commissioner*

A special meeting of the legal voters of school district no. 3, town of East Hampton was regularly called for May 11, 1905, to consider the advisability of making repairs to the schoolhouse and authorizing an appropriation therefor. The meeting appointed a committee to act with the trustees in preparing plans for the proposed improvements. The meeting appears to have given the question of repairs careful attention and to have regularly adjourned from time to time. At a meeting held May 25, 1905, plans and specifications prepared by an architect for an addition to the building were submitted and adopted. An appropriation of $5000 was voted for making such repairs.

At a meeting held June 15, 1905, the wisdom of erecting a new building instead of enlarging the present building appears to have been discussed. An informal ballot was taken on the question to ascertain the sentiment of the district and 19 votes were cast in favor of erecting a new building and 13 votes in favor of erecting the addition already authorized. At a meeting of the district held June 29, 1905, the following resolution was adopted: "*Resolved,* That all

acts, resolutions, appropriations, plans and specifications relative to the building on or addition to the present schoolhouse in the village of Amagansett, New York, be now rescinded."

No other action in relation to the matter was taken at that meeting or so far as the pleadings herein show at any subsequent meeting. It appears that at the time of this meeting no contracts had been let for the repairs authorized by the district May 25th. No district liability would have followed by a change of plans to provide for the erection of a new building. Had this meeting made an appropriation for the erection of a new building and taken such other action necessary to prepare for the erection of such building its action would undoubtedly have been lawful. No action of this character was taken and the meeting even adjourned sine die. The action of the meeting, therefore, in voting to favor the erection of a new school building can not be regarded as having been taken in good faith. Without providing for the erection of a new building this meeting could not legally rescind its former action in voting an appropriation of $5000 for repairs to the building. Section 18 of title 7 of the Consolidated School Law provides that a vote to repair or erect a schoolhouse or to erect an addition to a schoolhouse shall not be reconsidered except at a meeting held within 30 days from the date on which such vote was adopted. The vote by which the appropriation of $5000 for the erection of an addition to the schoolhouse in question was reconsidered took place at a meeting held 49 days after the date of the meeting at which such appropriation was made. The action of such meeting was in violation of law and therefore void. No answer has been filed to this appeal and the allegations contained in the moving papers must be regarded as admitted.

The appeal herein is sustained.

It is ordered, That the board of trustees of school district no. 3, town of East Hampton, be, and they hereby are, ordered to proceed to erect the addition to the present school building as directed by a special meeting of such district on May 25, 1905, and to raise the said appropriation of $5000 as directed by that meeting.

5179

In the matter of the appeal of Edwin L. Rymph for the removal of Louis J. Cobey, sole trustee of school district no. 3, towns of Hyde Park and Poughkeepsie, Dutchess county.

When a district meeting appoints a building committee to assist the trustees in making certain repairs and the district subsequently decides not to make such repairs but authorizes the erection of a new building and does not continue such building committee it is held that the duties of such committee ceased.

A building committee can act in an advisory capacity only. A building committee may advise trustees or make suggestions as to the procedure in erecting a building, but the responsibility, under the law, of erecting such building rests upon the trustee and he may proceed as his judgment directs even in opposition to the wishes or recommendations of a building committee.

A school district meeting can not restrict the powers of a trustee in determining the number of teachers to be employed and the compensation of such teachers. The law imposes this duty on a trustee.

If authorized expenditures made by a trustee are excessive or improper objection should be made at the meeting of the district when the trustee makes a report thereon. If no objection is made and such report is accepted by the district, such acceptance will be regarded as a concurrence in the judgment and authority of the trustee in making such expenditures.

A trustee should not proceed with the erection of a building to cost an amount in excess of the funds available until he calls a special meeting of the district and receives instruction therefrom or until a further appropriation is made.

When a trustee violates no instruction from the district but exercises his best judgment on the course to pursue, even if that judgment is faulty, it does not constitute sufficient cause for removal from office.

Decided February 23, 1905

Homer E. Briggs, attorney for appellant
Hackett & Williams, attorneys for respondent

Draper, *Commissioner*

This proceeding is brought to remove Louis J. Cobey from the office of trustee of school district no. 3, towns of Hyde Park and Poughkeepsie. It is alleged that Mr Cobey has illegally, wastefully and excessively expended the funds of the district and that he has wilfully refused to obey instructions given him by the district. Thirty-five legal voters of the district join Mr Rymph in this petition and 26 legal voters of the district join Mr Cobey in his answer to such petition. This district has three schoolhouses. One is known as the Violet avenue schoolhouse, one as Mount Hope schoolhouse, and one as the Chapel Corner schoolhouse.

One cause of much of the trouble in this district is a misunderstanding between a building committee and the trustee. At a special meeting of the district held September 16, 1902, the chairman was authorized to appoint a building committee "to assist the trustee with the supervision of the repairs and the enlargement to the Mount Hope schoolhouse." The records of the meeting show the chairman appointed as such committee: John A. Roosevelt, Frederick R. Newbold and William R. Wright. At this special meeting the collector reported that after paying the running expenses of the district there would be a balance of $250. The meeting directed the trustee to raise by tax $250 and to use such other amount remaining on hand after payment of all other school expenses, for the enlargement and repairs to the Mount Hope schoolhouse. The district, therefore, contemplated and authorized an addition and repairs to the Mount Hope building to cost about $500. It appears that Mr Roosevelt went to Canada shortly after the appointment of this committee and that upon his return he was ill for some time. It also appears that Mr Newbold went to Europe and that neither of these members rendered any service on such com-

mittee or were ever consulted in relation to the work of such committee. The only member of such committee who rendered any service was Mr Wright.

No repairs were made during the year to the Mount Hope schoolhouse. At the annual meeting in August 1903 Mr Wright as the building committee made a report recommending that a new schoolhouse be built on the property adjoining the present site. This annual meeting directed that a special meeting be held August 11, 1903, to consider among other things the proposition to build a new schoolhouse at Mount Hope. Such special meeting decided to build a new schoolhouse. Neither the annual meeting of 1903 nor the special meeting of August 11, 1903, authorized the continuance of the building committee appointed at the special meeting of September 16, 1902, or the appointment of a new committee. The records of these meetings or the pleadings in this proceeding do not show that any discussion took place at either meeting in relation to the continuation of such building committee. That committee was appointed for a definite purpose, namely, "to assist the trustee with the supervision of the repairs and the enlargement to the Mount Hope school." No work in connection with such repairs or enlargement at the Mount Hope building was done for one year and at the expiration of that time the district decided not to do the work which this committee was appointed to assist the trustee in supervising. Therefore, the duties of the committee ceased. Such committee was not authorized to assist the trustee in any manner whatever in building the new schoolhouse authorized at the special meeting of the district August 11, 1903. When a district meeting authorizes the appointment of a building committee, such committee can act in an advisory capacity only. Subdivision 5, section 47, title 7 of the Consolidated School Law imposes on the trustees of a district the duty of building a schoolhouse when a district authorizes the erection of such building. A building committee may advise trustees or make suggestions as to the procedure in erecting a building, but the responsibility, under the law, of erecting such building, rests upon the trustee and he may proceed as his judgment directs even in opposition to the wishes or recommendations of a building committee. Trustee Cobey was entirely within his legal rights in obtaining plans from an architect of his selection instead of taking the plans prepared by an architect consulted by Mr Wright.

At the annual meeting of the district August 4, 1903, the trustee was authorized "to make such repairs to Chapel Corner school as he may find necessary." Trustee Cobey in compliance with such instruction made extended repairs to such building at a cost of $449.22. He made a complete detailed report of such repairs and the expenditures therefor to the annual meeting of the district August 2, 1904. The meeting accepted such report. Under the instruction given the trustee he possessed power to make any necessary repairs. It is not claimed that unnecessary repairs were made. No one suggested at the annual meeting that the expenditures were excessive for the repairs made. It is not even claimed that the district, at the time of the annual meeting, was not in possession of all

information in relation to such repairs and the cost of the same which the petitioners herein now possess. The appellant herein and many of those who join him in this petition were present at the annual meeting and in accepting the report of the trustee acquiesced in his judgment on the necessity of repairs made and the cost of the same. If these expenditures were improper or excessive it was the duty of the petitioners to have offered their objections at the annual meeting and not to accept the report. The petitioners also fail to show that such repairs were not necessary or that the expenditures therefor were excessive.

It is alleged that Trustee Cobey expended $86.34 in building a chimney in the Chapel Corner schoolhouse when a contractor offered to do such work for $45 if the trustee furnished the necessary sand. Trustee Cobey shows that the actual cost of building such chimney, including all labor and material, was only $46. He also shows that the remaining $40.34 was expended in repairing the ceiling and walls of the Chapel Corner building as the ceiling of such building had fallen after the annual meeting of 1904, and in also placing a concrete bottom in the Violet avenue schoolhouse. The annual meeting of 1904 voted an appropriation of $70 to build the chimney in the Chapel Corner schoolhouse. Since the trustee built such chimney for $46 and made the additional repairs for $40.34 it appears that such expenditures were legally and wisely made.

The petitioners allege that the annual meeting of 1904 instructed the trustee to employ three teachers — one at a salary of $14 per week and two at a salary of $10 each per week, and that only one teacher should be employed in each of the schoolhouses of the district. The records show that Trustee Cobey asked for an appropriation of $1760 for teachers' wages and that such appropriation included $400 for an *extra teacher* in the Violet avenue schoolhouse. The meeting voted not to hire *an extra teacher* and reduced the estimate of the trustee for teachers' salaries $400, appropriating only $1360 for that purpose. Subdivision 9, section 47, title 7 of the Consolidated School Law confers upon trustees the power to employ all teachers, to designate the number of teachers to be employed, and to determine the compensation of each teacher. A school district meeting can not restrict the powers of trustees in such matters. It appears that Trustee Cobey employed only three teachers and that he paid each of them $12 per week. He possessed the legal right to do this. If in his judgment it had been necessary to employ four teachers he might have employed that number notwithstanding the fact that the district voted to hire only three teachers. Twelve dollars per week is a reasonable salary for this district to pay its teachers. The action of the trustee in this respect was proper and legal.

The special meeting of August 11, 1903, voted an appropriation of $4000 to buy the Violet avenue schoolhouse and site, paint the schoolhouse, fence the lot, make the necessary improvements to the same, and to build a new schoolhouse at Mount Hope. The Violet avenue building was purchased at $2045.19. Previous to the annual meeting of 1904 the trustee expended $233.75 for repairs to the second floor of this building and $183.41 for fencing the lot. Trustee

Cobey included these expenditures in his report to the annual meeting of 1904. That meeting accepted such report and thereby ratified the action and judgment of the trustee. Many of these petitioners were present at such annual meeting, but offered no objection to these expenditures. If these expenditures were excessive, improper or illegal, objection should have been made when the report of the trustee was under consideration at the annual meeting. It appears that since the annual meeting of 1904 Trustee Cobey has made additional repairs to the Violet avenue building amounting to $435.21. It is not claimed that such repairs were unnecessary and the trustee was authorized to make all necessary repairs. It is alleged, however, that the expenditures for such repairs were excessive. It is incumbent upon the appellants to establish conclusively by a preponderance of evidence that such expenditures were excessive. In this they have failed. It appears that such expenditures were reasonable and proper.

It therefore appears that of the $4000 appropriated by the district to purchase the Violet avenue building and site, to paint the schoolhouse, fence the lot, make the necessary improvements to the same, and to build a new schoolhouse at Mount Hope, $2897.56 have already been expended in purchasing the Violet avenue property and making repairs thereto. Of the $4000 appropriation only $1102.44 remains for the erection of the Mount Hope building. This amount is insufficient for that purpose. Trustee Cobey is not responsible for this condition. He followed the direction of the district in purchasing the Violet Avenue property and in repairing the same. It is not shown that any unnecessary repairs or excessive expenditures were made.

Of the $1102.44 remaining from the $4000 appropriation the trustee has already expended $153 for cutting timber on the site, removing stumps and rocks and otherwise clearing the site. He has also expended $213 in building outhouses, a foundation for the new school building and laying a tile drain to properly drain the grounds. He possessed power under instruction from the district to make these expenditures. The petitioners have failed to show that these expenditures were wasteful or excessive. There remains in the fund to be used for the erection of the new schoolhouse $736.36 to which may be added $450 voted to repair the old building which was never used. This affords $1186.36 which is not sufficient for the erection of a suitable building. Plans for a building have been approved at this Department, but such plans call for a building which will cost an amount greatly in excess of the fund available for this purpose. The trustee states that such plans are being modified to reduce the cost of erection. The trustee should not proceed with the erection of a building to cost an amount in excess of the funds available until he calls a special meeting of the district and receives instruction therefrom or until a further appropriation is made.

It is alleged by the petitioners that it was the sense of the annual meeting of 1904 that the old schoolhouse at Mount Hope should remain standing and

be used for school purposes until the new schoolhouse should be completed, The records of the meeting do not sustain this contention. The records of the meeting do not show that any direction was given by the district on this question. The district had authorized the trustee to tear down the old building and to erect a new one. He could, therefore, exercise his discretion in such matter. The trustee claims that he desired to use in the new building any of the material in the old building which was suitable for such purpose. He also claims that to continue school in the old building while the construction of the new one was in progress, would be dangerous to the lives of the children. He therefore transferred the teacher and pupils of the Mount Hope school to the upper story of the Violet avenue school. He violated no instruction from the district and exercised his best judgment on the course to pursue. Even if that judgment was faulty it does not constitute sufficient cause for removal from office.

In my opinion the respondent has shown that he acted entirely within his legal rights and in entire good faith in all these matters.

The appeal herein is dismissed.

5436

In the matter of the appeal of George H. Melious and others for the removal of J. O. Hankinson, as trustee of district no. 3, town of Gorham, Ontario county.

Duty of trustee where appropriation has been made for erection of school building. Where an appropriation has been voted at a district meeting for the erection of a new schoolhouse and plans and specifications have been prepared and duly approved by a district meeting and subsequently approved by the Department, it is the duty of the trustee to ask for bids for the erection of the building in accordance with such plans and specifications. He should make every reasonable effort by advertisement and otherwise to secure bids or proposals for the construction of the schoolhouse. If a bid is received, within the amount appropriated, from a reliable person, the contract must be immediately awarded. If the lowest bid received is in excess of the amount appropriated the trustee must immediately call a special meeting to vote an additional appropriation.

Decided February 14, 1910

Scott & Fitch, attorneys for appellant

Draper, *Commissioner*

This is a proceeding for the removal of J. O. Hankinson, sole trustee of school district no. 3, town of Gorham, Ontario county. The petition is signed by a number ot the taxpayers in such district. The chief ground of complaint is the failure of the respondent to carry out the directions of the district in respect to the erection of a new schoolhouse in such district. It appears that a special meeting was held September 3, 1907, and it was voted to build a new

schoolhouse and a resolution was passed appropriating $5000 for such purpose. Plans and specifications were prepared and duly approved by the district at a meeting held February 8, 1908, and a further appropriation of $1500 was made, so that the sum of $6500 is available for the construction of the building. The plans and specifications were approved by the Department at some time prior to April 1, 1908. The respondent Hankinson was elected as trustee to fill a vacancy, August 12, 1908, and reelected to such office August 3, 1909. It is alleged that he has neglected to carry into effect the resolutions of the district meeting providing for the construction of the schoolhouse; that he has made no effort to let contracts for such construction; that he has in all respects wilfully and persistently refused to comply with the will of the district as expressed in the several resolutions providing for such construction.

The respondent did not file an answer in reply to such petition. The allegations of the petition therefore stand admitted. An order was issued December 30, 1909, directing the said Hankinson to appear before me to answer the charges contained in said petition and to show cause why he should not be removed from his office. Such order was returnable January 18, 1910, and Mr Hankinson appeared before me in person; the petitioners were represented by their attorney, Mr Royal R. Scott. The facts in the case were carefully considered. Mr Hankinson was permitted to explain why he had failed to proceed more rapidly with the erection of the building.

It is apparent that Mr Hankinson has been contending against real troubles and difficulties. There seems to have been a lack of harmony in his district as to the best methods to be followed in building the schoolhouse. It is possible that Mr Hankinson has been more favorably inclined toward the side of those who do not desire the erection of a schoolhouse in conformity with the plans and specifications already adopted and approved. It does not seem desirable to remove him at this time. He should be given further opportunity to carry into effect the expressed will of the district.

It is Mr Hankinson's first duty to ask for bids for the construction of this building, in accordance with the plans which have been adopted. If a bid is received from a reliable person, which is within the amount available, a contract should be immediately awarded for the construction of the building. If the bids are in excess of the amount available he should immediately call a special meeting to vote an appropriation of an amount necessary to complete the building in accordance with the bid which seems most beneficial to the district.

He must submit these plans and specifications to reliable contractors in Geneva, Canandaigua and other nearby places, and make every reasonable effort to secure bids or proposals for the construction of the schoolhouse.

This district has voted for a new schoolhouse. There is no doubt of the necessity of such schoolhouse. The district is sufficiently strong to build and maintain a suitable building. The will of the district must be carried out. This

proceeding will be suspended pending the completion of the building, and the proper performance by the respondent of the duties of his office, as herein directed.

5390½

In the matter of school district no. 6, town of Sheridan, county of Chautauqua.

To justify the Commissioner of Education in vacating the action of the meeting as expressed by a vote of 34 to 14 on the erection of a new school building there should be overwhelming evidence of the need of such building and evidence to the effect that in no probability would the voters of the district authorize the erection of such building.

Decided July 9, 1908

Warner & Farnham, attorneys for respondent

Draper, *Commissioner*

On April 21, 1908, a special meeting was held in school district no. 6, town of Sheridan, for the purpose of voting upon a proposition to build a new schoolhouse at an expense of $5000, and to bond the district for such amount. It appears that there are about 90 voters in the district and that only 48 attended this special meeting. The vote on the proposition to erect a new schoolhouse resulted in 14 ballots being cast in favor of such proposition and 34 against it. The proposition was therefore defeated. Appellants request in their moving papers that such action be taken as will enable the district to maintain adequate school accommodations, and to authorize the district to issue bonds and erect a new schoolhouse.

To justify the Commissioner of Education in setting aside the action of the meeting and in overriding its wishes as expressed by a vote of 34 to 14, there should be overwhelming evidence of the need of a new school building and also evidence to the effect that in no probability would the voters of the district authorize the erection of a new building. The pleadings of appellants do not contain such evidence.

If this district has not adequate school facilities, the statutes afford ample means for providing them. If the building is unfit for use and not worth repairing, it is the duty of the school commissioner having jurisdiction to condemn such building and order the erection of a new building at such amount as he deems necessary. Refusal on the part of the school commissioner to condemn a building is ground for an appeal to the Commissioner of Education.

If the building is worth repairing, the school commissioner can not condemn it, but he may make an order directing repairs. He can not direct an expenditure of more than $200 in each order for repairs, but there is no limit as to the number of orders which he may make if necessity requires it.

The appeal herein is dismissed.

5382

In the matter of the appeal of Charles I. Redfield, a member of the board of education of the city of Middletown, from the action of the board of education of the city of Middletown, in relation to the alterations and changes in the heating system of the Benton avenue school building of said city.

Section 17, title 7 of the Consolidated School Law sets a standard of sanitary requirements as to the ventilation, heating and lighting of school buildings.

This law also provides that the plans and specifications of all new buildings constructed and of all additions to school buildings the cost of which exceeds $500 shall be approved by the Commissioner of Education.

This law does not require that the plans and specifications of a heating system to be installed into an old building when no addition to such building is to be erected, shall be approved by the Commissioner of Education.

It is not the practice of this Department to require the adoption of any particular system of ventilation and heating.

The law contemplates that each building shall be properly heated and ventilated so that they shall afford comfort and protection to the health of the children who are compelled to attend upon instruction in such building. The law is ample to reach such cases under a proper proceeding.

Decided March 2, 1908

Dill & Thompson, attorneys for appellant
Hon. Russell Wiggins, corporation counsel, attorney for respondent

Draper, *Commissioner*

The appellant in this proceeding is a practising physician in the city of Middletown, a taxpayer therein and a member of the board of education of such city. He is also the chairman of a committee of the board of education having supervision of one of the school buildings in the city known as the Benton Avenue building. For more than a year there has been a controversy between appellant and the other members of the board of education over the heating and ventilating of this building. I am asked to withhold the public money of such city and to order the building closed until certain repairs are made to the heating and ventilating system. It appears that this building was erected about the year 1882 and in accordance with plans which were regarded at that time as the most modern and best adapted to the construction of such buildings. It also appears that the building is now in satisfactory condition with the exception of its heating and ventilating systems.

Appellant alleges that soon after his appointment upon the committee having the care of the Benton Avenue building reports came to him of the improper heating and ventilating of such building. Appellant gave much conscientious investigation to these defects of the building and the methods to correct the same. He promptly reported the results of his investigations to the board of education. It also appears that the heating plant was installed only two years ago. The board of education instructed appellant to continue his investigation and to take

the matter up with the firm which installed the boiler and ascertain what such firm thought might be done to remedy the defects in question.

Appellant consulted such firm and was informed that additional radiation would remedy the defects in the heating system. Appellant was not satisfied that additional radiation would remedy the difficulty and he consulted another firm of steam fitters in the city of Middletown. This firm employed the consulting engineer of a New York firm who, it is claimed, was familiar with the problems involved in school heating and ventilating, to examine the Benton Avenue building. The engineer made a written report on the defects found and the improvements necessary to correct the same and he estimated that the cost of such improvements would be $2500. This engineer's report was in substance that the fault in the heating system was due to lack of radiation and lack of proper circulation of air. He also reported that defects in the ventilating system were due to the use of an impaired wooden duct in the cellar, an insufficient number of aspirating coils, that the foul air ducts and the cold air ducts were too large for the hot air intakes and that the indirect stack casings were also impaired.

Appellant made a further report to the board of education on the result of his investigations and included therein the report made by the firm which had installed the heating plant and also the one made by the New York engineer. He alleges that thereafter the board directed him to make a few unimportant changes in the system but refused to take such action as would insure proper repairs or improvements to the building. Appellant thereupon addressed a communication to the health officer of the city of Middletown setting forth very fully the discoveries his investigation had revealed as he understood the situation and requesting the board of health to investigate the building and transmit a report to the board of education. The board of health complied with this request and reported to appellant in substance that a committee of the board had inspected the school building twice and found that the woodwork on the cold air conduit needed renewing and recommended that a galvanized iron conduit be substituted for the one used at present. The board further reported that if necessary repairs are made to the boiler, radiator, and all other connections the heating system is ample to properly heat and ventilate the building. This report was not satisfactory to appellant and he thereafter appeared in person before the board of health and discussed the matter with that body. He asked the local health board to request the State Health Department to send an inspector to make an investigation and he also requested the local board to make an order directing the board of education to make necessary repairs to the building. The board of health communicated again with the board of education but made no further recommendation than that contained in its communication to appellant expressing the result of the two inspections made by a committee of that board.

Appellant then took the matter up with Doctor Porter, State Commissioner of Health, and filed with that officer a long communication in which he reviewed the details of the whole controversy. Doctor Porter advised the appellant that

the question at issue was one to be determined by the Education Department and referred appellant's communication to this Department. A long correspondence followed between appellant and officers of the Education Department. Mr Hall, this Department's inspector of school buildings, was directed to examine the building in question. He made such examination on June 20, 1907, and reported that the heating and ventilating system was inadequate and faulty and that as a result thereof the building was unsanitary.

It therefore appears that the firm which installed the heating plant, the expert heating engineer from New York City, the board of health of the city of Middletown and Inspector Hall practically agreed upon the principal repairs or improvements which it was necessary to make in order to correct such defects. These principal improvements were additional radiation, the substitution of a galvanized iron conduit for the old cold air wooden conduit, an increase in the number of aspirating coils and the substitution of pipes or ducts of proper sizes etc. The board of health deemed additional radiation unnecessary and Mr Hall recommended the fan system of ventilation.

With this knowledge of the condition of the building in the possession of the board of education it was clearly the duty of such body to take such action as was necessary to make this building comfortable and sanitary. The pleadings show that on June 11, 1907, the board of education directed the chairman of the local committee having the charge of the Benton Avenue building of which appellant was chairman, "to put the heating and ventilating system in condition to properly heat and ventilate the building." This resolution of the board gave the committee ample power to make any changes or improvements in the heating system which were necessary. Appellant as chairman of such committee requested several firms to submit plans and estimates. Several of these firms did submit such plans and specifications. The committee however was unable to agree upon any of these plans. It appears that appellant had been partial to the fan system because he had investigated several large buildings in which that system was in operation and for the further reason that Inspector Hall had recommended such system. Other members favored the aspirating or gravity system. Appellant would not consent to the adoption of any plans which were not approved by this Department. The other members of the board of education appear to have taken the position that under section 17, title 7 of the Consolidated School Law as amended by chapter 281, Laws of 1904, the board of education had full authority to determine what repairs should be made to the heating system and to make such repairs without the approval of the Commissioner of Education. This was one of the principal points of disagreement between appellant and the other members of the committee and the board. This provision of the law sets a standard of sanitary requirements as to the ventilation, heating and lighting of school buildings and provides that the plans and specifications in relation thereto for all *new buildings* constructed and all *additions* to school buildings the cost of which exceeds $500 shall be approved by the Commissioner of Education. The approval of the Commissioner of Education

is therefore restricted to *new buildings* and to *additions to buildings* when the cost thereof exceeds $500. The law does not provide that the plans and specifications of a heating system to be installed into an old building when no addition to such building is to be erected shall be approved by the Commissioner of Education. This board of education was simply considering repairs to the heating and ventilating system and the approval of the Commissioner of Education was unnecessary.

Appellant was fully advised upon the right of the board of education to determine what repairs should be made. He sought the opinion of the corporation counsel of the city upon such question and on the 26th day of July 1907, was advised by that officer that the approval of the Commissioner of Education was not required. He was informed to like effect by the Chief of the Law Division of this Department on August 6, 1907. The Chief of the Inspections Division gave similar information to the president of the board of education under date of July 17, 1907, and on the same date wrote appellant expressing the hope that the position assumed in such communication to the president of the board of education would commend itself to the appellant. While this Department is not required to approve plans and specifications in such cases it has cheerfully examined and passed upon them whenever requested by local school authorities. Whenever plans and specifications have been submitted for approval in cases where repairs only are being made the requirements specified by law for new buildings have been applied in determining such approval. It has not been the practice of this department to require the adoption of any particular system of ventilation. The fan system and the aspirating or gravity system have been freely approved.

On August 14, 1907, the committee adopted the following: "That in order to facilitate the work of installing a proper ventilating and heating system at the school, that Ayers and Galloway, lowest bidders on repiping the basement, be awarded the contract, to begin work at once; contract price $300."

On August 22, 1907, the committee adopted the following: "In the judgment of this committee, the best plan for heating and ventilating Benton avenue school is the gravity system like the one approved by the State Department in the new Mulberry street school, and therefore be it

Resolved, That we proceed along these lines; that the chairman be authorized to have the wooden cold air duct on the north side of the building replaced with galvanized iron, in addition to the work authorized at the last meeting of this committee, and any other necessary repairs, leaving the determination of other changes to await the test of these."

On September 10, 1907, the majority of the committee made a report of its action to the board of education and the board sustained such report. Appellant submitted a minority report dissenting to any plan which did not embody the installation of a complete system. Appellant refused to carry out the instructions of the committee although he was its chairman and also the instruction of the board. Appellant appears to have been actuated in the position which

he has assumed in the controversy by a desire to do what he regarded for the best interests of the school and the taxpayers of the city. On the other hand, there is nothing in the pleadings to show that the other members of the board were actuated by other motives. Appellant undoubtedly believed that the improvements authorized were inadequate and that the building would not be properly heated or ventilated until the fan system or some other new and complete system should be installed. Nevertheless he is in error in refusing to proceed as the other eight members of the board directed.

It does not appear from the pleadings in this case that the board of education was not willing to make the necessary repairs to perfect the heating and ventilating system. The very repairs which the board authorized were to remedy important defects pointed out by the expert engineer, by the board of health and by Inspector Hall. One of the principal defects reported by Mr Hall in the ventilating system was the impaired wooden cold air conduit which he claimed received foul air from the toilets and basement and conveyed such air to the schoolroom. The installation of a galvanized iron conduit was necessary under the adoption of any plan. The substitution of larger steam pipes in the cellar was also necessary. The adoption of any particular plan would necessitate the very changes which were authorized. Were these changes to be made now they could be utilized in any further repairs which might be necessary. It would not result in a waste of funds to proceed as the board directed and it would have facilitated the completion of whatever repairs were ultimately found to be necessary. The language used by the board indicated its willingness to make additional repairs if such repairs were necessary. The direction of the board was that the improvements above stated should be made and the "determination of other changes to await the test of these." The board of education should see that the improvements authorized are made without further delay. If the proper committee refuses to execute the orders of the board in this respect a committee should be appointed who will execute such orders.

It should not be understood, because section 17, title 7 of the Consolidated School Law does not require plans and specifications for *repairs* to the heating and ventilating system in school buildings to be approved by the Commissioner of Education that the law does not contemplate that old buildings shall be properly heated and ventilated so that they shall afford comfort and protection to the health of the children who are compelled to attend upon instruction in such buildings. The law is ample to reach such cases under a proper proceeding. Such question is not presented in this proceeding and a proper proceeding could not be instituted until the repairs authorized have been made and it is then shown that the heating and ventilating of the building is inadequate and thereby unsanitary and that the board of education refuses to take such action as will remedy such defects.

The appeal herein is dismissed.

5390

In the matter of the appeal of the taxpayers of union free school district no. 4, town of Orangetown, from the decision of the trustees for a special meeting of the district.

A board of education is not justified in awarding a contract for a proposed addition to a school building at a cost of $75,000 when the voters of the district have had no opportunity to examine the plans and specifications of such proposed addition or to vote upon the adoption of the same. When such proposition is involved and a petition of a large number of voters of the district has requested a special meeting to consider the matter, it is the duty of the board to call such special meeting.

Decided July 10, 1908

Howe, Smith & Howe, attorneys for appellants
White & Case, attorneys for respondents

Draper, *Commissioner*

At the annual meeting of union free school district no. 4, town of Orangetown, county of Rockland, held in August 1905, an advisory committee was appointed to confer with the board of education upon the action which should be taken to provide adequate school accommodations for the district. This district embraces the village of Nyack and the official reports of inspectors of this Department are to the effect that the school building in this district is the worst in the State. It appears that the board of education and the advisory committee appointed in August 1905, deliberated over the inadequate school accommodations of the district and the best method of providing adequate school facilities until April 1907, a period of one year and eight months. The board of education then called a special meeting and that meeting adopted a resolution authorizing such board to erect an addition to the school building at an expense not to exceed $75,000 and to raise such amount by the issuance of bonds pursuant to the provisions of the Consolidated School Law. It appears that previous to the special meeting of April 1907, the board of education had considered two sets of plans and specifications known as the Emery plans and the Truax plans and had decided to adopt the Emery plans. In the notice of the April special meeting the board stated that the Emery plans were on exhibition at a specified place and might be seen and examined by residents of the district.

There is no doubt but that the understanding at the district meeting was that the Emery plans should be used subject to slight modifications. It was upon this understanding that the appropriation was voted.

It appears that after such special meeting the board obtained other plans prepared by Mr Jaroleman which provided for an addition to the present building at an expense of $45,000 and for remodeling and repairing the present building at an expense of $30,000. The board adopted these plans and awarded contracts for constructing the addition and repairing the old building accordingly. The board claimed that the adoption of the Jaroleman plans would result in

great economy to the district, which was not within its knowledge at the time of the April meeting, and at the same time provide as good educational facilities to the district as the proposed addition under the Emery plans would provide. The board asserts that for these reasons it was justified in changing plans and thus adopted the Jaroleman plans.

A taxpayer of the district thereupon obtained a preliminary injunction in the Supreme Court, restraining the board of education from proceeding with the work under such contracts. Thereafter at the annual meeting of the district the question was made an issue in the election of members of the board of education. Three members, a majority of the board, were elected at such meeting and the election resulted in three members being chosen who were opposed to the action of the board in proceeding under the Jaroleman plans. The new board of education also instituted a suit in the Supreme Court in the name of the district to test the validity of the contracts made by the old board. The taxpayer's action to restrain the board and the action brought by the board to test the validity of the contracts were tried together in the Supreme Court at Newburgh and resulted in judgment in favor of the plaintiff in both actions. The board of education was permanently enjoined from proceeding under the plans adopted by the former board. The court held that the resolution adopted at the district meeting authorized the board of education to expend $75,000 in erecting *an addition* to the present building but that the board was not authorized to divert $30,000 of this sum from the purpose for which it was voted and use it in *repairing the old building* and that the action of the board in making the contracts in question was *ultra vires* and therefore void. The decision of the Supreme Court has recently been affirmed by the Appellate Division of the Second Department.

It appears that some time after the decision of the Supreme Court nearly 600 residents of the district petitioned the board of education to call a special meeting of the district for the purpose of authorizing the board of education to expend so much of the $75,000 obtained by the issuance of bonds under the action taken at the special meeting in April 1907, as might be necessary to remodel the present building in accordance with the Joraleman plans and specifications and to also approve the contracts made by the former board which were declared void by the court and to confer authority on the board of education to make necessary arrangements to carry out the provisions of such contracts. After due deliberation the board of education declined to call such special meeting. This proceeding is brought from the action of the board in refusing to call such meeting. I am therefore called upon to determine but one question in this case and that is, Was the action of the board of education in refusing to call a special meeting properly within its discretion?

It is claimed by respondents that the district has twice voted upon the proposition to build an addition to the present building and that as the district has twice expressed its wishes upon such question the board of education is not obligated to submit further propositions upon this question to a district meeting.

It is true that the district did, at the April special meeting, authorize the erection of an addition to the present building. It is not true that the district has since such meeting voted directly upon that question. The action of the trustees in changing plans after the April meeting, without authority, was an important issue at the annual election and the members of the old board standing for reelection at such meeting were defeated.

It appears from the oral arguments of the attorneys of the respective parties to this proceeding at the hearing before me that other important issues were involved in that annual election. The defeat of the old members of the board did not rest upon the sole issue of the school building question. It can not be properly held therefore that this district has voted twice upon the question of the improvements to be made to its school accommodations. Even if the district had voted twice upon such question the conditions in the district might be such that the board would not be justified in refusing to call another special meeting.

It is also contended by respondents that the board of education is now enjoined by the Supreme Court from using the Jaroleman plans and could not make the improvements provided for under such plans even if a district meeting should authorize the board to proceed.

The pleadings of the respondents show that the only question raised by such respondents in their action in the Supreme Court and by the plaintiff taxpayer in his action in the Supreme Court was the right of the board of education to use any substantial portion of the amount authorized for an *addition* in remodeling the old building. Respondents state in their answer in this proceeding that in the two court proceedings they did not raise any question as to the merits or demerits of the Jaroleman plans. The learned trial justice in his opinion decided these cases upon a question of law only and held that the district meeting had not authorized the board of education to remodel and repair the old building and that the board could not therefore use any substantial portion of the $75,000 for such purposes. The decision of the court was based of course upon the authority given the board of education by the action of the district meeting. The restraining order of the court does not enjoin the district meeting in any way whatever. A district meeting is free to take such action as a majority of the voters shall determine. The district meeting has authority to adopt the Jaroleman plans and to authorize the board of education to award contracts accordingly. If as contended by respondents the order which now enjoins the board of education and granted because the board was not authorized as required by the statutes to do the work for which contracts were made would still be binding upon the board against proceedings instituted *de novo* and which legally authorize the board to make such contracts, such order would undoubtedly be modified or vacated in a proper proceeding instituted for that purpose. The language used by the learned trial justice in his opinion in such cases warrants this conclusion. He said:

It seems to me that in equity as well as in exact right the voters of the district are entitled to vote upon the proposition to so substantially alter the existing building at such very considerable cost.

He further said:

If, as claimed by the defendants the action taken by the board in making the contracts is approved by a majority of the voters in the district, it will be an easy matter to call a special district meeting upon due notice and to pass there a proper resolution authorizing the doing of the work as proposed by these contracts and the raising of the necessary funds therefor.

But it is further contended by respondents that the $75,000 in question has already been obtained by the issuance and sale of bonds pursuant to the resolution of the April 1907 meeting and that such sum is irrevocably pledged to the construction of an addition to the present building. This resolution authorized the board of education to expend in the erection of an addition to the school building a sum *not to exceed* $75,000. The board was not directed to expend *$75,000* in erecting such addition, but it was directed to expend a sum *not to exceed* $75,000. The board was given discretion to determine the amount which should be expended for the addition but could not expend more than $75,000. Suppose the board should be able to erect a suitable addition for $65,000, what would become of the remainder of this fund which would amount to $10,000? Could not the voters of the district who had authorized the board to raise such fund direct in a meeting duly convened the use which should be made of any balance remaining after the addition is erected? Section 10, title 8, of the Consolidated School Law confers very broad power upon the voters of a union free school district when duly convened in a district meeting. This section provides, among other things, that the voters,

May authorize such acts and vote such taxes as they shall deem expedient for making additions, alterations or improvements to or in the sites or structures belonging to the district, or for the purchase of other sites or structures or for a change of sites, or for the erection of new buildings, or for such other purposes relating to the support and welfare of the school as they may, by resolution approve.

Ample authority is found in this section of the law to authorize the voters of a district to direct that a portion of the fund obtained by the sale of bonds for the erection of an addition may be used to repair the old building. This view is supported by a further provision in said section 10 by which the voters of a district may rescind a vote authorizing an expenditure for improvements to school property or may reduce the amount authorized for such purposes.

The board of education states that they have had prepared new plans for an addition to the old building without cost to the district and that it is their intention to proceed promptly to erect such addition. The plans of this proposed addition have never been submitted to a district meeting and so far as shown by the pleadings in this proceeding, such plans have not even been informally considered by any of the representative citizens of the districts. The action of the board is not unanimous on the proposition to erect an addition on the proposed new plans. Of three members of the board, a majority of *one* only

favor such proposition. The question is an important one. The voters and taxpayers have a right to express their wishes upon such question. A bare majority of the board of education should not assume to perform this function of a district meeting. Under all the circumstances in this case, the board of education should have complied with the request of the petitioners and called a special meeting. The board would have been justified in calling such special meeting to have also submitted to such meeting any other proposition for the solution of this question which it believed to be for the best interests of the district. The board should therefore call a special meeting of the voters of the district and submit to them now the proposition requested by petitioners and the proposition to erect an addition on the plans proposed by a majority of the present board.

The appeal herein is sustained.

It is ordered, That the board of education of union free school district no. 4, town of Orangetown, shall without unnecessary delay call a special meeting of the voters of said district for the purpose of considering the propositions named in a petition signed by nearly 600 residents of said district and presented to said board of education on or about the 27th day of February, 1908, and for taking such action thereon as the said voters shall determine.

It is further ordered, That the said board of education of union free school district no. 4, town of Orangetown, shall also submit to the voters of said district at the special meeting hereinbefore ordered such further propositions in relation to the erection of an addition to the schoolhouse in said district or in relation to repairs to said schoolhouse as the said board of education shall deem to be for the best interests of said district.

5365

In the matter of the appeal of Milton F. Kuhn from the action of Caleb Skilton, trustee of school district no. 1, town of Canadice, county of Livingston.

When the trustee of a district submits to the Commissioner of Education plans and specifications for a new building to replace one destroyed by fire and the trustee is authorized to proceed with the erection of the building but to modify the plans and specifications in minor details and the trustee acts in accordance with instruction, he will be sustained by this Department.

Decided December 16, 1907

Scott W. Crane, attorney for appellant
H. V. Pratt, attorney for respondent

Draper, *Commissioner*

The object of this appeal is to vacate a tax list issued by respondent trustee and including an item for the erection of a new schoolhouse. The ground upon

which this action is requested is that the plans and specifications for such schoolhouse have not been approved by the Commissioner of Education as required by section 17, title 7, of the Consolidated School Law. The records of this Department show that the trustee submitted his plans and specifications for the new building as the law provides. Such plans were not satisfactory in some of the minor details. They were returned to the trustee by the Chief of the Inspections Division of this Department with suggestions and instruction as to the changes which should be made. The district was without a schoolhouse as the old one had been burned. To facilitate matters the trustee was properly directed by the Chief of the Inspections Division to proceed with the erection of the building in accordance with the modifications suggested by him to the plans and specifications, and to submit such modified plans and specifications for formal approval when completed. There may have been some delay in submitting such plans but they have now been filed at this Department and approved by me. It appears that the building has been erected in accordance with such plans and specifications and that the trustee has acted in entire good faith in the whole matter.

The appeal herein is therefore dismissed.

3911

In the matter of the appeal of George C. Tredwell and others v. the board of education of union free school district no. 21, of the town of Hempstead, in the county of Queens.

Proceedings of a special meeting held in a union free school district at which a resolution was adopted to erect a new school building, and to authorize the borrowing of money therefor, to be paid in instalments, when statute has not been complied with, can not be sustained.

Decided September 23, 1890

Charles Bradshaw, attorney for appellant

Draper, *Superintendent*

A special meeting of the electors of union free school district no. 21, of the town of Hempstead, was called for and held July 7, 1890, at which a resolution was adopted to erect a new school building, and the board of education was authorized to borrow the sum of $18,000, to be paid in instalments.

Appellant alleges that the notice for such meeting did not comply with the statute in the following particulars:

1 It did not specify the amount which was voted at the meeting, or the object thereof.

2 The notice was not published in a newspaper published in the district, once in each week for four weeks.

The notice was as follows:

Rockville Centre, June 20, 1890

To whom it may concern:

Notice is hereby given to the inhabitants of union free school district no. 21, town of Hempstead, county of Queens, State of New York, that a special school meeting will be held in the schoolhouse of said district, on Monday, July 7, 1890, at 8 o'clock p. m., for the purpose of voting for or against the erection of a new school building, raising the funds for the payment thereof by issuing bonds running from five to thirty years, and providing for the redemption of said bonds and payment of interest by a tax upon the taxable property of the district.

(Signed) W. H. CONNELL
Acting Clerk of the District

No answer has been interposed, and the irregularities are therefore conceded.

The appeal is sustained, and the proceedings of the meetings above referred to are set aside and declared of no effect.

3883

In the matter of the appeal of George E. Fralick and others v. Jonathan E. Leach, sole trustee of school district no. 4, town of Marathon, Cortland county.

Action of a trustee who has constructed a new school building as directed by a commissioner's order, which condemned the old school building, sustained.

An appeal from trustee's proceeding, to be entertained, should have been promptly taken. It is too late to do so after the building has been completed and accepted by the authorities.

Decided July 11, 1890

Milo C. Paige, attorney for appellants
William D. Tuttle, attorney for respondent

Draper, *Superintendent*

This appeal is brought by residents and legal electors of school district no. 4, of the town of Marathon, Cortland county, from the action of the trustee relative to the construction of a new school building in said district, and his removal from office is asked for upon the ground that he has been negligent in the discharge of his duty, and has allowed the interests of the district to suffer by making a contract for the construction of the schoolhouse at a greater sum than other responsible bidders were willing to do the work for. The evidence shows that prior to the last annual meeting School Commissioner Stillman condemned the schoolhouse in said district, and ordered the erection of a new one, at a cost not to exceed $400. Subsequent to the service of such order, and before the last annual meeting, a special meeting of the district was held, and by a small majority, a motion to build a new schoolhouse was voted down. It is charged that the respondent voted with such majority. At the annual meeting

which was held a few days later, the respondent was chosen trustee. Subsequently he entered into a written contract with a resident carpenter of the district to build a schoolhouse according to certain plans and specifications set forth in the contract, at a cost of $400. The schoolhouse was built, accepted by the trustee, a tax list issued to levy a sufficient amount to pay the contractor, whereupon this appeal was taken and an order granted by this Department staying the collection of the tax pending the determination of this appeal. The respondent admits that he voted against the construction of a new schoolhouse, but alleges that he did so with a view of having the district annulled; that, when he became trustee, recognizing the fact that a large minority of the district were in favor of building a new schoolhouse, and that a district meeting had neglected to vote to build the same, the duty devolved upon him to do so, and that he entered into a contract, after consultation with the school commissioner, and which was approved by the school commissioner, to build a new schoolhouse.

It is not denied that, before plans and specifications had been agreed upon, a certain other resident of the district had offered to build a schoolhouse for something less than $400, but it appears that the party so offering was not willing to reduce his proposition to writing. The school building has long since been completed, and the school commissioner certifies that it is a suitable building, well constructed of good material, and the sum charged for the same reasonable.

After carefully considering the voluminous proofs offered by the respective parties to this appeal, I am led to the conclusion that the appellants were at fault, if they were dissatisfied with the contract and the manner in which the work was being done, in not promptly taking an appeal and asking for a stay, instead of waiting until the completion of the work, its acceptance by the trustee, and the establishment of a debt against the district in favor of the contractor, which no decision of mine could at this time affect. The appellants, it seems, stood idly by until they were called upon to contribute toward the payment for the work by the issuance of a tax levy and warrant. I do not find that there was any collusion between the trustee and the contractor, nor am I satisfied that the charge for the building was unreasonable. I am, however, satisfied that a good schoolhouse has been constructed, and that the contractor should be paid for his work.

The appeal is, therefore, overruled, and the stay heretofore granted herein vacated and set aside. The district collector will proceed to enforce the tax list and warrant.

3648

William Shackleton v. school district no. 8, of the town of New Hartford, Oneida county.

A district meeting has the right to secure plans and provide specifications for a new school building.

Appointing a committee to act with trustee, while conferring no power upon such a body, does not vitiate the proceedings of the meeting relative to the construction of a new building.

Where the amount appropriated for a new building exceeds $500, the school commissioner's approval must be obtained before a tax can be levied therefor.

The proceedings of a district meeting will not be disturbed for the reason that an elector failed to receive notice thereof, and it appears that the omission was unintentional, and that one additional vote would not have changed the result.

Seven-thirty o'clock in the evening not an unusual hour for a district meeting.

Decided December 5, 1887

Draper, *Superintendent*

At a special meeting held in district no. 8, of the town of New Hartford, on the 17th day of October 1887, it was voted that the sum of $1200 be raised for the purpose of the erection of a new schoolhouse in said district. The appellant seeks to overthrow this action, and alleges as his reasons therefor, first, that a previous school meeting had voted the sum of $1500 for the same purpose, and that such action had not been rescinded; second, that the meeting appointed a committee to secure and select plans for the new building, which he alleges was an encroachment upon the prerogatives of the trustee; third, that the tax was voted without the certificate, in writing, of the school commissioner approving a larger sum than $500; fourth, that no provision was made for applying the avails of the old building, and that, in consequence, the sum needed for the new one was indefinite and uncertain; fifth, that the notice of such special meeting was not properly served upon all entitled thereto.

There is little force in the objections of the appellant. The trustee of the district, in his answer, alleges and swears that the meeting of October seventeen did rescind, by a unanimous vote, the action taken at a former meeting raising $1500 for a new building. Whether it did or not is not very material, for the action of the seventeenth of October, by a necessary implication, supplanted the former action. In relation to the objection that the district appointed a committee to secure plans for the new building, and to provide specifications as to the details thereof, it may be said that the district had the right to do this. The district certainly could not take the erection of the building out of the hands of the trustee, but it would have the right to direct him as to the kind and character of the building which he should erect. The trustee swears that the commissioner has verbally given his approval of the action of the meeting, and has stated that he would do so in writing when the plans, so far as heating, ventilation and lighting are concerned, were ready for his approval. In any event, the statute which requires the approval of the school commissioner before a sum in excess of $500 can be raised, only provides that the trustee shall not levy the same until such approval has been given. There is nothing to prevent the district voting the amount without such approval. Indeed the statute implies that it *shall* do so. That the district failed to say what should be done with the avails of the old building is not important. In the absence of such action by the district, the law provides as to the disposition of the proceeds of the old building. The appellant's objections to the sufficiency of the notice are not important. He offers the affidavit of one person who swears that she is a resident and taxpayer

in the district, and that she would have attended the meeting if she had had notice. This is the only proof upon this point. The trustee, on the other hand, swears that the notice was served upon every resident of the district, and specifically alleges that the person referred to has not been a resident of the district, but of the city of Utica, for the last two years. In any event, it does not appear that, even though such person had been present, and had voted against the proposition, it would have changed the result. It is alleged that the meeting was held at an hour so that old and infirm persons could not well attend, but it seems to have been held at 7.30 in the evening, which is the hour at which school meetings in the district have ordinarily been held, and I do not deem it an unseasonable hour.

For these considerations the appeal must be dismissed.

3613

In the matter of the appeal of Nelson Reese and others v. school district no. 15, of the town of Florida, Montgomery county.

The proceedings of district meetings directing the erection of a new school building, which would furnish accommodations for more children than there are at present residing in the district, sustained where it is shown that the population of the district is rapidly increasing.

Decided June 23, 1887

Draper, *Superintendent*

This is an appeal by certain residents and taxpayers in district no. 15, of the town of Florida, Montgomery county, against the action of certain district meetings, held upon the 21st day of March 1887, the 11th day of April 1887, and the 9th day of May 1887, whereby it was determined to change the site and erect a new schoolhouse, at an expense not to exceed the sum of $3000, and to raise the necessary funds by the sale of bonds, payable in nine yearly instalments. The appellants urge, as the grounds of their appeal, that the motions or resolutions providing for the change of site and the erection of the building, and the raising of the funds necessary therefor, are indefinite and uncertain; that they fail to state the kind, size, quality, dimensions or site of the proposed school building, or when it is to be ready for use; that they fail to fix any definite sum of money to be expended for said proposed schoolhouse; that they do not state the amount of par value of the bonds, or the rate of interest to be paid on them, and that said bonds will not be negotiable and will not bind the district, because unauthorized and illegal, and that, when the meeting of the 11th of April adjourned, the motion for adjournment fixed two different times or dates, in consequence of which the time of the adjourned meeting was indefinite and its acts were unlawful and void. It is also urged that the proposed new schoolhouse is much larger than the district requires, and that the purpose of the trustees in

erecting so large a building is that they may rent the second floor for other than school purposes, and that the amount of money proposed to be expended in the erection of a new schoolhouse is excessive and extravagant. It is claimed that the district now has a school building sufficiently large for its needs.

The answer to this appeal is made by James Finlan and others, and sets forth that the meeting of March 21st was regularly called and that the subsequent meetings were held in pursuance of regular adjournments. It is admitted that there was some misunderstanding as to the time of one of the adjourned meetings, but that this was cured by the publication of notices in the district. It is alleged that all of the proceedings of these meetings were regularly taken. It is set forth that the schoolhouse in the district has become inadequate to the needs of the district and unfit for use, and that the district is growing in population; that the building which it is proposed to erect would be somewhat larger than the present needs of the district will require, but it is said in explanation of the determination to erect a "four-room" building that it can be done at very little expense beyond what would be required for the erection of a "three-room" building, which would, in any event, be necessary. It is denied that there is any intent or purpose of providing a room for other than school purposes. It is denied that there is any indefiniteness or uncertainty as to the terms of the resolutions appealed from.

It is customary to sustain the action of district school meetings unless it be clearly shown that such action is contrary to, or unauthorized by, the laws or is clearly and manifestly opposed to the educational interests of the district. It is assumed that the majority of the qualified electors in any school district know best what is for the educational interests of the district, and their acts will be upheld unless it is made plainly to appear that the contrary is the fact, or that such acts have not the sanction of the statutes covering such matters. I see no irregularity in the proceedings of the district meetings here under consideration which is sufficient to set aside the action appealed from. There seems to have been ample time for discussion and consideration, and the requirements of the statutes in relation to the manner of taking and recording the vote, seem to have been observed. The meetings were evidently well attended, as upon the vote relative to a change of site there were 103 votes cast. In determining what particular site should be chosen, there were 74 votes cast, the choice falling upon the property owned by J. H. Enders, by a vote of 41 to 33. I think that the adjournments from one time to another were regularly taken. The contrary is not shown with any degree of definiteness, and if there was any uncertainty as to the time to which an adjournment was taken, the same seems to have been fully cured by the publication of notices of the time of the adjourned meeting, and whether this was done or not, it is not shown that any one was misled or stayed away from the adjourned meeting in consequence of it.

It is proper for the district to anticipate future growth. It would be suicidal for a district which was rapidly increasing in population to erect a new schoolhouse which would only be sufficient for present needs. But a district

ought to act with prudence and reason in such a matter. From the allegations and proofs of the parties in this case, I am led to think that the district went as far as it ought to in erecting a school building which should contain four rooms —perhaps farther than it was well to go. The answer of the respondents indicates that there are but 148 children of school age residing in the district. This being so, the attendance upon the school ordinarily would not be more than two-thirds of that number, and this being so, it is evident that the district does not at present require a building of the size contemplated. And there is some proof to show that the population of the district is growing with some rapidity. I think perhaps it is true that the district requires a building which shall have three departments, and I am well aware of the fact that but small additional expense will now be incurred in making room for a fourth department when it shall be needed, while from an architectural point of view, it is probable that a building of four rooms will be more perfect and better suited to school uses. While I have had considerable doubt upon this point, I have not been able to determine that upon that account I ought to overrule the deliberate and regular proceedings of the district meetings.

In view of the foregoing considerations I dismiss the appeal.

3584

In the matter of the appeal of Atwell & Co. v. the board of education of union free school district no. 1, town of Westchester, Westchester county.

A board of education was authorized by special law to construct a new school building, by contract, to be entered into with the lowest bidder. The lowest bidders admit that their proposition did not conform to the specifications for the same, furnished by the board, but insist that in each instance where the bid differed from the specifications, the variance was more favorable to the board than to them.

Held, that the board was justified in disregarding their bid.

Decided April 5, 1887

A. W. Paige, Esq., attorney for appellant

Draper, *Superintendent*

The board of education of union free school district no. 1, of the town of Westchester, is engaged in the erection of a new school building, under the authority conferred by the general school laws of this State, and particularly of chapter 36 of the Laws of 1886, having special reference to this particular district. Being so engaged the board advertised for bids from parties willing or desirous to furnish the building with steam-heating apparatus, and in response to such advertisement received five different propositions, the lowest of which was submitted by the appellant herein. Atwell & Co. offered to supply the apparatus for the sum of $2535, while Gillis & Geoghegan proposed to do so for the sum of $2925. The board accepted the proposition of Gillis & Geoghegan. From this action, on the part of the board, Atwell & Co. bring this appeal.

The statutes, under which the board is acting, provide that the building should be erected by contract with the lowest bidder or bidders, and further provide that the board might refuse to accept any bid made, for reasonable cause. Aside from this statutory restriction upon the action of the board, it would have the right to accept such bid as it should see fit, regardless of the amount thereof, provided its action should be untainted with fraud; or, at least, should not be so injudicious or indiscreet as to overthrow the presumption of ordinary sound business management in the transaction of the public business in which it is engaged. To entitle the appellants to the relief which they seek, it would be necessary to show that the different bidders proposed to do precisely the same things for different amounts and that, the other things being equal, the board deliberately refused the lowest bidder.

In this case it appears that the board supplied to different bidders specifications setting forth, in detail, what would be required in connection with steam-heating apparatus. The appellants admit that they did not bid upon these specifications. Their offer was set forth in detail, and they say that they offered to furnish more than the board required. They insist that their specifications were substantially like those furnished by the board and that, in each instance where there was variation, the difference was more favorable to the board than to the bidders. The respondent denies this. There is no allegation of fraud against the action of the board set up in the papers, nor is there any proof which would sustain such an allegation, and fraud is never to be imputed in the absence of proof. It being stated that the specifications upon which the different bids were made were not identical, the board of education was the only judge as to which proposition it was to the advantage of the district to accept. This would be particularly and emphatically true of propositions to supply heating apparatus, for the different kinds and systems are so dissimilar that it would seem practically impossible to determine the question by competitive bids, unless it should be left to the discretion of the board to accept such as it might think most desirable.

For these considerations I feel obliged to dismiss the appeal, and it is so ordered.

3987

In the matter of the appeal of Brinkerhoff Myers and others v. school district no. 6 of the town of North Hempstead, county of Queens.

An appropriation was made at an annual district meeting for the construction of a school building. No action was taken by the school authorities in pursuance of such vote. A subsequent meeting was held at which a smaller appropriation was made for the same purpose, and a plan for building adopted in accordance with the vote. From the action of the latter meeting an appeal is taken.

Proceedings of the second meeting sustained. Appeal dismissed.

Decided July 25, 1891

Draper, *Superintendent*

It appears that, at the annual school meeting held in 1890, the district above named made an appropriation of $3300, and approved plans for the erection of a new schoolhouse. The board of education took no steps in pursuance of this action, for the reason that some doubt was entertained as to its validity. Recently, a special meeting has been held in the district, at which the sum of $3000 was voted for the purpose named, and different designs and plans for a new schoolhouse were adopted. From this latter action, Mr Myers appeals to the Department.

Two questions are presented, first, whether the action of the annual meeting in 1890, in voting to raise the sum of $3300, is valid; and second, as to which of the two sets of plans and specifications shall be used.

No sufficient reason is shown for overthrowing the action of the recent special meeting. It seems to have been regularly called and well attended. The action of this meeting in voting to raise $3000 for the erection of a new schoolhouse, was taken only upon the assumption that there was doubt as to the validity of similar action a year ago. The board of trustees assures me that they believe the action of the annual meeting in 1890, in this regard, was invalid. In any event, the recent action must be held to be conclusive of the matter, and must be given force and effect. The board of education will proceed with the erection of a school building, to cost not to exceed $3000.

Touching the plans which shall be used, it must be said that the action of the last meeting should be followed, inasmuch as it is not made to appear that the designs last adopted are not suited to the educational interests and needs of the district. The district has a right to change plans before the work is entered upon, as was done in the present case.

The appeal is therefore, dismissed, and the action of the special meeting held on the 15th day of July 1891, is held to be valid and binding.

3942

In the matter of the appeal of Jacob P. Lansing and others v. S. C. McKown and Enos Fike, as trustees of school district no. 11, town of Schodack, county of Rensselaer.

Action of a board of trustees in accepting a school building which is well and properly constructed, worth the cost of the same and where there has been a substantial compliance with the terms of the contract, sustained.

Decided December 18, 1890

Draper, *Superintendent*

This appeal is an application to remove S. C. McKown and Enos Fike from the office of trustee of school district no. 11, Schodack, Rensselaer county.

The grounds are that the trustees have been derelict in duty in accepting a school building before the same was completed according to plans and specifica-

tions, and in permitting the contractor to do work upon such building not specified. Also in insuring the school building for one year, when the district meeting directed them to effect an insurance for three years, and appropriated nine (9) dollars for that purpose; in refusing to call a special meeting when requested by the inhabitants for the purpose of filling a vacancy in the office of trustee; that there is a difference of opinion existing between the respondents, as trustees, as to the disposition which should be made of a litigation which is pending against the district.

Respondents admit insuring the building for one year, and allege that the amount voted was insufficient to insure it for a longer time. They deny that the building was accepted before completion, and say that changes in the plans and specifications were made, and that they were authorized to make such changes, and that in making such changes they used their best judgment, and consider them to have been beneficial.

At the time this appeal was taken, an investigation was proceeding before L. N. S. Miller, Esq., school commissioner of the second commissioner district of Rensselaer county, in the matter of an appeal involving the question as to the construction of the school building in question. The result of such examination is before me, and is considered in connection with this appeal. From an examination of the evidence submitted, I am satisfied that there has been a substantial compliance with the contract. Some slight changes have been made, but as a whole, the building is well and properly constructed, and is worth the cost of the same.

The item of insurance is too trivial to be considered. The charge for insurance is well established, and it is not charged that the amount of premium paid was unreasonable for the amount of insurance effected.

I shall sustain the appeal so far as it relates to the neglect of the trustees to call a special meeting to fill the existing vacancy in the office of trustees. That meeting should have been called, and the electors given an opportunity to act upon the question of selecting the district officers. Otherwise, the appeal is overruled.

The trustees are hereby ordered and directed to forthwith give notice of a special meeting to fill any existing vacancy in a district office.

3955

In the matter of appeal of James Cunningham and others v. union free school district no. 2, town of Greenburgh, county of Westchester.

At an adjourned annual meeting in a union free school district, which adjournment was had to consider the erection of a schoolhouse, an appropriation was voted therefor.

A large appropriation was made, but the wealth of the district is sufficient to justify it

Notice of the adjourned meeting, which was for a less period of time than thirty days; *held* unnecessary.

Notices of certain meetings are required to be published in newspapers actually published in the district; *held,* not to intend papers circulated but not published therein.

The attendance at the adjourned meeting was considerably less than at the original meeting; *held,* not to affect validity of the meeting or its proceedings.

In the construction of a costly school building, the very best architectural talent should be employed, and opinions of electors of the district respected.

Decided January 26, 1891

William W. Bryan, attorney for appellant
L. T. Yale, attorney for respondent

Draper, *Superintendent*

At an adjourned annual school meeting in the above-named district, held on the 2d day of November 1890, it was voted to raise the sum of $10,000 by tax for the purpose of erecting a new schoolhouse at the village of East Irvington in said district. The appellants object to this action on various grounds. The principal objections are that no adequate notice of the proposed action was given, and that the circumstances do not necessitate so large an expenditure.

I do not find any irregularity in the proceedings which is sufficient to overthrow the action objected to. The meeting at which such action was taken was not, technically, a special meeting. At the annual meeting, at which 321 persons were present, it was voted to adjourn until the evening of the 2d of September, for the purpose of considering this precise question. The trustees posted notices for the period of twenty days. There was no newspaper published in the district. It is claimed that numerous newspapers circulated in the district, but there is nothing in the statute which would require the board to publish notices in the newspapers circulated in the district. Publication only is required in the case of newspapers actually published in the district. Eighty persons were present at the meeting. It is true that there was no such large representation at the adjourned meeting as at the regular annual meeting, but that fact is not sufficient to invalidate the action of the adjourned meeting. It is said that there are only 50 or 75 children to attend school at the point where it is proposed to erect a new schoolhouse, and that it is not necessary to erect so costly a house. It is then only a question as to how much should be expended for one. There is probably no other union free school district in the State of New York containing as much wealth as this one. The valuation upon which school taxes are levied, exceeds $3,000,000. This district can well afford to build a schoolhouse which shall be a model, and which shall thus promote the cause of school architecture generally.

Inasmuch as a regularly adjourned annual meeting seems to have acted regularly in voting to raise $10,000 for such a purpose, in such a district, I see no good reason why the Superintendent should intervene to prevent it.

There is some complaint that the board proceeds without consulting interested parties in the district, as to the character and plans for the new structure. There should be no mistake upon this point. The very best architectural talent should be employed, and the best opinions in the district respected.

Under all the circumstances, I have determined, as was indicated at the time of the argument, to direct the board to call a special meeting of the district

for the purpose of permitting it to have full information as to the character of the building which it is proposed to erect. The board should so plan as to complete the structure and furnish it with the sum appropriated. When the plans and specifications are completed, the board is directed to lay the same before a special meeting of the district.

In view of all these considerations, the appeal is dismissed.

4337

In the matter of the appeal of Frederick Cramer and others from proceedings of a special school meeting held December 21, 1894, in school district no. 3, town of Great Valley, Cattaraugus county.

The inhabitants of a school district, entitled to vote, when duly assembled in any district meeting, have the power, by a majority of those present and voting, to vote to hire or purchase rooms or building for schoolrooms or schoolhouses or to build schoolhouses. Where a district owns a schoolhouse it is not necessary as a condition precedent to the power of the voters of said district to vote to erect a new schoolhouse, that such schoolhouse should have been condemned by the school commissioner.

Decided March 11, 1895

E. D. Northup, attorney for appellants
G. M. Rider, attorney for respondent

Skinner, *Superintendent*

The appellants in the above-entitled matter appeal from the action and proceedings of a special school meeting held on December 20, 1894, in school district no. 3, town of Great Valley, Cattaraugus county.

The principal grounds alleged in said appeal are that said meeting was not duly called and held, and that the proceedings had and taken at said meeting were in violation of the school law.

An answer to the appeal has been interposed, and to the answer a reply and to the reply a rejoinder.

The following facts are established by the proofs presented herein: That the respondent herein, Edward M. Shaffer, was in December 1894, and still is, sole trustee of school district no. 3, town of Great Valley, Cattaraugus county; that on or about December 11, 1894, a petition, signed by fifteen of the inhabitants of said district that a special meeting of said district be called to vote on the question of a new schoolhouse in said school district, was delivered to the trustee of said district; that said trustee wrote out a notice calling a special meeting of said school district, to be held at the schoolhouse on December 20, 1894, for the purpose of voting upon the question of erecting a new schoolhouse in said district, and if carried, to transact such other business as may be necessary, which shall pertain to the erection of said schoolhouse, said polls to open at 7.30 p. m. and remain open one hour, and on December 12, 1894, delivered

said notice to the clerk of said district with directions to serve the same; that thereupon said clerk on the same day posted written copies of said notice in several public places in said district including the post office, and each of the two general stores in said district, and in addition thereto, read and stated the contents of said notice to many of the voters of said district; that an annual school meeting held in said district at some date prior to said December 1894, it was voted that special meetings of said district be called by posting notices; that from said December 12 to December 20, 1894, the fact of such special meeting being called and the matters to be acted upon thereat were generally known and discussed by the qualified voters of said district; that said district has about 141 qualified voters residing therein; that on said December 20, 1894, the qualified voters of said district assembled at the schoolhouse in pursuance of said notice and duly organized by the election of a chairman, the clerk of the district acting as clerk, and the appointment of two tellers or inspectors of election, and an assistant clerk; that the appellants herein were present at said meeting; that a motion was made and adopted to proceed to ballot for the proposed schoolhouse and thereupon a ballot was taken upon the question of erecting a new schoolhouse, said ballots being printed and having thereon respectively "for building a new schoolhouse" and "against building a new schoolhouse"; that a poll was kept upon which was entered the name of each person whose vote was received; that at the close of the polls the vote was duly canvassed and the result announced, namely, whole number of votes cast was 109 of which 67 votes were "for" and 42 votes "against" building a new schoolhouse; that motions relative to the cost of the schoolhouse were made by one Kane and one Richards, and one Chase presented a resolution that the district appropriate not less than $3000 and not more than $4000 to build said schoolhouse and that the district be bonded for four-fifths of the amount, the bonds of which shall not be sold for less than par, payable in one, two, three and four years, and the balance of one-fifth be raised by tax during the summer of 1895; that an amendment to the resolution, the schoolhouse be completed inside of the $4000 was offered and accepted by the mover of said resolution; that a resolution was presented that the whole sum be raised the first year and a vote taken thereon, such being ascertained by taking and recording the ayes and noes of those present and voting, and said motion lost, the whole number of votes being 91 of which 18 were in favor and 73 against; that said resolution was further amended by the addition that said schoolhouse should be of brick, and that a vote was then taken thereon which vote was ascertained by taking and recording the name of each person who voted and setting opposite to said name whether such person voted aye or no, with the following result, namely, whole number voting 62 of which 61 were for and 1 against the resolution.

It also appears that of the 141 qualified voters in the district 109 were present and voted at said meeting; that one voter at least who did not vote was present at said meeting; that of the 31 not affirmatively appearing to have been present all but 11 are shown to have lived respectively in the same family with

other voters who were present and voted at said meeting, and must be presumed to have had knowledge of the meeting, and 10 of the 11 are shown to have had actual notice.

The provisions of the Consolidated School Law of 1894, chapter 556 of the Laws of 1894, which went into effect on June 30, 1894, were in operation in December 1894.

Under the provisions of said law trustees of school districts have power and it is their duty to call special meetings of the inhabitants of such districts whenever they shall deem it necessary, and a special meeting shall be held whenever called by the trustees. It is not required by the school law that to legally call and hold a special meeting in a district the trustees should be required to do so by a call or petition on the part of the voters. This Department has held that when any considerable number of the voters of a district do make such request the trustees should call the meeting. When a special meeting is called the notice thereof shall state the purposes for which it is called and no business shall be transacted at such meeting except that which is specified in the notice. When special meetings are called a notice thereof shall be served upon each inhabitant of the district qualified to vote at district meetings, at least five days before the day of meeting by reading the notice in the hearing of every qualified voter, or in case of his or her absence from home by leaving a copy thereof, or so much thereof as relates to the time, place and object of the meeting at the place of his or her abode; but the inhabitants of any district may, at any annual meeting, adopt a resolution prescribing some other mode of giving notice of special meetings which resolution and the mode prescribed thereby shall continue in force until rescinded or modified at some subsequent annual meeting. The proceedings of no district meeting, annual or special, shall be held illegal for want of a due notice to all the persons qualified to vote thereat, unless it shall appear that the omission to give notice wilful and fraudulent.

The respondent herein, as trustee of said district, had the power under the provisions of the school law, to call special meetings of said district either upon a call or petition of any number of the voters of said district, or without any such call or petition. The purposes for which the meeting was called were sufficiently stated. The notice of said meeting was duly given under a resolution adopted at an annual meeting of the district prescribing the mode of giving notice of special meetings of said district, and which resolution does not appear, from the proofs herein, to have been rescinded or modified. Assuming for the sake of argument only that no such resolution was ever adopted by said district, there is no proof that the omission to give the notice in the manner required by the school law was wilful and fraudulent, and that the proceedings of said special meeting shall not be held illegal for want of said notice.

It appearing that the appellants herein were all present at said special meeting they have not been injured by any failure to receive due notice thereof.

The inhabitants entitled to vote, when duly assembled in any district meeting, have the power under the school law, by a majority of those present and

voting, to vote to hire or purchase rooms or buildings for schoolrooms, or schoolhouses, or to build schoolhouses. Where a district owns a schoolhouse it is not necessary as condition precedent to the power of the voters of said district to vote to erect a new schoolhouse, that such schoolhouse should have been condemned by the school commissioner under the provisions of subdivision 4, section 13, title 5 of the Consolidated School Law of 1894. The power of condemnation of a schoolhouse, given by the school law, is to require the erection of new schoolhouse where the schoolhouse of the district is wholly unfit for use and not worth repairing, and it has become apparent that it is not the intention of the qualified voters of the district to take steps for the erection of a new schoolhouse. Where in any school district, as is shown in this appeal, the schoolhouse is unsuitable and inadequate for the needs of the district, the voters of said district have the power in their wisdom and discretion to vote to build a new schoolhouse.

Under the school law, no tax voted by a district for building, etc., a schoolhouse exceeding the sum of $800 shall be levied by the trustees unless the commissioner in whose district the schoolhouse of said district so to be built is situate shall certify in writing his or her approval of the larger sum. It is affirmatively established herein that the school commissioner has so certified in writing her approval of the sum voted to be raised for building a schoolhouse at the special meeting of said district no. 3, held on December 20, 1894. By section 18, article 2, title 7 of the Consolidated School Law of 1894, the voters at a school district when they shall have voted a tax for the building of a new schoolhouse have the power by a majority vote of those present and voting, which vote shall be ascertained by taking and recording the ayes and noes of those attending and voting, that said sum shall be raised in instalments; that thereupon the trustees are authorized to cause the same to be raised in the same manner as other school taxes; but the payment or collection of the last instalment shall not be extended beyond twenty years from the time such vote was taken; and no such vote to levy any such tax shall be reconsidered except at an adjourned meeting, annual or special, to be held within thirty days thereafter; that for the purpose of giving effect to such provisions trustees are authorized to borrow so much of the sum voted as may be necessary at a rate of interest not exceeding 6 per cent, and to issue bonds or other evidence of indebtedness therefor, which bonds, etc., shall not be sold below par.

Said special meeting in said district voted a tax of not less than $3000 or more than $4000 to build a new schoolhouse of brick, said schoolhouse to be built and completed within said sum of $4000, and that said sum be raised by instalments, to wit: in five instalments, one instalment to be collected by tax during the summer of 1895 and the other four-fifths to be raised in one, two, three and four years; that the vote upon said resolution was ascertaind by taking and recording the ayes and noes of those present and voting.

The aforesaid action of said special meeting in voting a tax for a new schoolhouse and that the sum so voted be raised in instalments, was a com-

pliance with the provisions contained in said section 18, and this action can not now be reconsidered. It having been stated in the resolution that one-fifth of the sum was to be raised by taxation in the summer of 1895, and the balance raised in one, two, three and four years, it was not necessary that the resolution should contain anything with reference to bonds, as under the provisions of said section it is the duty of the trustee to borrow the money necessary for the other four-fifths of the sum voted and to issue bonds etc. in the manner stated in said section.

The appellants have failed to sustain the appeal herein and said appeal should be dismissed.

Appeal dismissed.

4225

In the matter of the appeal of board of education of union free school district no. 10, town of Newtown, Queens county v. John B. Merrill, school commissioner, second district, Queens county.

In the application by school district officers to a school commissioner for the approval of plans for the ventilating, lighting and heating of a new school building the only question the commissioner is officially called upon to decide is whether the system of heating, ventilating and lighting such building, constructed in accordance with the plans and specifications prepared by the architect and adopted by the school officers, is a proper and adequate one. Where it appears in an appeal from the action of the commissioner, in refusing to aprove such plans and specifications, that the same are proper and adequate, the action of the school officers should be approved and the decision of the commissioner vacated.

Decided March 9, 1894

Crooker, *Superintendent*

This appeal is taken from the order of the respondent as school commissioner of the second commissioner district of Queens county, made on August 14, 1893, disapproving and rejecting the revised plans adopted by the appellants for ventilating, heating and lighting a new school building to be constructed in union free school district no. 10, town of Newtown, Queens county.

It appears from the papers presented upon this appeal, that said district designated a new school site and voted to purchase the same and for the erection of a new school building thereon; that the sum of $30,000 was voted, of which $10,000 was for the site and $20,000 for the school building, which sum was to be raised in instalments; and the board of education was authorized to issue bonds for said sum of $30,000; that the bonds were duly issued and sold and the proceeds thereof in the hands of the treasurer of the board of education; that an architect was employed and plans and specifications for the new school building were prepared and adopted; that the subject of heating, ventilating and lighting the new school building received the attention of the board, and investigations were made as to the methods of heating, ventilating and lighting

school buildings, and especially what are known as the Smead and Fuller & Warren systems; and subsequently the board invited proposals from the representatives of each of said two systems, and such proposals, with plans and specifications, were received from each; that a committee of the board visited school buildings in various places where each of said two systems of heating, etc., was in use, and after said committee had reported and on June 13, 1893, said board decided to adopt the Fuller & Warren; that the Fuller & Warren Company thereupon, at the request of said board, prepared plans and specifications for heating and ventilating as adapted to the proposed new school building to be erected in accordance with the plans and specifications therefor prepared by the architect and adopted by their board, for submission to the respondent for his approval; and the same were submitted to the respondent, who make objections to the same; that subsequently revised plans and specifications were made by Fuller & Warren and the architect of the new school building and approved by said board and forwarded to the respondent for his approval; that on August 14, 1893, the respondent made his order and decision disapproving of such revised plans and specifications.

Under the Consolidated School Law it is provided that no schoolhouse shall be built in any school district in the State until the plan of such schoolhouse, so far as ventilation, heat and lighting is concerned, shall be approved in writing by the school commissioner of the commissioner district in which the district in which the schoolhouse is to be built is situated. Under the said school law an appeal may be taken to the Superintendent of Public Instruction from an official act and decision concerning any matter under said school law.

It seems from the correspondence between the appellants and respondent relative to the plans, etc., for heating and ventilating said new school building as the copies thereof were presented in this appeal, that the respondent favored the Smead system of heating and ventilating, and endeavored to have such system adopted by the appellants.

The only question the respondent was officially called upon to decide was, whether the system of heating and ventilating a building, constructed in accordance with the plans and specifications prepared by the architect and adopted by the appellants, as contained in the revised plans and specifications of the Fuller & Warren Company and adopted by the appellants, was proper and adequate. While the order and decision of the respondent, of August 14, 1893, contains other matters than that upon which his decision was asked, it contains a disapproval of the plans, etc., so far as ventilating, heating etc., are concerned in the new school building to be erected, approved by the appellants. From such order and decision this appeal is taken.

I have carefully examined the plans and specifications of the architect of the new school building, to be constructed, and the revised plans and specifications for heating and ventilating such building, prepared by the Fuller & Warren Company and approved by the appellants, and submitted to the respond-

ent for his approval. After such examination I am satisfied that the method of heating and ventilating of such a building as the plans and specifications of the architect call for, as set out in the revised plans and specifications of the Fuller & Warren Company, and adopted by the appellants, will afford proper, suitable and adequate ventilation and heat for such new school building.

I am of the opinion that the appeal herein should be sustained; that the order made by the respondent on August 14, 1893, appealed from, should be vacated; that the appellants be permitted to go on with the construction of their new school building in accordance with the plans and specifications adopted by them, and so far as the heating and ventilating of the school building are concerned, in accordance with the said revised plans, etc., of the Fuller & Warren Company, adopted by the appellants.

The appeal herein is sustained.

It is ordered. That the order of John B. Merrill, school commissioner of the second commissioner district of Queens county, bearing date August 14, 1893, entitled "In the matter of the new school building to be erected in union free school district no. 10 of the town of Newtown," be, and the same hereby is, vacated.

It is further ordered, that the system of heating and ventilating of said new school building, in accordance with the revised plans and specifications of the Fuller & Warren Company, approved by the board of education of said district, presented to said Merrill, as school commissioner, for his approval, and disapproved by him, be, and the same are, hereby approved.

3657

In the matter of the appeal of E. R. Greene and Henry E. Denison v. school district no. 8, of the town of Berlin, county of Rensselaer.

An annual school meeting may vote a tax to fit up a part of a school building, although special notice of such proposed action has not been given.

Persons who do not attend an annual meeting are not in a position to object to its proceedings upon the ground that they were not present.

The action of an annual meeting in providing for a janitor to live on the premises, where the schoolhouse is located in an isolated place, in order to prevent the recurrence of depredations and consequent injury of property, sustained.

Decided December 15, 1887

Draper, *Superintendent*

At the annual school meeting, held in school district no. 3, of the town of Berlin, county of Rensselaer, on the 30th day of August last, a motion was adopted to finish off a vacant part of the schoolhouse for the purpose of enabling a janitor for the building to live therein, at an expense not to exceed $75. The trustees proceeded to carry out the resolution, and afterwards levied

a tax for the sum of $70, to pay the expenses of the changes. From such action this appeal is taken. It is insisted by the appellants that such action could not be taken at an annual meeting without special notice thereof in advance, and also that, while there were 192 legal voters in the district, but 25 were present. I think that section 15 of title 7 of the Consolidated School Act contains sufficient authority to have enabled the annual meeting to take the action which it did without any special notice thereof in advance. This being so, it is not material whether the meeting was largely attended or not. Persons who remained away are not in position to complain.

The appellants seek to avoid the tax which is the result of the action of the district meeting. If the meeting had the lawful authority to take the action which it did, then the tax which is resultant from such action must be paid. This would be so, even though the action taken was unwise. I think it would also be so as to any actual indebtedness incurred by trustees in carrying out the directions of a district meeting, even in case the meeting acted without lawful authority. It seems entirely clear to me in any event, that the tax must be paid.

The principal question which has addressed itself to my mind touching this matter is, whether the presence of a family in the schoolhouse is detrimental to the quiet and comfort of the school and injurious to the best interests thereof. For the purpose of determining that question, I directed the school commissioner having jurisdiction, to notify the respective parties, and take their testimony with reference to it. He has reported that he gave the requisite notices of a time and place for hearing, and that he attended at such time and place for the purpose of taking their testimony; that the respondents appeared with several witnesses and were sworn, but that the appellants entirely failed to appear. From the testimony of the witnesses of the respondents, it appears that the schoolhouse in question stands in a somewhat secluded place; that, for several years, it has frequently been broken into, and that it has been repeatedly entered by marauders; that, upon numerous occasions, it has been defiled, and that frequently obscene language and pictures have been placed upon the blackboards and walls. It is alleged that, in consequence of this, the arrangement to have the janitor live in the building for the purpose of protecting it was effected. The members of the board of trustees and the two teachers who were employed, and other citizens whose standing is not questioned, swear that the arrangement has resulted in preventing the depredations referred to; that it has been a help rather than an inconvenience to the school, and that no annoyance has been suffered in consequence of it.

In view, therefore, of the fact that the annual meeting had authority to do what it did, and of the proof that what it did was not against the interests of the school, I am compelled to dismiss the appeal.

3663

In the matter of the appeal of Henry C. Cole v. George E. Sunderland, trustee school district no. 6, town of Carmel, Putnam county.

A tax regularly voted for the purpose of building a new schoolhouse will not be required to be refunded for the reason that the old school building had not been sold and avails applied to diminish the amount of said tax.
The trustee could not sell the old building until so directed by the district meeting.
While the statute permits a sale of the old building, it does not require it.
Decided January 27, 1888

Draper, *Superintendent*

This is an appeal by a taxable inhabitant of school district no. 6, town of Carmel, Putnam county, against the sole trustee of said district and the relief asked for is that the trustee be required to refund a tax of $1000 regularly voted by a district meeting for the purpose of building a new schoolhouse, etc.

The ground of the appeal is that the old schoolhouse owned by the district was not sold and the avails applied to diminish the amount of tax for building a new schoolhouse according to law.

It is unnecessary to delay the consideration of this appeal to await the service of an answer as the allegations of the petition are insufficient to sustain the appeal.

The trustees could not sell the old building until authorized by a vote of the district meeting, and this is not alleged to have been done.

The statute permits a sale but does not require it and wisely too, for in some cases the use of both buildings is needed and in almost every case the use of the old building should be retained until the new building is ready for occupancy.

The appeal is overruled.

3614

In the matter of the appeal of Coleman S. Townsend v. Cornelius Hill, as sole trustee of school district no. 3, town of Carmel, Putnam county.

Since the passage of chapter 480, Laws of 1847, an old school building need not be disposed of until a new schoolhouse is completed upon another site.
Decided July 13, 1887

Draper, *Superintendent*

This proceeding is an appeal by a resident and taxpayer of school district no. 3, town of Carmel, Putnam county, against Cornelius Hill, as sole trustee of said school district.

The appellant asks that the trustee be required to refund to the taxpayers of said district, certain moneys raised by tax upon the taxable property of said district for the purpose of purchasing a new and different schoolhouse site and building a new schoolhouse.

The ground urged by appellant for such relief is that the old house owned and occupied by the district as a schoolhouse, was not sold before the levying of the tax aforesaid, and the avails applied in diminution of the amount needed to build a new schoolhouse as required by law.

An answer has been interposed by the trustee, the allegations of which it is not necessary to consider in deciding this appeal. The only question which presents itself is this: Does the law require the sale of an old school building before the levying of a tax to build a new one?

The appellant refers me to a decision of this Department rendered by Young, Superintendent in 1844, holding the affirmative of this proposition. I find that subsequently to such decision, chapter 480 of the Laws of 1847 was passed, and section 74 thereof is now substantially section 21 of title 7 of the Consolidated School Act.

This section in positive terms clearly authorizes and contemplates first, the building of a new schoolhouse, and then the sale of the old building, and since the passage of the statute aforesaid, the Department has uniformly held to that effect.

There are many reasons which will suggest themselves as to the wisdom of this statute, foremost among them, the advantages of continuing school in the old building until the completion of a new building, so that there may be no interruption of the school.

The appeal is overruled and the trustee sustained.

3720

In the matter of the appeal of Katharine P. Chamberlain v. Everett O'Neill, school commissioner of the first commissioner district of Wayne county.

The action of a school commissioner in condemning a building as unfit for use and not worth repairing, will be upheld unless overwhelming proof is adduced that it should not be.

Decided October 25, 1888

Draper, *Superintendent*

This is an appeal from an order made by the respondent, as school commissioner of the first district of Wayne county, condemning the schoolhouse in school district no. 23 of the town of Sodus as unfit for use, and not worth repairing, and directing the erection of a building to cost at least $750 in said district. The appellant urges that the schoolhouse referred to can be repaired so as to be suitable for use at an expense of $200. She admits that the building, which is of stone, is badly cracked, and that the floor, the door, a portion of the roof, and portions of the plastering, need replacing. She presents the affidavits of two builders which go to sustain her position that the building is worth repairing, and that it can be put in good condition for $200.

The school commissioner answers that he has inspected this building and found the walls badly cracked and out of plumb. He shows that the foundations are not of sufficient depth, and that the building yields to the action of the frost; that the carpentry work and the plastering are in very bad condition indeed; that the building has no suitable means of ventilation, and that it is not in a sanitary condition. He produces the affidavits of several taxpayers in the district, and several expert builders, which go to show that the building is not worth repairing.

The action of a school commissioner in condemning a schoolhouse should be upheld, unless overwhelming proof is adduced that it should not be. Human experience does not show that public officers are accustomed to exercise a power of this nature too frequently or without sufficient cause. The proofs submitted in this case do not satisfy me that the order of the commissioner was unwarranted, and that his power was improperly exercised. Beyond this, I am led to give considerable weight to the fact which appears in the papers, and is not controverted, that the clerk's record shows that a special meeting was held in this district on the 31st day of March 1888, for the purpose of considering the question of building a new schoolhouse, and that at said meeting the resolution to build was defeated by but one majority, and that a subsequent special meeting was held on the 14th day of April 1888, to consider the question of repairing the schoolhouse, and that at said meeting the vote stood 11 in favor of repairing and 20 opposed thereto. This action of the district meetings indicates a strong sentiment in the district in favor of new schoolhouse. I am confident that such a sentiment would not exist if there were not strong reasons for it. In any event, it is not shown to me that the school commissioner has not exercised the power which the law confers upon him properly, and the burden is upon the appellant to show that.

The appeal is therefore dismissed.

3869

George Flack, trustee of school district no. 17, town of Hartland, county of Niagara v. Robert C. Woods, school commissioner of the second commissioner district of Niagara county.

The action of a school commissioner condemning a school building and ordering the erection of a new one sustained, no abuse of power or discretion being shown.

Decided April 11, 1890

Draper, *Superintendent*

Appellant appeals from an order of the respondent bearing date August 27, 1889, condemning the schoolhouse in district no. 17, in the town of Hartland, Niagara county. The grounds of the appeal are that the inhabitants of the district prior to the service of the commissioner's order, had adopted a

resolution to repair the schoolhouse and place the same in a proper and suitable condition, and to raise the sum of $150 to meet such repairs; that the school building is worth repairing, and with the repairs contemplated, would meet the requirements of the district; that a majority of the inhabitants of the district who are taxpayers are poor people, and will be distressed if compelled to pay at this time the necessary tax to rebuild the schoolhouse.

A number of affidavits are offered in support of the above objections to the commissioner's order.

Upon the part of the commissioner, the respondent herein, it is shown by the affidavits of the largest taxpayers in the district, mechanics and others who are familiar with the circumstances, and acquainted with the condition of the schoolhouse, that the present schoolhouse has been in use many years, and is in a dilapidated condition, and, if the use of the present building is continued, it will be a source of constant expense to the district for repairs. It appears that the commissioner, before making the order condemning the house, in conjunction with the trustee of the district, and several of the citizens thereof, made a thorough examination of the building, its foundation and supports, and agreed that the building should be condemned upon the ground that it was not worth repairing, and in its present condition, unfitted for use as a schoolhouse.

In a proceeding of this nature the law confers upon the school commissioner original jurisdiction, and it is not the policy of this Department to interfere with the exercise of his power, except upon grounds showing an abuse of discretion. I am unable to find any such abuse in this proceeding. The commissioner is clothed with the power of condemnation without reference to the wealth or poverty of the district affected. It has been the experience of this Department that good schoolhouses, with satisfactory schools, are essential to the welfare of communities. Well-appointed school buildings and satisfactory schools are found to be very great inducements to families proposing to locate in localities. In this case I am clear that the action of the commissioner should be upheld. The trustee of the district is, therefore, directed to forthwith proceed to carry out the directions of the commissioner's order.

The appeal is overruled.

5015

In the matter of the appeal of G. M. Barney v. Oscar M. Burdick as school commissioner, second commissioner district of Allegany county.

Orders made by school commissioners under the provisions of subdivision 4, section 13, title 5 of the Consolidated School Law of 1894, as such section was amended by section 1 of chapter 512 of the Laws of 1897, condemning schoolhouses, must state that such schoolhouse is deemed *"wholly unfit for use and not worth repairing."*

Decided September 17, 1902

Jesse L. Grantier, attorney for appellant

Skinner, *Superintendent*

This is an appeal from an order made by Oscar M. Burdick, as school commissioner of the second commissioner district of Allegany county, dated June 22, 1902, condemning the schoolhouse in union free school district 1, Andover, Allegany county.

The appeal herein was verified by the appellant July 30, 1902, and proof of service of a copy of the appeal on Commissioner Burdick July 30, 1902, is annexed to the appeal. The appellant alleges that he learned of said order of Commissioner Burdick on or subsequent to the 4th day of July 1902.

The main grounds alleged by the appellant for bringing the appeal are, in substance, that said order of the commissioner is indefinite and uncertain and does not state that he deemed the schoolhouse in the district wholly unfit for use, and not worth repairing.

On August 6, 1902, Commissioner Burdick filed an answer to the appeal, in which he claims that his order is in accordance with the provisions contained in subdivision 4 of section 13, title 5 of the Consolidated School Law of 1894, and the acts amendatory thereof; that the appeal herein was not taken within thirty days after knowledge of said order came to the appellant.

In subdivision 4, section 13, title 5 of the Consolidated School Law of 1894, chapter 556 of the Laws of 1894, as such subdivision was amended by section 1, chapter 512 of the Laws of 1897, it is enacted that every school commissioner shall have power, and it shall be his duty, by an order under his hand, reciting the reason or reasons therefor, to condemn a schoolhouse, *if he deems it wholly unfit for use and not worth repairing,* and to deliver the order to the trustees, or one of them, and transmit a copy to the Superintendent of Public Instruction.

The following is a copy of the order of said commissioner, from which the appeal herein is taken:

To the board of education, Andover High School:

I, Oscar M. Burdick, school commissioner of the second district of Allegany county, by virtue of power in me vested, as defined in title 5, section 4, as amended by section 1, chapter 512 of the Laws of 1897, do hereby condemn the school building of district 1, Andover, this commissioner's district, as wholly inadequate to accommodate the pupils attending said school.

The building was built without reference to proper heating and ventilating, and is therefore not only insufficient in size and arrangement, but is also unsanitary and detrimental in every particular to the wants of the pupils.

I would therefore advise that said building be done away with, and a new building erected capable of meeting the requirements of the law, and increasing the health and safety of the pupils in future years, said building to cost not less than $10,000.

Given under my hand this 27th day of June 1902.

OSCAR M. BURDICK
School Commissioner

Commissioner Burdick fails to state that he deems said schoolhouse "*wholly unfit for use and not worth repairing,*" but on the contrary alleges that he condemns the school building "as wholly inadequate to accommodate the pupils attending said school."

Said school building may not have proper heating facilities, and not be properly ventilated, and not be large enough to accommodate the scholars of school age residing in the district, without being repaired or added to, and proper heating apparatus and ventilation provided, and still said building not be "wholly unfit for use and not worth repairing."

This Department has uniformly held that an order of condemnation of a schoolhouse by a school commissioner, upon appeal, will be vacated where it does not conform to the requirements of the statute. (See decision of Superintendent Weaver, March 9, 1870; decision of Superintendent Gilmour, December 21, 1874; decision 4989, December 30, 1901, by me in Neugen, trustee, school district 4, Broadalbin, Fulton county v. Willis E. Leek, school commissioner.)

I decide that the appeal herein was duly taken; that the order of Commissioner Burdick, appealed from, does not conform to the requirements contained in subdivision 4, section 13, title 5 of the Consolidated School Law of 1894, as amended by section 1, chapter 512, Laws of 1897; that it does not appear that the school building in school district 1, Andover, Allegany county, was, on June 27, 1902, "wholly unfit for use and not worth repairing."

The appeal herein is sustained.

It is ordered that the order made by Oscar M. Burdick, school commissioner of the second commissioner district of Allegany county, on June 27, 1902, condemning the school building in school district 1, Andover, Allegany county, be, and the same is, hereby vacated and set aside.

4250

In the matter of the appeal of William V. Mathewson, trustee school district no. 13, town of New Berlin, Chenango county, v. Dennis Thompson, school commissioner, first commissioner district, county of Chenango.

Where a school commissioner, having made an order condemning schoolhouse and having approved of certain plans and specifications submitted to him for the repairs of the schoolhouse and the sum voted by the district to pay for such repairs, and having subsequently made an order revoking and setting aside his former order and condemning the schoolhouse, an appeal having been taken from the latter order, and it appearing upon said appeal that in making said order appealed from, said commissioner unduly and unwisely exercised his power and discretion in the matter, such order appealed from should be vacated and set aside.

Decided June 1, 1894

George W. Marvin, attorney for appellant
George W. Ray, attorney for respondent

Crooker, *Superintendent*

This appeal is taken from the order of the respondent, dated February 12, 1894, revoking and setting aside an order and consent, made by him, dated January 22, 1894, in which he approved of certain plans and specifications submitted to him for repairing the schoolhouse in district no. 13, town of New Berlin, Chenango county, and of the sum voted by the district for such repairs, and directing a tax to be levied therefor; and in which order, dated February 12, 1894, he condemns the schoolhouse in said district as wholly unfit for use and not worth repairing, and states as his opinion that the sum of $780 will be necessary to erect a schoolhouse capable and sufficient to accommodate the children of said district.

The appeal is founded upon various grounds stated therein, the principal ones being that the respondent in his order of January 22, 1894, in approving of the action of the special meeting of said district, held on January 16, 1894, relative to repairing said school and of the plans and specifications for such repairs, and the sum voted to be raised for such repairs, acted under a full knowledge of the subject matter; and that said order of February 12, 1894, was improvidently granted, wasteful and extravagant in that it contemplated a complete destruction of the present school building and of the materials therein, thus subjecting the district to an unnecessary and burdensome tax.

It appears from the proofs presented herein that the territory forming said school district no. 13, New Berlin, consists principally of farming land, the exception being a summer hotel known as the "Chenango Lake Hotel," a saw mill, grist mill and planing mill combined, and a post office, all of which are located within fifty rods of the schoolhouse of said district; that there is no village situate within or near the boundaries of said district; that the number of children of school age residing within said district is about 18, and the whole number attending the school therein, at the term of school ending on December 22, 1894, was 15, 1 of whom was a nonresident; that the aggregate assessed valuation of the taxable property in the district is $22,225; that the schoolhouse in said district was constructed in the year 1859, is a wooden building of the dimensions of about 22 by 26 feet on the outside and about 21⅓ by 25 feet on the inside, about 9¼ feet high in the clear, and has a seating capacity sufficient to afford ample accommodation for 40 pupils with seats and desks, with ample passageways, platform, stove and recitation seats, after taking out entryways and clothes closets; that the said schoolhouse is not in proper repair or condition for the maintenance of a school therein, and that its condition and the necessity of making repairs thereon or constructing a new schoolhouse in place of the present schoolhouse has been the subject of consideration and discussion in said district for some time; that in September 1893, in an interview between the appellant and respondent, the appellant stated to the respondent that it was advisable to repair said schoolhouse, and the cost of such repairs would exceed the sum which he (the appellant) was allowed to expend without a vote of the district, and requested the respondent to examine the schoolhouse and in case a school meeting should be called to assist him (the appellant) at such meeting;

that the appellant had drawn a call for a special meeting of the voters of said district to vote upon the question as to whether the schoolhouse should be repaired or a new schoolhouse be built, which draft was shown to the respondent and verbally approved by him; that on or about December 10, 1893, the respondent went to said school district and to said schoolhouse without notifying the appellant, and in the absence and without the knowledge of the appellant, made an examination of said schoolhouse, and on December 15, 1893, made an order condemning said schoolhouse as wholly unfit for use and not worth repairing, and certifying that in his opinion the sum of $750 would be necessary to erect a schoolhouse in said district capable of accommodating the children of the district, which order was filed with the clerk and trustee of said district and a copy thereof sent to the Superintendent of Public Instruction; that on January 5, 1894, the appellant gave notice of a special meeting of said school district to be held on January 16, 1894, for the purpose of taking into consideration and voting upon the question of building a new schoolhouse or repairing the one now used for school purposes and for voting tax, etc., said call being an exact copy of the draft of call exhibited to the respondent by the appellant at their interview in September 1893; that said special meeting was duly held on January 16, 1894, and the appellant submitted to the meeting plans and specifications that he had caused to be prepared for repairing said schoolhouse, with the estimated cost thereof; that said meeting voted by ballot upon a resolution whether a new schoolhouse be built or the old one be repaired, in favor of repairing the present schoolhouse by a vote of 9 in favor of repairing and 3 in favor of a new schoolhouse; that said meeting *unanimously* adopted the following plans and specifications for repairs to said schoolhouse: New roof, cove siding, windows, casings, floors, doors, chimney, ceiling of Georgia pine, seats and desks, building paper for outside foundation to be laid in mortar, three windows each at the sides of the room and none at the rear end, clothesroom, entry way and partitions as now, or nearly so, as in the old house, the ceilings to be properly oiled and outside to be properly painted with two coats or more if needed, such repairs to be made of good material and to be done in a good workmanlike manner and the schoolhouse to be properly ventilated, heated and lighted as follows: windows to be lowered from tops and raised from bottoms and a register in ceiling over the stove, the room to be heated by a stove in about the same position as the present one; the light will come from three windows on each side; that upon a vote by ballot a resolution was adopted by 10 votes in the affirmative and 2 in the negative levying a tax for the sum of $562.50 for paying the expense of such repairs; that the meeting adjourned for two weeks; that on January 20, 1894, the appellant delivered to and left with the respondent personally a copy of the proceedings of said special meeting of January 16, 1894, which the respondent retained, and on January 22, 1894, the appellant and respondent met at Norwich, N. Y., went to the law office of George W. Marvin and the respondent requested said Marvin to draft an approval of said action so taken at said special meeting of said district for him to sign; that said Marvin drew a paper, stating

in substance that the inhabitants of said school district at a meeting regularly called and held had voted to repair the present schoolhouse therein in a certain manner with certain specifications as to ventilation and to expend the sum of $562.50, or so much thereof as may be necessary to make such repairs, and that a minute of such proceedings, properly signed by the proper officers, is hereto attached; that the same having been read and examined by him (the respondent) that he (the respondent) as commissioner etc., does hereby consent to and approve of the repairs and specifications therefor, for the repairs of said schoolhouse as voted at said meeting, and also that a sum not exceeding $562.50 be raised by tax and expended in making such repairs according to the plans and specifications named in said minutes thereto attached, such repairs to be made by or under the directions of the trustee in said district, and ordering that the same be done soon as possible after May 1, 1894; that to said paper, consent or order was attached a copy of the proceedings of the special meeting of said district held on January 16, 1894, signed by the chairman of said meeting and the trustees and clerk of the district; that paper or order was dated January 22, 1894, and, after the same was examined by the respondent, was signed by him as school commissioner of the first commissioner district of Chenango county; that, at the request of the respondent, the appellant permitted him to take said paper home with him to make a copy thereof, and on January 26, 1894, received said paper from said Marvin, to whom the respondent had delivered said paper to be delivered to the appellant; that after the making and signing of the said paper by respondent, the appellant made out a tax list and assessment for the sum of $555.67 upon the taxable property of said district, and delivered the same, with his warrant, to the collector of said district; that the adjourned special meeting of said district was held on January 30, 1894, at which the said paper or order of January 22, 1894, signed by the respondent, was presented and recorded in the school register, and the trustee was empowered to have the work of repairs to the schoolhouse let by contract, that suitable blinds be put on the windows on the outside, an eave trough be furnished for west side of house if necessary, or grading be done to avoid water striking against the house; that if necessary the building be raised; that the size of the schoolhouse remain as at present; that a modern blackboard be placed at the south end of schoolroom; that if new studding be necessary it be procured; that privies be constructed in accordance with the law; that all material that will answer without detriment to the new work be used, in the judgment of the building committee; that on February 12, 1894, the respondent made his order revoking his order of January 22, 1894, and condemning said schoolhouse, which is the order appealed from by the appellant as trustee of said district, pursuant to a vote of said district at a special meeting held therein on February 21, 1894, directing said appeal to be taken.

It also appears from allegations contained in the affidavits in support of this appeal, and which are not denied, that for some years one Loomis, the proprietor of the summer hotel near the schoolhouse, has been urging the voters of the district to build a new two-story school building, thereby affording facilities

for a public hall in said building, to be used for religious meetings, concerts and other gatherings, and that said district, while willing to repair the present schoolhouse or build a new schoolhouse of sufficient dimensions for school purposes and to accommodate the children attending the school, have steadily refused to construct a two-story building.

There is a conflict of opinions, as set out in the affidavits on both sides, of carpenters as to the amount of and value of the material in the present schoolhouse that can be used in a new building or repairing the old one. I am of the opinion that it is established that if the present building should be sold, as it stands, that not more than twenty-five dollars could be obtained for it, and that if the schoolhouse is repaired in accordance with the plans and specifications adopted, material in the value of $75 to $100 in the present building could be used advantageously in making such repairs.

Under the provisions of section 13 of title 2 of the Consolidated School Law of 1864 and the amendments thereof, every school commissioner shall have the power, and it shall be his duty, by an order under his hand, reciting the reason or reasons, to condemn a schoolhouse if he deems it wholly unfit for use and not worth repairing; such order, if no time for its taking effect be stated therein, shall take effect immediately; he shall also state what sum, not exceeding $800, will, in his opinion, be necessary to erect a schoolhouse capable of accommodating the children of the district. Immediately upon the receipt of such order the trustee or trustees shall call a special meeting of the inhabitants for the purpose of considering the question of building a schoolhouse thereon, and such meeting shall have power to determine the size of the schoolhouse and the material to be used in its erection and to vote a tax to build the same; but shall have no power to reduce the estimate made by the commissioner by more than 25 per centum of such estimate. Where no tax for building such house shall have been voted by such district *within thirty days from the time of holding the first meeting to consider the question,* it is the duty of the trustee or trustees to contract for the building of the schoolhouse and to levy a tax for the same.

The power conferred upon school commissioners by the section above cited is an arbitrary one, and the exercise of such power is usually reserved until after a district has refused to build, or it becomes apparent that it is not the intention of the inhabitants to take any steps in the proper direction. Such orders, under the school law and decisions of this Department, are *not irrevocable* and may be amended or revoked by the commissioner, and an appeal may be taken therefrom to me. Indeed, many of such orders, upon consultation with school district officers and voters, and upon further consideration or review, or a fuller statement of the situation of matters in the district, have been revoked or amended.

While under the school law it is the duty of the trustees of a district, after an order for the condemnation of a schoolhouse is served upon them, to *immediately* call a special meeting of the inhabitants for the purpose of considering the question of building a schoolhouse, such trustees are not *prohibited* from calling such meeting for the purpose of considering the construction of a schoolhouse,

or repairing the schoolhouse. If, however, the order of condemnation shall not be appealed from, or altered, modified or revoked, so much of the action of the special meeting for the repairs of the schoolhouse would not be operative, and if the voters of the district failed to consider the question of the construction of the schoolhouse under an order of confirmation not appealed from or modified, altered or revoked, and vote a tax to build the same, and no tax was voted within thirty days after the time of holding the first meeting to consider the question, it is the duty of the trustees to proceed, under the provisions of law above cited, and their failure to do so would be a wilful violation and neglect of duty on their part. At a special meeting in said district, held on January 16, 1894, the question of building a schoolhouse was considered, in voting upon the resolution of building a new schoolhouse or repairing the present, and decided to repair by the affirmative vote of two-thirds of the whole number of votes cast. It adopted plans etc., for such repairs and voted to raise the sum of $562.50 to pay for the same, and adjourned for two weeks; that on January 20, 1894, the appellant delivered personally to the respondent copies of the proceedings of said meeting for the approval of the respondent, and the respondent named January 22, 1894, at the law office of Mr Marvin, in Norwich, as the time and place to meet the appellant upon the matter of such approval; that the appellant and respondent did meet at the time and place appointed and said Marvin, at the request of respondent, drew a paper in which such proceedings of said special meeting were approved by the respondent, and the paper was signed by him on January 22, 1894; that the respondent, with the consent of the appellant, retained such paper, having annexed thereto a copy of the plans etc., adopted for the repairs of the schoolhouse, for the purpose of making a copy and subsequently delivered it to Mr Marvin, who, on January 26, 1894, delivered it to appellant.

The respondent, when he signed such order and approval on January 22, 1894, had been a school commissioner for three years, and had occasion to visit the schoolhouse in said district on several occasions; he made a special visit in December 1893, prior to making his first order for the condemnation of the schoolhouse; he had knowledge of the style of the school building, its capacity and its condition; that the district was comprised of a farming locality remote from any village, had but about twenty children of school age residing therein, with an average school attendance of about nine, and that there was no prospect of any large increase in numbers; that the aggregate valuation of taxable property was about $22,000; that he had had, for several days, a full copy of the proceedings of the special meeting of the district of January 16th, showing that two-thirds of the voters present were opposed to building a new schoolhouse, and a full copy of the plans and specifications of the manner of repairing the schoolhouse, and the amount of money to be expended in such repairs; that upon such knowledge and the facts presented to him he made such order and approval.

In my opinion, the action of the respondent in said order and approval, signed by him on January 22, 1894, was a wise exercise of power and discretion on his part, and I hold that said order and approval were a revocation of the order of December 15, 1893, condemning said schoolhouse.

The respondent, on February 12, 1894, made the order appealed from herein, revoking his order and approval of January 22, 1894, and again condemning said schoolhouse. The respondent alleges in his answer that he revoked his order of approval of the proposed repairs, on application of three persons, named by him, who were residents and taxpayers of the district; but he does not make proof of any fact brought to his attention relative to the sentiment in the district upon the question of repairing or building that was not before him upon the application made to him for his order or approval of January 22, 1894, contained in the proceedings of the district meeting of January 16, 1894, nor of anything brought to his knowledge different from that before him when, on January 22, 1894, he approved of the action of the district meeting in repairing the schoolhouse.

Upon the papers and proofs presented herein, I am of the opinion that the said schoolhouse, if repaired in accordance with the plans and specifications adopted at the meeting of the district, will be practically a new schoolhouse, affording ample accommodation to the pupils residing in said district, and be convenient and comfortable for use, well lighted, ventilated and warmed; that it was an undue and unwise exercise of power and discretion on the part of the respondent in making such order of February 12, 1894, and that the appeal herein should be sustained, and said order of respondent be vacated and set aside.

Appeal sustained.

It is ordered, That the order made by Dennis Thompson, school commissioner of the first commissioner district of the county of Chenango, dated February 12, 1894, condemning the schoolhouse in school district no. 13, town of New Berlin, Chenango county, and revoking a former order or approval of the action of the special meeting of said district, held on January 16, 1894, which order or approval was dated January 22, 1894, be, and the same hereby is, vacated and set aside.

5076

In the matter of the appeal of William S. Carr and Frank E. Doolittle as residents and legal voters in and William S. Carr as trustee of school district 6, Elmira, Chemung county v. Jess S. Kellogg as school commissioner of Chemung county.

Where in any common school district the schoolhouse therein has been condemned by the school commissioner having jurisdiction as totally unfit for use and not worth repairing and subsequently at a duly called and held school meeting of the district a new schoolhouse site is designated, the consent of the school commissioner to the change of site is not necessary under the provisions of section 19, article 2, title 7 of the Consolidated School Law for the reason that there was not at the time of the designation of such new site any schoolhouse within the meaning of the school law situated upon or in process of erection upon the site then owned by the district.

Decided May 18, 1903

Roswell R. Moss, attorney for appellants
Jess S. Kellogg, respondent in person

Skinner, *Superintendent*

This is an appeal by William S. Carr and Frank E. Doolittle as residents and legal voters in and William S. Carr as trustee of school district 6, Elmira, Chemung county from the decision of Jess S. Kellogg as school commissioner of Chemung county refusing his consent to change the site of the schoolhouse of such district.

The appeal herein was filed in this Department June 23, 1902 and July 2, 1902 Commissioner Kellogg filed his answer thereto.

The main grounds alleged by the appellants for bringing the appeal herein are that Commissioner Kellogg did not wisely exercise the discretion given him under the Consolidated School Law in such refusal to consent to such change of site, and at the time the district designated such new site and Trustee Carr applied for such consent there was not a schoolhouse erected or in process of erection upon the site then owned by the district and therefore no consent of the commissioner was required to a change of such site by the district.

The respondent asks that the appeal herein be dismissed on various grounds alleged in his answer.

It is in proof that some fifty years ago school district 6, Elmira, Chemung county was duly organized, a school site designated and a schoolhouse erected thereon. From the time of such organization of such district until a few years ago the site upon which the schoolhouse was situated, as regards the school population in the district, was near the center of such population. In the past few years such school population has largely increased in the eastern and southern portions of the district and has almost entirely ceased in the northern and western portions. The records of this Department show that the number of children enrolled in the district for the school year 1900–1 was 69, the number that attended 49 and the average attendance 33. In the school year 1901–2 the number enrolled was 86, the number that attended 42 and the average attendance 35.

In subdivision 4, section 13, title 5 of the Consolidated School Law of 1894, as such subdivision was amended by section 1, chapter 512, the Laws of 1897, it is enacted that a school commissioner, by an order under his hand reciting the reason or reasons, may condemn a schoolhouse, if he deems it wholly unfit for use and not worth repairing, and it is his duty to deliver the order to the trustee or one of them and transmit a copy to the Superintendent of Public Instruction. Such order, if no time for its taking effect be stated in it, shall take effect immediately. He shall also state what sum will in his opinion be necessary to erect a schoolhouse capable of accommodating the children of the district. Immediately upon receipt of said order the trustee or trustees of such district shall call a special meeting of the inhabitants of said district for the purpose of considering the question of building a schoolhouse therein etc.

August 7, 1901 School Commissioner Kellogg of Chemung county filed in this Department a copy of an order made by him dated August 5, 1901 in which he certifies that August 5, 1901 he made an examination of the schoolhouse in school district 6, Elmira and after reciting the condition of such schoolhouse he stated

that he deemed it wholly unfit for use for school purposes in such district and not worth repairing and thereupon ordered that such schoolhouse be and the same was condemned. He further certified that the sum of $3600 would in his opinion be sufficient to build a schoolhouse for the needs of said district.

No appeal has been taken to me from such order of condemnation, and such order remains in full force and effect.

April 22, 1902 at a special meeting held in such district, called by the trustee of the district for the purpose "of selecting, designating and describing a new site for a schoolhouse for the district" a resolution was adopted by a vote of 54 ayes and 52 noes, the vote thereon being ascertained by taking and recording the ayes and noes of the qualified voters present and voting thereon, such resolution designating such new site by metes and bounds.

Subsequently to such special school meeting, Trustee Carr communicated the proceedings taken thereat to Commissioner Kellogg and requested the consent of the commissioner to such change of the site. On or about May 10, 1902 Trustee Carr received from Commissioner Kellogg a letter dated May 10, 1902 inclosing his (Kellogg's) decision in writing under date of May 3, 1901 refusing, upon various reasons stated therein, to give his consent to such change of site. Thereupon June 23, 1902, the appellants herein brought their appeal from such decision of Commissioner Kellogg.

The respondent asks that the appeal herein be dismissed for the reason that it was not taken within thirty days after the appellants had knowledge of such decision. Rule 5 of the rules of practice of this Department regulating appeals to the State Superintendent provides that such appeals must be sent to this Department within thirty days after the making of the decision or the performance of the act complained of or within that time after the knowledge of the cause of complaint came to the appellant or some satisfactory excuse must be rendered in the appeal for the delay. The appellants have rendered in their appeal a satisfactory excuse for their delay in bringing their appeal and therefore the application of the respondent to dismiss the appeal is denied.

In section 19, article 2, title 7 of the Consolidated School Law of 1894 it is enacted, "so long as a district shall remain unaltered the site of a schoolhouse owned by it, upon which there is a schoolhouse erected or in process of erection, shall not be changed nor such schoolhouse be removed unless by the consent in writing of the school commissioner having jurisdiction; nor with such consent unless a majority of all the legal voters of said district present and voting, to be ascertained by taking and recording the ayes and noes at a special meeting called for that purpose, shall adopt a written resolution designating such new site and describing such new site by metes and bounds."

As the order made by Commissioner Kellogg August 5, 1902 condemning the schoolhouse in district 6, Elmira, Chemung county, which order took effect immediately, has never been revoked, at that date there ceased to be any schoolhouse erected or in process of erection in such district within the intent and meaning of said section 19 above cited. When Commissioner Kellogg was

requested to consent to a change of the schoolhouse site of such district there was a building owned by the district, but such building had been condemned August 5, 1901 by competent authority "as wholly unfit for use and not worth repairing" as a schoolhouse or for use for school purposes and such building is not a schoolhouse under the Consolidated School Law.

I decide that the consent of School Commissioner Kellogg to the change of the schoolhouse site of district 6, Elmira, Chemung county was not required under the provisions of section 19, article 2, title 7 of the Consolidated School Law for the reason that at the time such site was changed and such consent asked there was not a schoolhouse then erected or in process of erection upon the site then owned by such district.

Admitting for the purposes of argument only that the consent of Commissioner Kellogg to the change of site was required under said section 19, I decide that the decision of the Commissioner, refusing to consent upon the grounds stated by him, was an unwise exercise of authority on his part and his decision should be vacated.

The growth of the district in its western portion and its educational needs require a larger site for a schoolhouse than that now owned by the district and one located nearer the center of such school population.

The appeal herein should be sustained and the decision of Commissioner Kellogg, refusing to consent to such change of site, should be vacated and set aside.

The appeal herein is sustained.

It is ordered: That the decision of Jess S. Kellogg as school commissioner of Chemung county dated May 3, 1902 refusing to consent to the change of the schoolhouse site designated and adopted at a special meeting held April 22, 1902 in school district 6, Elmira, Chemung county be and the same is hereby vacated and set aside and altogether held for naught.

5074

In the matter of the appeal of Hiram Lovell and George W. Hoffman 2d from special school meetings held March 5, April 15 and April 22, 1902, in school district 6, Elmira, Chemung county.

Where in a common school district the schoolhouse therein has been condemned by a school commissioner having jurisdiction as wholly unfit for use and not worth repairing and no appeal has been duly taken from such order of condemnation, such building ceases to be a schoolhouse of the district within the meaning of the provisions of the Consolidated School Law relating to the change of a site of a schoolhouse "upon which there is a schoolhouse erected or in process of erection."

Decided May 12, 1903

Lattin & Mills, attorneys for appellants
Roswell R. Moss, attorney for respondents

Skinner, *Superintendent*

This is an appeal from the proceedings of a special meeting held March 5, 1902, an adjourned special meeting held April 15, 1902, and a special meeting, held April 22, 1902, in school district 6, Elmira, Chemung county.

The appellants also ask me to decide the proceedings of a special meeting held on April 18, 1900, and those of the adjourned meeting held on May 10, 1900, were legal and to take into consideration other meetings held in such district during the year 1900.

The appeal herein was filed in this Department May 14, 1902. June 23, 1902, William S. Carr and Frank E. Doolittle filed an answer to the appeal. July 8, 1902, the appellants filed a reply and August 18 the respondents filed a rejoinder and September 13, 1902, the appellants filed a surrejoinder.

The appeal herein was submitted to me May 1, 1903, in an oral argument made by the attorneys for the respective parties.

The appellants allege various grounds for the appeal from the special school meetings held March 5, April 15 and April 22, 1902.

The appellants allege that at the special meeting held in said district March 5, 1902, business was transacted other than that specified in the notice calling the meeting. The notice for such meeting was dated February 27, 1902, and stated that a special school meeting of the electors of the district would be held on March 5, 1902, at 8 p. m. for the purpose of "considering the question of building a new schoolhouse in said district."

It appears that on the evening of March 5, 1902, between 90 and 100 of the qualified voters of such district assembled and after the meeting was organized a resolution was offered by Mr Doolittle to the effect that at the end of the then school year the schoolhouse and site of the district be abandoned for school purposes; a new schoolhouse be built on a new site, such site to be located not more than 100 feet west of Hendy avenue; and the sum of $2800 be appropriated for the school building, and the further sum of $1000 or as much less as is necessary be appropriated for the purchase of such site, the sums of money to be raised in the manner to be determined at an adjourned meeting to be held on the third Tuesday of April; and that a committee be appointed to select a site, agree upon a price and report at such adjourned meeting for confirmation or rejection. A motion was made to amend such resolution to the effect that the district erect a new school building on the property owned by the district, but upon a vote the amendment was defeated and thereupon the resolution of Mr Doolittle was adopted by an aye and no vote of 56 ayes and 42 noes, and a committee consisting of three persons was appointed and the meeting adjourned to April 15, 1902, at 8 p. m. April 15, 1902, an adjourned meeting was held at which the report of the committee on site was read by the chairman. The chairman exhibited plans for schoolhouses furnished by the State Superintendent of Public Instruction. A motion to adopt the plan furnished was adopted and the meeting adjourned without day.

April 16, 1902, Trustee Carr issued a notice for a special school meeting to be held at the schoolhouse in said district April 22, 1902, at 8 p. m., for the purposes of selecting, designating and describing a new site for the schoolhouse in such district. Such notice was duly posted in accordance with a resolution adopted at the annual meeting held in said district August 6, 1901, under the provisions contained in section 6 of article 1, title 7 of the Consolidated School Law of 1894, authorizing the inhabitants of any district, at an annual meeting, to adopt a resolution prescribing some other mode of giving notice of special meetings than that prescribed in said section 6. April 22, 1902, over 100 voters of such district assembled in the building formerly used as the schoolhouse of the district and organized by the choice of William S. Carr, chairman; Charles Camp, district clerk, acted as clerk. Mr Doolittle offered the following resolution:

Resolved, That the site for a new schoolhouse in district 6, Elmira, be changed from its present situation to that designated property in said district described as follows: commencing at a point eighty-two (82) feet from north line of tobacco shed line owned by B. G. Smith at the center of Hendy avenue; thence north two hundred (200) feet on Hendy avenue; thence east to W. F. Campbell line three hundred (300) feet, more or less, as measured by site committee; thence south two hundred (200) feet to a stake; thence west three hundred (300) feet to the place of beginning, being the same premises conveyed to the said B. G. Smith by George W. Hoffman and wife by deed dated April 18, 1898, and recorded in the Chemung county clerk's office April 20, 1898.

An aye and no vote was taken upon the adoption of such resolution which resulted in 54 votes aye and 52 votes no. Thereupon the meeting adjourned without day.

Under section 6, article 1, title 7 of the Consolidated School Law of 1894 a special district meeting shall be held when called by the trustees. The notice thereof shall state the purposes for which it is called, and no business shall be transacted at such special meeting except that which is specified in the notice.

Said school law also requires that the designation of a schoolhouse site for a school district can only be made at a special meeting, duly called for that purpose, by a written resolution in which the proposed site shall be described by metes and bounds, and which resolution must receive the assent of a majority of the qualified voters present and voting, to be ascertained by taking and recording the ayes and noes.

The special meeting called for March 5, 1902, was, as stated in the notice, for considering the question of building a new schoolhouse in the district. The meeting did not take any action authorizing the building of a schoolhouse for the district upon its present site, but considered a proposition of obtaining a new schoolhouse site and erecting a new schoolhouse thereon. At the adjourned meeting held April 15, 1902, no action was taken with reference to the erection of a new schoolhouse.

The special meeting held April 22, 1902, was called for the purpose of designating a new site for a schoolhouse and the meeting when assembled

designated such new site by a written resolution describing the site by metes and bounds, and such resolution received the votes of a majority of the qualified voters of the district present and voting, such vote being ascertained by taking and recording the ayes and noes.

A vote to change a schoolhouse site may be taken at a district meeting, duly called and held for that purpose, before the consent of the school commissioner having jurisdiction is applied for.

School meetings have the power to alter, repeal and modify their proceedings from time to time as occasion may require or it shall be decided. The power to repeal proceedings must be exercised before they have been carried into effect whereby other parties have acquired rights or incurred responsibilities. Any resolution directly or necessarily repugnant to a previous one repeals it, whether the intent to repeal is stated therein or not.

I am not aware of any provision of the school law that prevents a school district meeting adjourning for more than a month. Subdivision 3, section 34, article 4, title 7, of such law enacts that it shall be the duty of the district clerk to affix a notice, in writing, of the time and place of any adjourned meeting when the meeting shall have adjourned for a longer time than one month, in at least five of the most public places in such district at least five days before the time appointed for such adjourned meeting. This Department has held that the failure of the clerk to post such notices would not of itself invalidate the proceedings taken at such adjourned meeting.

The contention of the appellants that subdivision 7, section 14, article 1, title 7, of the Consolidated School Law of 1894 and section 19, article 2, title 7, of said law or either of them requires that notice of a special meeting called to designate a new site for a schoolhouse in a district must contain therein a description of the proposed site is not tenable. Said sections only require that the notice shall state that the meeting is called *for the purpose of designating such new site* but the meeting must adopt a resolution *designating such new site by metes and bounds.* Subdivision 7, section 14, article 1, title 7, of such law relates only to the designation of school sites *in the formation of new school districts.* It is claimed as there is no comma after the word purpose in subdivision 7 the notice calling the special meeting must contain a resolution describing the proposed site by metes and bounds. The courts have held that "there is no punctuation in a statute which ought to rule; the general rule is that punctuation is not part of a statute;" in matter of application of Brooklyn Elevated Railroad Company, etc., 125 N. Y. 434.

I must decline to express any opinion as to the proceedings taken at school meetings held in said school district 6 in the year 1900, copies of which are annexed to the appeal herein.

The records of this Department show that August 5, 1901, Jess S. Kellogg, as school commissioner of Chemung county, condemned the schoolhouse in school district 6, Elmira, Chemung county, as wholly unfit for use and not worth repairing. No appeal was taken to me from such order, and such order

remains in full force and effect. It was the duty of the trustee of the district to have called a special meeting of the qualified voters of the district for immediate action for the construction of a new schoolhouse, but such action does not appear to have been taken. I am clearly of the opinion that after the expiration of thirty days after the date of the order there ceased to be any schoolhouse within the meaning of the school law erected upon the site owned by the district or in process of erection thereon. There is now and has been since September 5, 1901, a building owned by the district which had theretofore been condemned by competent authority as "wholly unfit for use and not worth repairing" for maintaining a school therein or for school purposes, but such building *is not a schoolhouse* under the school law.

The appeal herein is sustained as to so much thereof as is taken from the proceedings of the special and adjourned special meetings, held in school district 6, Elmira, Chemung county, on March 5, and April 15, 1902; and as to all other matters such appeal is dismissed.

It is ordered, That the proceedings of special meetings held in school district 6, Elmira, Chemung county, March 5 and April 15, 1902 be and the same are vacated and set aside.

28

SCHOOL MONEYS

5092

In the matter of the appeal of C. B. Stoddard from certain proceedings of annual meeting held August 4, 1903 in union free school district 3, Cohocton, Steuben county.

Moneys lost or embezzled by district officers are recoverable in the first place from such officers and secondly from the sureties in the official bond given by such officers. The school districts in this State are municipal corporations except as to the power of refunding an existing bonded indebtedness and the boards of education of union free school districts are bodies corporate.

The treasurer of a union free school district is a public officer having custody of public moneys, the property of the district. The Court of Appeals of this State in the appeal of George S. Tillinghast as county treasurer of the county of Madison v. J. Herman Merrill, supervisor of the town of Stockbridge and others, 131 N. Y. reports, page 133 etc. held "public officers having the custody of public moneys are *ex virtute officii* insurers of the same and are liable for a loss thereof although occurring without their fault or negligence." The action of the qualified voters in union free school district 3, Cohocton, Steuben county, in adopting a resolution that the trustees be authorized to add to the tax levy $247.30 to be placed in the hands of the new treasurer such sum or so much thereof as may be needed to be used to reimburse the present treasurer for the loss on account of the failure of the Shults bank, was without authority of law.

Decided October 8, 1903

Skinner, *Superintendent*

This is an appeal from the proceedings taken at the annual meeting held August 4, 1903, in union free school district 3, Cohocton, Steuben county, authorizing the trustees of the district to add to the tax list to be issued by them the sum of $247.30, such sum or so much thereof as may be needed to be used to reimburse the present treasurer C. L. Shattuck for loss on account of the failure of the Shults bank.

The appellant is one of the members of the board of education of such district and Messrs Otto, Wolfanger, Gray and Clement, the other members of such board have joined with the appellant in the allegations contained in the appeal.

The appeal contains a statement that the allegations in the appeal herein, with a letter of mine dated August 18, 1903 to the appellant Stoddard, have been read to Treasurer Shattuck and he (Shattuck) stated that he did not care to make any answer thereto or to join in or object to the appeal herein.

It appears from the records of this Department that school district 3, Cohocton, Steuben county is a union free school district, organized under the general school law, whose limits do not correspond to those of any incorporated village or city and having a board of education consisting of five members. Section 7, article 1, title 8 of the Consolidated School Law of 1894, as amended

by section 1, chapter 466 of the laws of 1897, provides that boards of education of union free school districts whose limits do not correspond to those of an incorporated village or city shall have power to appoint one of the taxable inhabitants of their district treasurer and fix his compensation who shall hold such appointment during the pleasure of the board. Such treasurer shall within ten days after notice in writing of his appointment execute and deliver to said board of education a bond with such sufficient penalties and sureties as the board may require conditioned for the faithful discharge of the duties of his office and, in case such bond shall not be given within the time specified, such office shall thereby become vacant and said board shall thereupon, by appointment, supply such vacancy.

It further appears that C. L. Shattuck has been treasurer of such district for the past three years by virtue of the appointment or appointments of the board of education; but it does not appear as to whether said Shattuck ever executed and delivered to such board any bond or bonds for the faithful discharge of the duties of such treasurer. He deposited the moneys which came into his possession, as such treasurer, in the W. J. Shults & Co. bank of Cohocton. During the month of June 1903 said bank suspended payment of its liabilities and its affairs are in process of settlement in the bankruptcy court with the prospect of paying a dividend of about 20 per cent upon its indebtedness. At the time of the failure of such bank Treasurer Shattuck had on deposit therein, of the moneys received by him and deposited by him as treasurer of the district, the sum of $247.30.

At the annual meeting held in such district August 4, 1903 the following resolution was presented: " that the trustees be authorized to add to the tax levy $247.30 to be placed in the hands of the new treasurer and such portion as may be needed shall be used to reimburse the present treasurer, C. L. Shattuck, for the loss on account of the failure of the Shults bank." The vote upon this resolution was taken by ballot and resulted as follows: Whole number of votes cast 62, of which 35 were for and 27 against the resolution, and such resolution was declared adopted.

It was claimed at the annual meeting August 4, 1903 by the persons who voted for such resolution that the provisions contained in subdivision 15 of section 14, article 1, title 7 of the Consolidated School Law of 1894 in relation to the power given to inhabitants of common school districts at school meetings therein, namely, " to vote a tax to replace moneys of the district lost or embezzled by district officers," authorize the adoption of such resolution. This contention is not tenable. It did not appear as a fact that any moneys of the district had been lost or embezzled by any district officers. It was conceded that Treasurer Shattuck was solvent and financially responsible for the entire amount of money of the district which remained on deposit in the bank of Shults & Co. at the time of the failure of the bank, namely, $247.30, and Shattuck had never stated that he could not or would not make such amount good to the district.

Moneys lost or embezzled by district officers are recoverable in the first place from such officers and secondly from the sureties in the official bonds given

by such officers. But before it would be possible in a suit at law to regain the money so lost or embezzled, the district may be required to pay debts and liabilities that could not be postponed and hence the propriety of the provision contained in subdivision 15 above cited. The proofs herein show that there was no immediate or urgent liability of such district but on the contrary there was at the time such meeting was held approximately $500 the property of the district in the hands of the treasurer not on deposit in Shults & Co.'s bank.

The school districts in this State are municipal corporations, except as to the power of refunding an existing bonded indebtedness, and the boards of education of union free school districts are bodies corporate. The treasurer of a union free school district is a public officer having the custody of public moneys the property of the district. The Court of Appeals of this State, in the appeal of George S. Tillinghast as county treasurer of the county of Madison, respondent v. J. Herman Merrill, supervisor of the town of Stockbridge et al. appellants, decided December 1, 1896, reported in 131 New York reports on pages 135 etc. held: "public officers having the custody of public moneys are *ex virtute officii* insurers of the same and are liable for a loss thereof although occurring without their fault or negligence."

I decide, That the action of the annual meeting, held August 4, 1903, in union free school district 3, Cohocton, Steuben county, in the adoption of the following resolution, namely, "that the trustees be authorized to add to the tax levy $247.30 to be placed in the hands of the new treasurer, and such portion as may be needed, shall be used to reimburse the present treasurer, C. L. Shattuck, for the loss on account of the failure of the Shults bank," was without authority of law.

The appeal herein is sustained.

It is ordered, That so much of the proceedings of such annual meeting as relates to the adoption of such resolution, be, and the same is, hereby vacated and set aside.

4441

In the matter of the petition of Charles H. Simpkins for the removal from office of Harvey S. Hempstead as trustee of school district no. 3, town of Coeymans, Albany county.

Under the school law the supervisors of towns and collectors of school districts are the legal custodians of the public moneys of the State apportioned to the school districts and of moneys collected upon tax lists by the collectors or received by them from county treasurer or boards of supervisors for taxes returned; and such moneys can only be paid out by the supervisors and collectors upon the written order of the trustees or a majority of the board of trustees to the order of the person or persons entitled to receive the same. Trustees of school districts have no lawful authority to receive or to retain in their custody any of such moneys.

Decided April 9, 1896

Andrew Vanderzee, attorney for petitioner
Lewis Cass, attorney for respondent

Skinner, *Superintendent*

The petitioner in the above-entitled matter asks for the removal of the above-named Hempstead as trustee of said school district for wilful violation and neglect of duty as such trustee.

From the papers presented herein the following facts are established:

That at the annual school meeting held in said district, said Hempstead was elected as trustee of said district and acted as such during the school year of 1894–95; that at the annual school meeting held in said district in August 1895, said Hempstead was elected as trustee and ever since has been, and still is, acting as such trustee; that on or about August 10, 1895, the said Hempstead obtained from Helen S. Willis of the village and town of Coeymans, agent for certain insurance companies, a policy of insurance for the sum of $1000 upon the schoolhouse in said district, the premium etc. therefor to be paid, amounted to the sum of $15; that on or about September 19, 1895, said Hempstead presented to Dwight Butler, collector of said school district, an order of which the following is a copy: "Ravena, N. Y., September 19, 1895. To Dwight Butler, collector of taxes, school district no. 3, town of Coeymans: Pay to Helen Willis the sum of $22.50 on premium on insurance on schoolhouse in said district. H. S. Hempstead, sole trustee," and said Hempstead then asked said Butler to pay to him (Hempstead) the said $22.50, stating he wanted it to pay the insurance premium to Mrs Willis, and thereupon said Bulter paid to said Hempstead said sum of $22.50, and took said order and filed the same among his vouchers of payments for said school district; that at some date between September 1 and November 8, 1895, the said Willis and Hempstead had a conversation at which said Hempstead stated in substance that said premium could not be paid for the reason that there were no funds on hand available for that purpose, and said Hempstead paid to said Willis the sum of $7.50 owing by him for insurance upon certain property belonging to him; that on or about November 8, 1895, said Willis had an interview with Butler, collector of said district, and then asked Butler whether he had received an order for her, to which Butler replied: "Yes, have you not received your money?" to which she replied, "No," and thereupon said Butler produced and exhibited to said Willis the said order of Hempstead, dated September 19, 1895 (of which a copy is hereinbefore given), and stated that he had paid to said Hempstead the said sum of $22.50; that said Willis then informed said Butler that the insurance premium, etc., was not $22.50, but $15, and took a copy of said order; that on the same day and after the said interview with Collector Butler, said Willis had an interview with said Hempstead at which he stated in substance, "I am sorry that we had to keep you waiting so long for this order," and thereupon gave to said Willis an order upon said Collector Butler for the sum of $15, signed by said Hempstead as trustee; that said Willis then exhibited to said Hempstead the aforesaid copy of the said order for $22.50, and asked Hempstead "What about this order?" and said Hempstead, after looking at said copy of order, said to Willis, "Give me that other order and I will pay you the $15 out of my own

pocket," whereupon said Willis delivered to Hempstead said order for $15 given her by him, and Hempstead paid to her the sum of $15 in cash; that said Willis never authorized said Hempstead to draw said order for $22.50, either directly or indirectly, and never knew of the existence of said order until November 8, 1895; that the total sum due and owing to said Willis for insurance, including policy and premium, was the sum of $15 and no more, and she had no other charge against said district.

That on or about October 15, 1895, the said Hempstead, as such trustee, at his request, received from Collector Butler the sum of $80, giving to said Butler his (Hempstead's) receipt as trustee, the said Hempstead stating to said Butler that said sum of money was for the purpose of paying for things he had bought for the schoolhouse.

That on or about December 4, 1895, said Hempstead received from Thomas F. Mason, deputy county treasurer for John Bowe, county treasurer of Albany county, a check of said Bowe, no. 2312, dated on that day, drawn upon the Albany City National Bank, for the sum of $60.02, to the order of Dwight Butler, collector, school district no. 3, Coeymans; that said check was for certain taxes returned by said collector as unpaid under the provisions of the Consolidated School Law; that on said December 4, 1895, the said Hempstead indorsed the said check, "Dwight Butler, Collector, District No. 3, Coeymans," and also "H. S. Hempstead," and received from said bank said $60.02; that said Hempstead has not paid said sum of $60.02 or any part thereof to said Collector Butler. That in the month of May 1895, there was in the possession of Henry Slingerland, of Coeymans, the sum of $9.66 of moneys deposited with him by the supervisor of the town of Coeymans, and on May 25, 1895, said Hempstead, as trustee of said school district no. 3, Coeymans, requested said Slingerland to inform him if there was any public money due to said district in his hands deposited by said supervisor, and said Slingerland examined the account of the supervisor with said district and found that the sum of $9.66 was due said district, and thereupon, at the request of said Hempstead, gave to Hempstead his check for said sum of $9.66, which check was duly paid after having been indorsed by said Hempstead.

That about January 1, 1895, said Hempstead, as such trustee, made a contract with Patrick J. Sweeney, of the city of Albany, for a heater for the schoolhouse in the district for the sum of $200, and the heater was placed in said schoolhouse; that on or about March 5, 1895, Hempstead delivered to Collector Butler an order signed by Hempstead, as trustee, for the sum of $200, payable to P. J. Sweeney, and requested said Butler to pay him (Hempstead) the $200, as he was going to Albany and would pay said Sweeney said $200 for the heater, and said Butler paid Hempstead said $200; that on or about April 2, 1895, said Hempstead paid P. J. Sweeney $100 in money and gave Sweeney his (Hempstead's) note, as trustee, for $100; that said Hempstead paid upon said note at different times and in divers sums the aggregate sum of $75; that on or about February 6, 1896, said Hempstead, as such trustee, gave to said Sweeney an

order upon Collector Butler for the sum of $25, in which order it was stated that the sum stated therein was for repairs to said heater; that said order was presented to said Collector Butler for payment and the payment thereof refused by him and said order remains unpaid, and there still remains due and unpaid to said Sweeney said sum of $25; that at the time said order of $25 was given to said Sweeney there was no sum due to him for repairs to said heater.

The respondent, Hempstead, has attempted to give an explanation of the aforesaid transaction with Mrs Willis, but such explanation is without merit. So far as the papers herein show, said Hempstead has unlawfully in his possession the sum of $7.50, the property of said district, and which sum should be in the possession of the collector, Butler. The respondent, Hempstead, alleges that said sum of $80, so as aforesaid received by him from said collector, "has been expended for the sole benefit, use and profit of the district as will fully appear in his report at the next annual meeting of said school district." Such explanation is without merit, and is no excuse for the unlawful action on his part in drawing and receiving said money from the collector of the district.

In relation to the $60.02 received by the respondent, Hempstead, upon the check of County Treasurer Bowe, said Hempstead contends that he was authorized by Collector Butler to indorse the name of Butler upon the check, which contention said Butler alleges is untrue. The respondent herein alleges that he informed Collector Butler he would deliver to him said sum of $60.02 at any time he (Butler) would call for it. So far as this proceeding is concerned, it is immaterial whether the respondent had authority to indorse the name of the collector upon the check or not, that is a matter to be settled in the criminal courts; but the respondent admits having in his possession the money, which it is his duty to pay over to the collector, who is the only legal custodian thereof, without waiting for the collector to come to him (Hempstead) for it.

In relation to the receipt by the respondent of said sum of $9.66 from the supervisor of Coeymans, he acted in violation of the school law, as he should have drawn his order upon the supervisor in favor of the teacher to whom the district was indebted.

The acts of the respondent in relation to the matter with Sweeney in the payment for the heater was in violation of the school law. The respondent should have drawn his order upon the collector in favor of Sweeney and delivered the same to Sweeney.

Under the school law the supervisors are the legal custodians of the public moneys of the State apportioned to the school district, and said supervisors can only pay out said moneys upon the orders of the trustees or a majority of the trustees in favor of qualified teachers; the collectors of the school districts are the legal custodians of all moneys collected by them upon the tax list issued to them or received from county treasurers or boards of supervisors for taxes returned, and such moneys can only be paid out by such collectors upon the written order of the trustees, or a majority of the board of trustees, to order of the person or persons entitled to receive the same. Trustees of school dis-

tricts have no lawful authority to receive or retain in their custody any of said moneys. Under the school law I have the power, whenever it shall be proved to my satisfaction that any school officer has been guilty of any wilful violation or neglect of duty under the Consolidated School Law, or any other act pertaining to common schools, to remove such school officer from office.

The respondent, Hempstead, has been a trustee of school district no. 3, town of Coeymans, Albany county, since the commencing of the school year 1894–95, and, it is presumed, knows what the law relating to his duties as such trustee is.

I do find and decide that Harvey S. Hempstead, as trustee of school district no. 3, town of Coeymans, Albany county, has been proved to my satisfaction guilty of wilful violation and neglect of duty under the Consolidated School Law.

The petition herein should be sustained.

Whereas, It having been proved to my satisfaction that Harvey S. Hempstead, trustee of school district no. 3, town of Coeymans, Albany county, has been guilty of wilful violation and neglect of duty as such trustee, under the Consolidated School Law, I do hereby remove said Harvey S. Hempstead from office as trustee of school district no. 3, town of Coeymans, Albany county.

3543

Charles W. Rodman, George N. Gardiner and Edmund Sherer, trustees of school district no. 25 of the town of Hempstead, Queens county v. Thomas H. Clowes, Robert Seabury, John B. Mesereau and Henry Powell, trustees of district no. 1 of the town of Hempstead.

APPORTIONMENT OF SCHOOL MONEYS

In a school district in which a branch school has been maintained, and subsequently that part of the district where the patrons of the branch school reside is formed into a separate district, so much of the public moneys apportioned to the old district upon the statistics of the branch school will be ordered paid to the new district.

Taxes levied and collected before the formation of the new district will not be so apportioned.

There is no provision of law for a division of common property when a new district is set off from an old one.

Decided November 30, 1886

Draper, *Superintendent*

Prior to April 1885, the village of Garden City constituted a part of school district no. 1 of the town of Hempstead, Queens county. On the 20th of April 1885, the Legislature passed an act making the village of Garden City a separate school district, to be known as district no. 25 of the town of Hempstead. No meeting was held for the purpose of electing officers and organizing

the new district until August 11, 1885. For several years prior to this, district no. 1 had maintained a school at Garden City, and, notwithstanding the act of the Legislature in April, this was continued and supported at the expense of district no. 1 till the end of the school year. At the close of the school year 1884–85, district no. 1 reported the maintenance of the school at Garden City during the preceding year, and in the annual apportionment of school moneys in the school year 1885–86 said district received such sum as would be payable in consequence thereof, while the new district, no. 25, received nothing. District no. 25 brings the matter before this Department, and demands that district no. 1 shall be required to pay to it such sum of money as was apportioned to it in consequence of the maintenance of a school at Garden City during the preceding school year.

It also appears that in February 1885, the board of education of district no. 1 levied a tax of fifteen cents on the hundred dollars, which amounted to the sum of $1351.35, of which sum Garden City paid her proportionate share, which was $229.20. Having parted company, Garden City now thinks and demands that the part which she has paid of this tax should be paid back to her.

Again, chapter 591, Laws of 1870, provides for the distribution to the several school districts of the town of Hempstead of a certain portion of the income of a fund which has arisen from the sale or rental of common lands of the town, and directs that such distribution shall be calculated and determined "in the same manner, and upon the same basis as the public school moneys of the State are apportioned." After Garden City became a separate school district, and before the commencement of this proceeding, there were two of these apportionments; the first for the six months ending November 1, 1885, and the second for the period ending May 1, 1886, and at each time the sum of $6000 was distributed. Of these apportionments from this trust fund district no. 25 received only such an allotment as was based on school population, and nothing on account of "pupil attendance" or the "district quota," that share going to district no. 1, pursuant to the school reports made at the close of the school year ending August 20, 1885. District no. 25 demands that district no. 1 shall be directed to pay over to her such sums as she received from these two distributions from this fund on account of the maintenance of a school at Garden City during the preceding school year.

District no. 1 resists these several demands with energy. The trustees of that district in answering say that the school which they maintained at Garden City was only a branch of the school at Hempstead, and that they were not obliged to open it, and that it was done only for the convenience of the former place, and that the report which they made at the end of the school year 1884–85 was such as they were required to make by law, and that the school moneys based upon such report which they have received are such and only such as the law gives them. In relation to the tax collected in February 1885, of which district no. 25 demands that the share which it paid shall be paid

back, they say it was levied to meet current expenses for the ensuing year, and that Garden City received back her share in school privileges. They urge, also, that when a new district is set off from an old one, the property of the old district can not be divided; that here the new district was set off at its own desire, and that it must support itself as best it can until the time when its school reports, made pursuant to law, entitle it to share in public moneys. In illustration, it urges that when it opened the school at Garden City it was obliged to maintain it the first year with no apportionment of public moneys based on the report of a previous school year, and that now this district must do the same.

The public moneys apportioned on or before the 20th day of January in each year, are intended for teachers' wages for the school year in the middle of which the apportionment is made. The apportionment is made upon the school statistics for the preceding school year, for the reason that that is apparently the most reasonable basis for a general apportionment. Ordinarily, when a new district is set off, it is impossible to make any allotment to it during the first year of its existence, because there is no preceding year's statistics for a basis. That is not so in this case. The school at Garden City had been in operation for years. It had an individuality of its own. For statistical purposes it was the same school, was as perfectly and completely organized and was as separate and distinct from the Hempstead school before the new district was erected as afterward. Its register of attendance for the year 1884–85, kept as required by law and duly verified, is produced here. It shows that school was kept more than 28 weeks. Here is the basis upon which to determine what amount of public money belonged to it, equitably at least, for the year 1885–86. There can be no doubt but that any new district is, in equity, entitled to share in the State school moneys, even during the first years of its organized existence. The difficulty is that the means of determining how much it should have are usually wanting. That difficulty does not exist in this case. District no. 1 received at the apportionment in 1886 more than it was entitled to for the year 1885–86, and district no. 25 received less than its share, because the Garden City statistics were included in the report of district no. 1 at the close of the preceding year. This being so, and there being at hand the data from which to determine, with exactness, *how much* was paid to no. 1, which should, in fairness, have been paid to no. 25, the matter should be set right if there is lawful authority for so doing.

The State school moneys are apportioned by the Superintendent of Public Instruction in the manner provided by title 3 of the Consolidated School Act of 1864. It was impossible to provide by statute for all exigencies which might arise, and it was necessary to vest some discretion in the Superintendent for the purpose of meeting exceptional cases. For instance section 10 of title 3 directs the Superintendent to make a special apportionment to a district which has been excluded from participation in the general apportionment by reason of its failure to comply with some provision of law or requirement of

the Department when such omission was accidental or excusable. Section 11 authorizes him to withhold from any district in a subsequent apportionment any sum which has been given to it in excess of what it should should have had at a prior apportionment. Section 12 provides that "if a less sum than it is entitled to shall have been apportioned by the Superintendent to any county, part of county or school district, the Superintendent may make a supplementary apportionment to it of such sum as shall make up the deficiency, etc. Reading the different sections together and having in view the general plan of apportionment which the Legislature was setting in operation, it is manifest that it was intended to clothe the Superintendent with authority to meet and adjust an inequality like the one here presented. Although the precise question here involved has never before been passed upon by the Department, the general authority requisite to meet it has always been exercised by it.

I shall therefore, direct that district no. 1, Hempstead, pay over to district no. 25 such sum as it received in the apportionment of 1886, on the basis of the Garden City statistics; or, in case of failure to do so before the apportionment of 1887, that the same be deducted from the allotment to no. 1, and added to that of no. 25.

The demand of district no. 25, that it be repaid so much of the tax levied in February 1885, as was paid by Garden City, must be denied. This tax was raised before district no. 25 was set off. It was used in part at least, to meet common expenses in which was included the expense of the school at Garden City. What was not so used, was district property at the time of the separation. There is no provision of law for the division of common property when a new district is set off from an old one, and in the nature of things there can not be.

There is some reasonable question of the power of this Department to correct the apportionment of the local trust fund applicable to school purposes as provided by chapter 591 of the Laws of 1870. The appellants cite section 17, title 3 of the Consolidated School Act which treats of trusts for school purposes, and provides that "the Superintendent of Public Instruction shall supervise and advise the trustees, and hold them to a regular accounting," etc. On the other hand, it is urged that the special act governing this particular fund takes it out of the provisions of the general statute. It is not necessary to determine this question at present, at least. The board of town auditors of Hempstead have, as yet, committed no error. They have complied with the law and followed the State apportionment. It is fair to assume that they will continue to do so, and will make the correction which the State now makes, and it will be time to consider what course must be taken for relief in that direction when it shall have become certain that some steps are necessary.

It is accordingly ordered that the board of education of district no. 1, Hempstead, pay over to district no. 25, Hempstead, known as the Garden City district, the sum of $66.12, the same being the amount of one district quota apportioned to no. 1, Hempstead, in the annual apportionment made by the

Superintendent of Public Instruction to January 1886, and reapportioned by the school commissioner of the second commissioner district of Queens county, in March 1886, for the year 1885–86, on the basis of one duly qualified teacher employed for the legal term of school in the Garden City school for the school year beginning with August 21, 1884, and ending August 21, 1885; and such further sum as shall be certified by the said school commissioner that district no. 1, Hempstead, received for the Garden City schools for the year 1885–86, on the basis of the number of resident children, the average daily attendance of such children, and for libraries, for the school year 1884–85. But in the event of there being no moneys in the hands of the board of education of district no. 1, Hempstead, or under their control, and available for this purpose, then the said school commissioner shall deduct for district no. 25, Hempstead, in the annual apportionment to be made by him in March 1887, from the school moneys to be apportioned to said district no. 1, for the year 1886–87, the total amount of public school money said district no. 1 received for the Garden City school in the annual apportionment of 1886, and apportion the same to district no. 25, together with the amount that no. 25 is to receive for the year 1886–87.

SCHOOL PROPERTY—USE OF

The trustees of school district no. 4 in the town of Champion, ex parte.

Schoolhouses can not be used for any other than common school purposes, excepting by general consent.

A vote of a majority of the inhabitants does not render it proper to use schoolhouses for any other than their legitimate purposes.

Decided February 19, 1833

Dix, *Superintendent*

This was an application to the Superintendent for his opinion upon the following questions:

1 Whether the trustees have a right to hold the schoolhouse of their district open for any religious or temperance meetings, when not encroaching on school hours.

2 Whether a vote of the majority of the taxable inhabitants in any district shall decide as to the duty of trustees on the question above mentioned.

1 The trustees of each school district have the custody and safekeeping of the district schoolhouse. They have the custody of it for the purposes specified in the act from which they derive their authority; and they have, therefore, strictly no more right to allow it to be used for religious meetings, than the trustees of a religious society would have to allow the church or meeting house to be used for keeping a school. There would be no impropriety in allowing either to be used for one purpose or the other, if no objection were raised by the district or the society. But where controversies grow out of the application of a schoolhouse to purposes not contemplated in establishing it, it is the duty of the trustees to confine its use strictly to the legitimate objects.

2 I do not consider the voice of a majority of the inhabitants of a district as a proper criterion for determining the propriety of applying a schoolhouse to other uses than those for which it was designed. The law has determined this question. It can not with strict propriety be applied to other than common school purposes. It may be otherwise used by the general consent of the parties interested. But if such use were likely to distract the district, by breeding dissensions, and a respectable minority should apply to me for an order to confine the schoolhouse to its legitimate purposes, I should not consider myself at liberty to deny the application. The trustees therefore should so act as to render any such application to me unnecessary.

3651

In the matter of the appeal of Marquis Baker, a legal elector of school district no. 12, town of Marcellus, Onondaga county, N. Y. v. Seymour Hull, as sole trustee of said district.

When a schoolhouse is used for religious services by permission of trustees, and such use is objected to by a legal voter of the district; *held,* that such use must be discontinued.
Decided December 8, 1887

Draper, *Superintendent*

This is an appeal by a resident and legal voter of school district no. 12, town of Marcellus, county of Onondaga, from the action of the trustee in permitting the use of the schoolhouse in said district to be used for other than school purposes. The appellant alleges not only that the building is used for religious services, but that the fuel of the district is consumed at such religious services, and district school furniture is damaged, and school books mutilated.

The answer of the trustee admits the fact that the building is used for a Sunday school composed of children who attend the public school, but denies the other allegations mentioned above.

In deciding this appeal it will not be necessary to pass upon the disputed questions of fact. The question of the right to allow a schoolhouse to be used for other than school purposes is not new, and unless such use is objected to, this Department never interferes to prevent the use for any praiseworthy cause; but when the question is raised, we are at once confronted with the law which prohibits the use of the school building for other than school purposes, unless all the trustees of a district consent thereto, and when the consent of all is obtained, the statute provides that such use shall only be for the purpose of "giving and receiving instruction in any branch of education or learning, or in the science or practice of music."

It is true, the trustee adroitly seeks to bring the use to which objection is made, within the law, by alleging that maps of the ancient world are studied, and the children instructed in the history of the ancient world and its people, but the fact remains that the use is for religious purposes, and not for such educational purposes as the statute clearly refers to.

It is the settled policy of the Department to sustain trustees in permitting the use of school property for other purposes than those recognized by the school laws, so long as the residents of the district do not object. It can go no further. The Superintendent would be very glad if all of the residents of the district here in question would consent to the careful use of the property for the purpose suggested. The use may, however, have been so abused as to justify the objection. In any event, the appeal must be sustained, and such use in the future, or until objection is withdrawn, must be prohibited.

4021

In the matter of the appeal of John Costello and others v. the trustee of school district no. 12, of the town of Pompey, county of Onondaga.

A school district trustee permitted the school building to be used for religious purposes. Its use did not interfere with the school, was not detrimental to the property, and was an accommodation to people living remote from an established church. *Held,* not a case for interference with the discretion of the trustee.

Decided November 16, 1891

Draper, *Superintendent*

This is an appeal from the action of the trustee of school district no. 12 of the town of Pompey, county of Onondaga, in permitting the schoolhouse to be used for the purpose of holding religious meetings therein. It is alleged by the appellant that the use complained of has depreciated the value of the property; that fuel provided by the district has been used, and that the seats and desks have been so separated for the accommodation of adults as to greatly inconvenience the younger pupils of the school.

An answer has been interposed by the trustee, and it is therein admitted that, for many years, the schoolhouse has been used for union religious services in which people of all denominations participate. It is denied that the seats have been separated, as alleged by the appellant, and the respondent insists that they remain today as they were when placed in the schoolhouse originally. He denies that fuel has been used without compensation to the district. It is shown by the respondent that the nearest church to the schoolhouse is three and a half miles away, and that such church is usually without a pastor or preacher, and that the next nearest church is four miles away. It is insisted by the respondent that instead of the property being depreciated by the use complained of, its value has been enhanced, and that the persons so using the building are interested in keeping it clean and neat and pleasant.

It seems clear to me from the proof presented, that the use of the school building to which the appellant objects, does not in any manner interfere with the use of the building for public school purposes, nor does it appear to me that any injury or loss to the district has resulted or is likely to result from such use. It appears that the holding of religious services in the district is an accommodation to a very large proportion of the inhabitants of the district, and in view of all the circumstances, I have concluded that there is no case presented which requires me to interfere with the discretion of the trustee in the matter, and I therefore overrule the appeal.

3707

In the matter of the appeal of James Cogan, Oliver Sancomb, Dennis Gregory and James G. Knox v. Pier Coolidge, trustee of school district no. 11, town of Ellenburgh, Clinton county.

The use of a schoolhouse with the trustee's consent for religious purposes will not be denied, where it is made to appear that no damage has been done to the public property, or to the property of pupils in consequence of such use.

Decided August 27, 1888

Draper, *Superintendent*

The trustee of the district above named has permitted the schoolhouse in said district to be used for religious meetings on the Sabbath. Objection is made by the appellants hereto to such use, and this appeal is brought for the purpose of preventing the schoolhouse from being used for such purposes hereafter.

The statute provides that the custody of the schoolhouse shall be in the trustee. This Department has always held that trustees might permit the use of schoolhouses which they have under their care for religious services where no harm is thereby done to the building or furniture or other property of the district. The appellants in the present case assert that the property of the district and of pupils attending the school has been damaged and destroyed by such meetings, and that fuel belonging to the district has been used at these meetings. But this is denied; the trustee and several credible witnesses swear that no use whatever has been made of the fuel of the district; no fire has even been necessary during the time that such meetings have been in progress, and they also seem to show that no damage has been done to the public property or to the property of pupils in consequence of the use complained of.

Therefore, following the long established holdings of the Department upon the question at issue, I have come to the conclusion that the appeal must be dismissed, and it is so ordered.

4653

In the matter of the appeal of John Shettler v. Prentiss Angel, as trustee of school district no. 13, Cameron, Steuben county.

When the schoolhouse in any district is used for any other purpose than for a school, and for holding school meetings therein, or in any manner that interferes with its use for school purposes, or where the property of the district is injured by such use, or where there are differences of opinion among the qualified voters of a district as to the advisability of using the schoolhouse for other than school purposes, or where any one or more of the qualified voters of the district object to such use, it becomes the duty of the State Superintendent of Public Instruction, upon appeal to him, to strictly observe and enforce the provisions of the school law.

Decided May 13, 1898

D. M. Darrin, attorney for appellant

Skinner, *Superintendent*

This is an appeal from the action of the trustee of school district 13, Cameron, Steuben county, in permitting the schoolhouse in the district to be used for other than school purposes.

The material facts alleged in the appeal are not controverted by the respondent in his answer, namely, that the respondent, as trustee of such district, permits the schoolhouse therein to be used for religious meetings and Sunday schools, and that the appellant, a resident of, and taxpayer in, such district, objects to such use.

The respondent contends that under section 52 of article 6, title 7, of the Consolidated School Law he, as trustee of such district, may freely permit such schoolhouse, when not in use for the district school, to be used for holding and conducting Sunday schools therein, for the reason that instruction is given and received therein in a branch of education or learning. This contention is not tenable. The branches of education and learning in which instruction may be permitted under such section 52, means secular education or learning as is taught in the schools and academies and colleges, and does not mean religious instruction and learning as taught in Sunday schools and in religious meetings.

The holding of Sunday schools and religious meetings in schoolhouses is frequently the source of dispute in every district in which they are so held, and such disputes are detrimental to the best educational interests of such districts.

When the schoolhouse in any district is used for any other purpose than for a school, or in any manner that interferes with its use for school purposes, or where the property of the district is injured by such use, or where there are differences of opinion among the qualified voters of a district as to the advisability of using the schoolhouse for any other than school purposes, or where any one or more of the qualified voters of the district object to such use, it becomes the duty of the State Superintendent of Public Instruction, upon appeal to him, to strictly observe and enforce the provisions of the school law. See the following decisions: No. 3577, by Superintendent Draper, July 21, 1887; 4334, Johnson v. Winston, by Superintendent Crooker, March 7, 1895; 4419, Martin and others v. Weaver, by Superintendent Skinner, January 16, 1896; 4450, Mayer v. Barnes, by Superintendent Skinner, May 11, 1896.

The appeal herein is sustained.

It is ordered, That Prentiss Angel, as trustee of school district 13, Cameron, Steuben county, forthwith notify the persons conducting and attending such Sunday schools and religious meetings heretofore held in the schoolhouse in such district, that no further or other religious meetings and Sunday schools shall or will be permitted to be held in said schoolhouse; and that the permission and consent heretofore given by him that such religious meetings and Sunday schools be so held, is revoked, canceled and withdrawn.

It is further ordered, That said Prentiss Angel, as such trustee, be, and he hereby is, enjoined and restrained from permitting or consenting to the hold-

ing of any religious meetings and Sunday schools in the schoolhouse in said district 13, Cameron, Steuben county, from and after the date at which he shall receive notice of my decision and orders herein.

4522

In the matter of the appeal of Enos Smith v. Elihu D. Conklin, trustee, school district no. 1, towns of Canisteo, Jasper and Greenwood, Steuben county.

Where an appeal is taken to the State Superintendent of Public Instruction from the refusal of the trustee or trustees of a school district to permit the use of the schoolhouse for religious meetings and Sunday schools, or for any other than school purposes, and it appears that any qualified voter of the district is opposed to such use or that such use causes contentions and dissensions in the district, or where the property of the school district or of the pupils attending the school, is injured by such use it becomes the duty of the State Superintendent to strictly observe and enforce the provisions of the school law upon the subject.

Decided December 4, 1896

Almon W. Burrell, attorney for appellant
Milo M. Acker, attorney for respondent

Skinner, *Superintendent*

This appeal is taken from the refusal of the trustee of school district no. 1, towns of Canisteo, Jasper and Greenwood, Steuben county, to permit the schoolhouse to be used for religious meetings on Tuesday and Friday evenings.

It appears, from the proofs presented herein, that for many years the schoolhouse of the district has been used on Sundays for Sunday school and other religious services, with the permission of the trustee, and without opposition on the part of any qualified voter of the district, and since this appeal was taken, has continued to be so used with the permission of the respondent herein as trustee; that since August 1, 1896, public religious meetings conducted by religious societies of the neighborhood have been held in the schoolhouse on Tuesday and Friday evenings; that for the period of about six weeks, commencing on September 7, 1896, one John H. Goff taught the school in the district, and the respondent was informed by said Goff that the persons attending the meetings held on Tuesday and Friday evenings were soiling and defacing the schoolhouse and property, and that some of the persons attending such meetings were in an intoxicated condition; that the schoolhouse would be left after such evening meetings without being swept, and with the mud and dirt not taken care of; that a large amount of tobacco juice was on the floor; the erasers and blackboards were used, and in one or two instances, chairs and other property were broken and damaged.

It further appears that the respondent, having knowledge of the condition in which the schoolhouse was left after such evening meetings had been held

therein, and after considering the statements made to him by Goff, decided that it was for the best interests of the school property and the children attending the school, that the schoolhouse be closed against the holding of such evening meetings therein, and thereupon locked the door of the schoolhouse and outbuildings against said evening meetings, and gave notice to the appellant herein that no evening meetings would be permitted to be held in the schoolhouse.

Under the school law the trustee or trustees of every school district are the custodians of the schoolhouse or houses in their respective districts, but for school purposes only, that is, for maintaining schools therein and for school district meetings. The only provision of the school law which authorizes trustees to permit the use of a schoolhouse for other than school purposes is contained in section 52, article 6, title 7, of the Consolidated School Law of 1894, and is as follows: "The trustees, or any one of them, if not forbidden by another, may freely permit the schoolhouse, when not in use for the district school, to be used by persons assembling therein for the purpose of giving and receiving instruction in any branch of education or learning, or in the science or practice of music."

The "branch of instruction and learning" contained in said section is secular education and learning such as is taught in the schools, academies and colleges, and not religious instruction or learning.

The societies or persons permitted to use the schoolhouse for holding meetings must furnish the fuel and light used at such meetings, and after the close of the meetings should sweep and clean the schoolhouse. The trustees of the district have no legal authority to permit the use of the property of the district for heating and lighting the schoolhouse for such meetings, or to sweep and clean, at the expense of the district, the schoolhouse after such meetings have been held.

This Department has uniformly held that where an appeal is taken from the refusal of the trustee or trustees of a school district to permit the use of the schoolhouse for other than school purposes, and it appears that any qualified voter of the district is opposed to such use, or that such use causes contentions and dissensions in the district, or where the property of the school district or of the pupils attending the school is injured by such use, it becomes the duty of the Department to strictly observe and enforce the law governing the matter.

The appeal herein is dismissed.

4419

In the matter of the appeal of Peter M. Martin and others v. Erwin Weaver, trustee school district no. 7, town of Rush, Monroe county.

To authorize the trustee of a school district against the objection of any one or more of the qualified voters therein, to permit the use of the schoolhouse for holding religious meetings and Sunday schools, or for any other purpose than for school purposes, he must find some provision of law giving him such authority. When a school building

is used for any other than school purposes or in any manner which interferes with its use for school purposes or where the property of the district is injured by such use, or where there are differences of opinion among the inhabitants of the district as to the advisability of using the schoolhouse for any other than school purposes, it becomes the duty of the State Superintendent of Public Instruction, upon an appeal being taken to him, to strictly observe and enforce the provisions of the school law governing such use.

Decided January 16, 1896

William Carter, attorney for appellants

Skinner, *Superintendent*

The appellants in the above-entitled matter appeal from the action of the respondent in permitting the use of the schoolhouse in district no. 7, town of Rush, Monroe county, for the holding therein of religious meetings and Sunday school.

An answer has been made to the appeal by the respondent, Weaver, the trustee of the said district.

It appears that the respondent, as such trustee of said district, has permitted the use of the school building in said district for religious meetings and for Sunday schools; that on or about October 19, 1895, a paper, signed by thirteen of the residents and qualified voters of said district, stating that they objected to the use of said school building for any purpose not warranted by law, and specially objected to its use for religious meetings, and demanding that such use be prohibited by the respondent as trustee, was delivered to the respondent as trustee; that on or about October 22, 1895, a paper signed by thirty-five of the residents and qualified voters of said district, asking that the schoolhouse continue to be used for religious purposes; that for several years said schoolhouse has been used for religious meetings and Sunday schools with the permission of the respondent and his predecessors in office as trustees of said district; that said religious meetings are not held by any one sect or denomination, but are union services participated in by persons of various religious denominations; that the village of West Rush is located in said school district, containing quite a number of people desirous of attending religious services, and that there is no hall or other suitable building for use for such purposes; that the persons attending such religious meetings have, at their own expense, placed in said schoolhouse a cabinet organ, lamps and window shades, which can be used, if desired, in conducting the school of the district; that the fuel and lights used at such religious meetings are furnished by and at the expense of the persons attending such meetings.

It also appears that the schoolhouse has been cleaned at divers times by persons interested in said religious meetings and also swept at different times, and the window shades washed; but it does not affirmatively appear that after each of said meetings or Sunday schools were held, that the schoolhouse was thoroughly cleaned, swept and put in order by or at the expense of the persons interested in said meetings.

It does not appear that the schoolhouse, or its furniture, aside from the natural wear and tear incident to its use for said meetings and Sunday schools, has been injured.

Schoolhouses are constructed and maintained by school districts for the purpose of public education by qualified teachers in the schools conducted therein, and also to furnish a place for the holding of school meetings, and for no other purpose.

By subdivision 6 of section 47, article 6, title 7, of the Consolidated School Law of 1894, the custody and safekeeping of the district schoolhouse or houses, their sites and appurtenances, in the respective school districts of the State, are given to the trustee or trustees of said districts respectively. The respondent herein, as sole trustee of said school district no. 7, of Rush, under the school law, is the custodian of the schoolhouse and appurtenances of said district; but such schoolhouse, etc., does not thereby become his private property, and he can not put it to any use which he sees fit; he is to manage it as the representative of the school district, and for school purposes only, and so that the instruction of the pupils in the school shall not be embarrassed by any use of the house other than for school purposes, and that the property of the district, and the furniture, books and papers belonging to the school or the pupils, shall not be injured or destroyed. No use of the schoolhouse should be permitted or tolerated by him which may or does give occasion to a controversy among the inhabitants of the district.

To authorize the respondent herein, against the objection of any one or more of the qualified voters in said district, to permit the use of the schoolhouse for any other purpose than for school purposes, he must find some provision of law giving him such authority. Section 52, article 6, title 7, of the Consolidated School Law of 1894, gives authority to the respondent herein, as sole trustee of said district, to freely permit the schoolhouse therein, when not in use for the district school, to be used by persons assembling therein for the purpose of giving and receiving instruction in any branch of education or learning, or in the science or practice of music.

The respondent herein contends that said section 52 gives him authority to permit religious meetings and Sunday schools to be held in the schoolhouse in said district, for the reason that "instruction in the principles of Christianity is the highest form of education." Such contention is not well taken. The school law refers wholly to secular as distinguished from religious education or learning. The Legislature intended in its use of the words, "in any branch of education or learning," that such branches of education and learning as are taught in the common and higher grades of schools, and in academies, colleges and universities should be understood and not instruction in religious education or learning as taught in Sunday and church schools and in the churches. Even under said section 52 the respondent, as such trustee, can not make any permanent contract for the occupation of the schoolhouse, but can simply give a license revoca-

ble at pleasure. Strictly speaking, he can grant no right to use the schoolhouse for any other than educational purposes; and can only, by his acquiescence in any such use, estop himself from bringing an action for the act of entering the schoolhouse, which would otherwise be a trespass.

My predecessors in office have, in many cases, refused to interfere with the action of trustees in permitting schoolhouses to be used for religious meetings; but each case has been decided upon the facts as established therein. No such refusal to interfere has been made in any case in which the action of the trustee or trustees has given occasion to a controversy among the inhabitants of the district.

It appears from the papers presented in this appeal that out of the forty-eight residents and qualified voters of the district who have expressed their opinion as to the act of the respondent, thirteen, more than one-fourth, are opposed to the use of the schoolhouse for holding religious meetings and Sunday school. The action of the trustee has occasioned a controversy among the inhabitants of the district.

The holding of religious meetings in schoolhouses is almost always the source of dispute in every district in which such a meeting is held, and such disputes are detrimental to the best educational interests of such districts. I am not in favor of the use of the schoolhouses for holding meetings for any purpose or purposes whatever other than those recognized by the school law, no matter how laudable the purposes of such assembly of persons may be.

I am clearly of the opinion that when a school building is used for any other purpose or in any manner which interferes with its use for school purposes, or where the property of the district is injured by such use, or where there are differences of opinion among the inhabitants of the district as to the advisability of using the schoolhouse for any other purpose than school purposes, it becomes the duty of the State Superintendent of Public Instruction, upon appeal, to strictly observe and enforce the provisions of the school law governing the matter.

The appeal herein is sustained.

It is ordered, That said Erwin Weaver, as such trustee of school district no. 7, town of Rush, Monroe county, forthwith notify the persons conducting and attending said religious meetings and Sunday school, heretofore held in the schoolhouse in said district, that no further or other meetings and Sunday schools shall be or will be permitted to be held in said schoolhouse in said district, and that the permission and consent heretofore given by him, that such religious meetings and Sunday school be so held, is revoked, canceled and withdrawn.

It is further ordered, That said Erwin Weaver, as such trustee, be, and he hereby is, enjoined and restrained from permitting or consenting to the holding of any religious meetings and Sunday schools in the schoolhouse in said district no. 7, town of Rush, Monroe county, from and after the date at which he shall receive notice of my decision and orders herein.

4450

In the matter of the appeal of Joseph S. Mayer v. Cassius H. Barnes, trustee, school district no. 2, town of Scriba, Oswego county.

This Department has uniformly held for many years that when upon an appeal it is established that a school building is used for any other purpose or in any manner which interferes with its use for school purposes, or giving and receiving instruction in any branch of education or learning, or the science or practice of music, or where there are differences of opinion among the inhabitants of the district as to the advisability of the use of the schoolhouse for any other than school purposes; or where the property of the district or of the pupils is injured by such use, it becomes the duty of the State Superintendent of Public Instruction to strictly observe and enforce the provisions of the school law relating to such use.

Decided May 11, 1896

Skinner, *Superintendent*

The appeal in the above-entitled matter is taken from the action of the trustee of school district no. 2, town of Scriba, Oswego county, in permitting the use of the schoolhouse of said district for meetings of the Ontario lodge of Independent Order of Good Templars.

The pleadings herein consist of the appeal, answer, reply and rejoinder.

The facts material to the issue, as appear from such pleadings, are as follows:

That the Ontario lodge of Independent Order of Good Templars, a secret society or association having its password, grips etc., holds weekly meetings in the schoolhouse of said district, with the permission of the trustee of said district, and have been so held for some considerable time; that at such meetings, when the initiation of members takes place, none but members of the order are admitted, and that at other meetings all persons so desiring are admitted; that a petition signed by twenty-one persons who claim to be voters and taxpayers, has been presented that the schoolhouse be closed against the meetings of said order, and a petition signed by thirty persons, who claim to be taxpayers in said district, but six of whom it is stated upon the petition are nonresidents of said school district, leaving the names of twenty-four residents of the district, is also presented, asking that the said order be permitted to hold its meetings in said schoolhouse.

It is alleged by the respondents herein that of the twenty-one persons signing said petition that the schoolhouse be closed against the said meetings of said order, eleven are not qualified voters in said school district. Admitting, for the purpose of argument only, that said allegations are true, it appears that of the thirty-four qualified voters of said district contained in the two petitions, more than one-fourth and nearly one-third are opposed to said order holding its meetings in said schoolhouse.

A large portion of the matters contained in the papers filed in this appeal are not relevant to the question at issue herein.

1 As to the action of the annual school meeting held in August 1895, upon the two resolutions offered, namely, one opposed and one in favor of permitting the schoolhouse in said district to be used for the meetings of said order, or for other use than for school purposes. By subdivision 6 of section 47, article 6, title 7 of the Consolidated School Law of 1894, it is enacted that it shall be the duty of the trustee or trustees of every school district, and they shall have power to "have the custody and safekeeping of the district schoolhouse or houses, their sites and appurtenances." Whether the said annual school meeting voted in favor of or against permitting the use of the schoolhouse for any other than school purposes is wholly immaterial, and the action of the meeting was but an expression of opinion on the part of those present and voting, and would not be lawfully binding upon the trustee of the district any more than a vote of said meeting directing the trustees to employ as teacher a person named by the meeting, or that the trustee should pay a sum fixed by the meeting as compensation for the services of a teacher. The school law gives to the trustee of the district the custody and safekeeping of the schoolhouse etc., therein and the voters of the district can not change the powers and duties of said trustee in that regard by any action they may take.

2 As to whether or not Mrs Mary O'Hara signed the petition against permitting the use of the schoolhouse for meetings of said order under a misapprehension of the nature of the petition. It appears that Mrs O'Hara has signed both petitions. The erasure of her name from the petition against such use of the schoolhouse would not, in any way, affect the question at issue, as out of thirty-three voters expressing their wishes, nine, more than one-fourth, are opposed to said use of the schoolhouse.

3 As to whether or not any rent has been paid by said order for its use of the schoolhouse; or whether the order has paid any part of the compensation of the janitor; or has paid for fuel and light used at its meetings; or allowed the school to use the organ owned by it, etc., are not, nor is any or either of them, material in determining the question at issue.

The question presented herein for my decision is, Had or has the trustee of school district no. 2, town of Scriba, Oswego county, authority under the school law to permit the schoolhouse of said district to be used by the Ontario lodge of Independent Order of Good Templars for holding its meetings?

Public schoolhouses are constructed and maintained by school districts for the purpose of public instruction by qualified teachers in the schools conducted therein, and also to furnish a place for the holding of school district meetings.

Under the provisions of the school law the trustees of school districts are charged with the custody and safekeeping of the district schoolhouse or houses, their sites and appurtenances, in the respective school districts for the purpose of public instruction and for school district meetings.

The respondent herein, Cassius H. Barnes, as sole trustee of school district no. 2, town of Scriba, Oswego county, under the school law, is the custodian of the schoolhouse, site and appurtenances in said district. Such schoolhouse etc.,

does not thereby become his property, and he can not put it to any use, or permit it to be used for any purpose that he sees fit. His custody and safekeeping thereof must be exercised by him as the representative of the school district, and for school purposes only. No use of the schoolhouse should be permitted or tolerated by him which does or may give occasion to a controversy among the inhabitants of the district.

The respondent herein, to authorize him to permit the use of the schoolhouse for any other than for school purposes, against the objection of any one or more of the qualified voters in said district, must find some provision of law giving him such authority.

Under section 52, article 6, title 7, of the Consolidated School Law of 1894, the respondent herein, as sole trustee of said district, has authority to freely permit said schoolhouse therein, when not in use for the district school, to be used by persons assembling therein for the purpose of giving and receiving instruction in any branch of education or learning, or the science or practice of music.

The Legislature clearly intended by the use of the words "in any branch of education or learning" such branches of education or learning as are taught in the common or higher grades of schools, and in academies, colleges and universities.

It is clear, from the proofs herein, that the Ontario lodge of Independent Order of Good Templars at their meetings, do not give, nor do the persons assembled thereat receive, instruction in any branch of education or learning within the meaning intended by the Legislature as contained in said section 52.

Superintendent Draper in July 1887, in his decision of an appeal taken to him where the question was presented whether a district meeting or the trustee can, over the objection of any interested party, let school property for use at certain times by a temperance lodge or society said, "The persons who were permitted to use it did not assemble for the purpose of giving and receiving instruction, but for the promotion of temperance. However laudable the purpose of their assembly, it is not a purpose recognized by the State. I am, therefore, of the opinion that the leasing complained of was unlawful, and that the appeal must be sustained."

It is clear from the proofs herein that not only the objection of one interested party in said district is made to the meetings of said order in said schoolhouse, but that nearly one-third of the qualified voters of said district object to said use of said schoolhouse, and that the action of the respondent herein in permitting such use has occasioned a controversy among the inhabitants of said district. This Department has uniformly held for many years, that when upon appeal it is established that a school building is used for any other purpose, or in any manner which interferes with its use for school purposes, or giving and receiving instruction in any branch of education or learning, or the science or practice of music or where there are differences of opinion among the inhabitants of the district as to the advisability of using the schoolhouse for any other than

school purposes, or where the property of the district, or one of the pupils is injured by such use, it becomes the duty of the State Superintendent of Public Instruction to strictly observe and enforce the provisions of the school law governing the matter.

The appeal herein is sustained.

It is ordered, That Cassius H. Barnes, as trustee of school district no. 2, town of Scriba, Oswego county, forthwith notify said Ontario lodge of Independent Order of Good Templars, or the officers thereof that no further or other meetings of said Ontario lodge of Independent Order of Good Templars shall be or will be permitted to be held in the schoolhouse in said district, and that the permission and consent heretofore given by him that said lodge may hold its meetings therein is withdrawn, canceled and revoked.

It is further ordered, That said Cassuis H. Barnes, as such trustee, be, and he hereby is, enjoined and restrained from permitting or consenting to the said Ontario lodge of Independent Order of Good Templars meeting in or holding any meetings in said schoolhouse in said district, from and after the day or date on which he shall receive notice of my decision and orders herein.

3577

George LeFever v. Reuben Milgate, sole trustee of district no. 9, towns of Clarksville and Portville, Allegany and Cattaraugus counties.

The trustee is the legal custodian of the schoolhouse, but it is not his private property and he can not put it to any use he sees fit.

As a general rule, it is to be used only for school purposes.

The use of a schoolhouse for any purposes other than those permitted by statute, however laudable, can not be sustained when objected to by interested parties.

Decided July 21, 1887

F. W. & E. F. Kruse, for appellants

Draper, *Superintendent*

This is an appeal of a resident and taxpayer in the above-named district from the action of the sole trustee of the district in renting the schoolhouse for one evening in each week to a temperance society, known as "Pleasant Valley Division, No. 107, of the Sons of Temperance," which society upon such evenings occupies the building exclusively, permitting none but members to be present, and pays for such use to the trustee a small stipulated amount.

The trustee in his answer admits the leasing and the use of the building as alleged. He says that at the last annual school meeting it was agreed, by the electors present, that the building should be rented for the purpose complained of by the appellant. This is denied. The record of such action is not produced, and several persons, including the chairman of the meeting, swear that no such

action was taken. There seems to have been considerable interest in the district over the question, and the fact probably is that it was made an issue in, and was understood to be determined by, the election of the trustee. I consider it immaterial in any event.

There is really no dispute as to the facts, and the question is presented whether a district meeting or the trustee can, over the objection of any interested party, let school property for the exclusive use at certain times of such an organization as that mentioned in the appeal.

The law constitutes the trustee the custodian of the schoolhouse. But it does not thereby become his private property, and he can not put it to any use which he sees fit. He is, as a general rule, to manage it as the representative of the district, and for school purposes only. He must find some express provision of statute authorizing him to permit it to be used for any other purpose before he is justified in doing so, provided objection is made by any interested party. The only provision of the statute of such a nature is found in section 52 of title 7 of chapter 555 of the Laws of 1864, which allows the trustee "to permit the schoolhouse, when not in use by the district school, to be used by persons assembling therein for the purpose of giving and receiving instruction in any branch of education or learning or in the science or practice of music." It can not be claimed that the leasing in the present case was for such a purpose as is here mentioned. In this case the house was given over to the use of a secret society. The people of the district who were not members of the society were excluded. The persons who were thus permitted to use it did not assemble for the purpose of giving and receiving instruction, but for the promotion of temperance. However laudable the purpose of their assembly, it is not a purpose recognized by the State. I am, therefore, of the opinion that the leasing complained of was unlawful, and that the appeal must be sustained.

It may be proper to say, however, that it has always been the practice of this Department to refrain from preventing the use of school property for other than school purposes, when such other use does not interfere with the use for which such property is maintained, and when such other use is acquiesced in by the taxpayers and electors of the district. This has, unquestionably, been a wise policy. Frequently, in the rural school districts, the schoolhouse is the only suitable place in the district for holding a meeting of any character, and such policy has greatly promoted the convenience as well as the intellectual and moral activity of the people of the district. But when a school building is used for any other purpose, or in any manner which interferes with its use for school purposes, or where there are differences of opinion among the people of the district as to the advisability of using the schoolhouse for any other purpose than school purposes, it becomes the duty of the Department to strictly observe and enforce the laws governing the matter.

The appeal is sustained, and the injunction granted on the 24th day of March 1887, is made perpetual.

4164

In the matter of the appeal of Albert B. Brown v. J. F. Stilson, trustee, district no. 8, city of Rome, Oneida county.

Schoolhouses may be used out of school hours and when not in use for district purposes for religious meetings, Sunday schools, lectures or any other moral, literary or useful purpose, with the approbation of a majority of the district and consent of trustees. Where an appellant does not show that any injury has resulted or does result to the schoolhouse, or to the district from the holding of said meetings for religious purposes, there is not presented any grievance demanding the interposition of this Department.

Decided February 15, 1893

Crooker, *Superintendent*

This is an appeal from the action and decision of the respondent in permitting the schoolhouse in school district no. 8, city of Rome, Oneida county, to be used for other than educational purposes as against the objection of the appellant.

The appellant shows that on October 25, 1892, the appellant served upon the respondent a notice not to allow the schoolhouse in said district to be used for other than school purposes from the date of said notice. The appellant also makes an affidavit of the service of such notice and avers that the respondent has disregarded said notice and continues to allow said schoolhouse to be used for other than educational purposes, to wit, for religious purposes. That deponent was present at the said schoolhouse on Sunday, November 8, 1892, and that preaching was held therein, and that the respondent was present and consented to and took part therein. It is not alleged in said appeal that any injury, damage or loss has been sustained by the district in consequence of the use of said schoolhouse for other than educational purposes. The appeal is not supported by any proof or affidavit other than that of the appellant.

The answer admits that said schoolhouse has been, and is, used for other than educational purposes and shows that the schoolhouse in said district is situate several miles from a church in which a Sunday school or religious meetings are held; that for many years it has been the custom to hold religious meetings in said schoolhouse; that about ten years ago, at the request of the people residing in said district, a union Sunday school was organized and said school held regularly on Sunday in said schoolhouse; that said school commenced with eleven scholars and has increased to fifty-five scholars, having a regular average attendance of thirty-five scholars, said scholars being children of persons belonging to different religious denominations; that at the religious meetings, which are regularly held in said schoolhouse, one Rev. Mr Decker, of Lowell, Oneida county, is the stated preacher, and said meetings have been largely attended by the people residing in said district, the most of whom are patrons of the district school and taxpayers in the school district. That prayer meetings are held in said schoolhouse once each month, and a religious meeting is held in said schoolhouse once in each month by the Young People's

Society of Christian Endeavor. That said religious societies have purchased and placed in said schoolhouse a cabinet organ, the free use of which is made by the district school every day in which said school is in session. Said Sunday school has also provided said schoolhouse with window shades, lamps and other fixtures and furniture. That said schoolroom is cleaned once every week by the Sunday school, and said religious societies furnish the fuel and lights used by them, no fuel etc., of the district being used at said religious meetings. That no injury has been done to the said school building or fixtures, nor to any school books or property of the pupils therein. That a large bell, mounted upon the schoolhouse, is in use by the district school, and said bell was purchased by the inhabitants and not by the district.

It does not appear from the papers presented upon this appeal that any other person than the appellant has objected to the use of said schoolhouse for said religious meetings, but, on the contrary, the affidavits of twenty qualified voters, in addition to that of the respondent, are presented approving of such use and the action of the respondent in permitting the same to be so used.

Trustees are charged with the custody of the schoolhouse for the purpose of public instruction, and it is their duty to exercise a general supervision over its care and management that the instruction of the pupils in the school shall not be embarrassed by any use of the house other than for school purposes, and that the property of the district, and the furniture, books and papers belonging to the school or the pupils shall not be destroyed or injured. Any use of the house in subordination to these restrictions, and not inconsistent with the main purposes for which it was designated may be allowed by the trustees under section 52 of title 7 of the Consolidated School Laws of 1864.

Superintendent Van Dyck, on March 15, 1859, held: "The quiet assembling of orderly persons for religious instruction, not at unreasonable hours can not be a serious injury to the schoolhouse, nor to educational interests, generally, of the district. At all events, I am not disposed to interfere with the discretion of the trustees in regard to a proper custody of a schoolhouse, until the abuse of that discretion is clearly proven by evidence showing that positive injury and damage have resulted from allowing the schoolhouse to be used for other than school purposes." Superintendent Van Dyck, on January 7, 1860, said: "I am disposed to hold, with a previous opinion of this Department, found in Randall's School System, 220, that the schoolhouse may be used, out of school hours and when not wanted for district purposes, for religious meetings, Sunday schools, lectures, or any other moral, literary or useful purpose, with the approbation of a majority of the district, and consent of trustees."

The decision of Superintendent Van Dyck, of March 1854, was concurred in by Superintendent Weaver, in October 23, 1868. Superintendent Gilmour, in June 1870, held: "The trustee is the legal custodian of the schoolhouse, and whenever he permits it to be used for purposes lawful and commendable in themselves, which do not interfere with the school, nor injure the district property, this Department will not interfere in the matter."

I fully concur with my predecessors in office in their opinions and decisions as above quoted.

As the appellant herein does not show that any injury has or does result to the schoolhouse, nor to the district, from the holding of said meetings for religious purposes, there is not presented any grievance demanding the interposition of this Department.

Appeal dismissed.

4334

In the matter of the appeal of Byron Johnson v. William D. Winston as trustee of school district no. 10, town of Marcy, Oneida county.

In an appeal from the action of a trustee of a school district in permitting a branch or lodge of the society or association known as "The Patrons of Industry of the State of New York," to hold meetings in the schoolhouse in his district: *held,* that the action of the trustee was without authority of and in violation of the school law of the State.

Decided March 7, 1895

E. A. Warren, attorney for appellant

Crooker, *Superintendent*

The appellant in the above-entitled matter appeals from the action and decision of the respondents herein, as trustee of school district no. 10, town of Marcy, Oneida county, in permitting certain persons claiming to be members of an order, society or association under the name of the "Patrons of Industry of the State of New York," or a branch or lodge thereof, to meet in, and hold meetings in the schoolhouse of said district; and upon the request of the appellant herein that said respondent as such trustee deny said order, society or association the further use of said schoolhouse, the action and decision of said respondent as such trustee refusing to grant such request.

It appears, from the proofs presented herein, that the appellant herein is a qualified voter in, and a taxable inhabitant of, said school district no. 10, town of Marcy, Oneida county; that the respondent herein, William D. Winston, is, and has been since the annual school meeting in said school district, held in August 1893, the sole trustee of said school district; that some time in the spring of the year 1894, a person calling himself Norman Smith and claiming to be grand organizer of the "Patrons of Industry of the State of New York," delivered a lecture in the schoolhouse of said district upon the purposes and objects of said society or association and the benefits to be derived from membership therein; that said organization was a secret one and the members thereof were required to keep such secrets although no oath was required; that the payment of a membership fee of $1 for those joining that night was required, and $2 for joining thereafter, with small dues payable once in three months; but women were only required to pay half price and a failure to pay dues

terminated such membership; that all persons under 14 years of age were excluded from membership; that a paper was passed around at such meeting to obtain the signatures of those willing to join said organization, and after signatures had been obtained, those not signing were requested to and did leave said schoolroom; that a branch or lodge of said Patrons of Industry was thereupon organized, the respondent herein becoming a member, some of the members therein being residents and qualified voters of said district, and the other members being nonresidents of said school district; that with the permission of the respondent herein, as trustee of said district, said branch or lodge of the Patrons of Industry so organized, has held its meetings in said schoolhouse on two nights in each month upon the agreement that said members thereof furnish the fuel and lights and clean the schoolhouse; that on or about September 20, 1894, the appellant herein personally served upon the respondent herein as such trustee a written notice requesting him to deny said branch or lodge of Patrons of Industry the further use of said schoolhouse, which request the respondent herein refused, stating, in substance, "that they could use it as usual"; that said brance or lodge still uses said schoolhouse for its meetings with the permission of the respondent herein as such trustee.

The respondent in his answer to the appeal herein alleges that the object of said organization, as set forth in the preamble to the constitution, is for the "promotion of the interest of farmers and employees and for the good of the nation," and that during its meetings various subjects of public interest are discussed by the members.

The respondent has annexed to his answer herein the written consent of twenty qualified voters of the district that said trustee may permit said Patrons of Industry to occupy said schoolhouse at such times as will not in any way interfere with the school, provided said Patrons shall not ill use the schoolhouse, and shall provide their own fuel and lights, and keep the schoolhouse neat and clean. The appellant herein objects to such use, and annexed to his reply herein are the affidavits of four other qualified voters objecting to such use of said schoolhouse. It appears, therefore, that there are differences of opinion among the qualified voters of said district as to the advisability and legal authority of permitting the use of said schoolhouse by said Patrons of Industry, or for any other than school purposes.

It is not alleged or proved that there is or are no suitable building or buildings other than said schoolhouse, in said school district, in which said Patrons of Industry could meet and hold their meetings.

Subdivision 6 of section 47, article 6, title 7 of the Consolidated School Law of 1894, enacts that the trustee or trustees of every school district shall have the custody and safekeeping of the district schoolhouse or houses, their sites and appurtenances, and such has been the law of the State for forty years.

The provisions of law above cited constitute the trustee or trustees of school districts the custodian or custodians of the schoolhouse or houses, and their sites and appurtenances, for the purposes of public instruction and for holding

the annual and special school meetings of said district under the school law, and for no other purpose. By said provisions of law such school property does not become the private property of the trustee or trustees, and he or they can not put it to any use which he or they see fit. In 1855 Deputy Superintendent Smith decided "That the trustees of each school district have the custody and control of the schoolhouse for the purposes defined and specified in the act conferring the authority. In general, schoolhouses are built for the purposes of public instruction by teachers holding regular certificates of qualification, and also to furnish a place for the holding of school district meetings, and for no other purpose. In short, the employment of schoolhouses for such objects (that is, other than school purposes) is only tolerated by general consent. This Department never raises the question. It is, however, under the necessity of sustaining the objection when it is made."

By section 52, article 6, title 7 of the Consolidated School Law of 1894 it is enacted, "The trustee, or any one of them, if not forbidden by another, may freely permit the schoolhouse, when not in use for the district school, to be used by persons assembling therein for the purpose of giving and receiving instruction in any branch of learning or education or in the science or practice of music." Section 52 above quoted is precisely the same as section 52 of the sixth article of title 7, of the Consolidated School Act of 1864. Said section 52 contains the only purposes under the school law for which trustees of school districts had the legal right to permit the schoolhouse under their authority and control to be used, other than those of holding the schools and school meetings of the district, until the Consolidated School Law of 1894 went into operation. Said section 52 was enacted to prevent the disputes continually arising about the right and power of the trustees to permit the schoolhouse to be used for any purpose but a common school.

Even under the provisions of said section 52 the trustee or trustees of a district can not grant any right to use the district property for any other than educational purposes. As trustees are forbidden to lease or contract the right of occupation and use of schoolhouses and appurtenances, or any part thereof, when allowing the use of said property under section 52, they can only acquiesce in said use and by such acquiescence estop themselves from bringing an action for the act of entering the schoolhouse, which would otherwise be a trespass.

Prior to the enactment of section 52, sixth article, title 7, of the Consolidated School Act of 1864, chapter 555, of the Laws of 1864, a trustee or trustees of a common school district had no legal power or right to consent, or permit the use of the schoolhouse, its site and appurtenances, or any part thereof, for any purpose whatever except for public instruction, in the maintenance of a school or schools therein and for annual and special school meetings of the district. Since the passage of chapter 556 of the Laws of 1894, pursuant to the provisions of said section 52, the sole trustee of a district or a board of three trustees, if none of them objected, had and have the power to freely permit the schoolhouse in their respective districts, when not in use for a district

school, to be used by persons assembling therein for the purpose of giving and receiving instruction in any branch of education or learning, or in the science or practice of music. Such instruction given and received, or any branch of education or learning, etc., etc., by lectures or instruction in music or other methods, must be free to the qualified voters of the district and the children residing therein of school age, and not restricted to the persons who may be members of any society or association, secret or otherwise.

By section 16 of title 5, and section 2, title 10, of the Consolidated School Law of 1894, chapter 556 of the Laws of 1894, trustees of school districts have the power and it is their duty, to grant the use of school buildings for all examinations appointed by school commissioners under the provisions of the school law, and in which to hold teachers institutes. To sum up, a trustee or trustees of a school district has not and have not any legal right or power whatever to consent to or permit the use of the schoolhouse, school site and appurtenances, in his or their school district, or any part thereof, for any purpose whatever except for the purpose of public instruction, the conduct of the school therein, and for the school meetings of the district, and the purposes mentioned in section 52, article 6, title 7; section 16, title 5, and section 2, title 10, of the Consolidated School Law of 1894.

It does not clearly appear from the proofs herein, what are the objects and purposes of the Patrons of Industry, and the meetings held, however laudable they may be, but it clearly appears that the purposes of the meetings held in the schoolhouse in district no. 10, Marcy, are not for giving and receiving instruction in any branch of education and learning, or in the science or practice of music; and admitting for argument only that such are the purposes of said meetings, such meetings are not open to all of the qualified voters of the district and the persons residing therein of school age, but are restricted to those who are under the constitution and laws thereof, members of such society or organization.

There are other good reasons, aside from the absence of statutory authority, why trustees should not consent to or permit the meetings of such society in the schoolhouse of the district. Such meetings created dissensions and controversies among the inhabitants of the district; one-fifth are opposed to such meetings. That conceding the society provides for its own fuel and lights, and cleans the schoolhouse, there is a continual wear and tear of the schoolroom and furniture by reason of said meetings, which must be borne by the taxable inhabitants of the district, in keeping such furniture and schoolroom in repair. The attorney for the appellant had suggested that such use of the schoolroom might cause complication and loss to the district in the contract of insurance of the schoolhouse and furniture. I assume that the schoolhouse and furniture in said district are (and if not, should be) insured from loss or damage from fire. The policy issued for such insurance states the use to which the building is to be put, namely, for school purposes; a meeting of said society is held in said school, and on the evening or night of such meeting the schoolhouse and

furniture are damaged or destroyed by fire; the trustee presents a claim against the insurance company under said policy for the loss or damage sustained by the district; the insurance company ascertaining that on the night of the fire the schoolhouse was occupied by the Patrons of Industry and not for school purposes, refuses to pay; an action is brought, in which the district is defeated. An action, possibly, might be maintained by the district against the trustee for the loss sustained by the district by reason of the neglect or violation of duty on the part of such trustee in consenting to or permitting the use of said schoolhouse for other purposes than those mentioned in the policy of insurance; but in the event of the trustee being financially irresponsible, the district must bear the loss.

In appeal no. 3577, decided by Superintendent Draper, on July 21, 1887, brought from the action of trustees in permitting the use of a schoolhouse for the meetings of a temperance society, he says: "The law constitutes the trustee the custodian of the schoolhouse. But it does not thereby become his private property, and he can not put it to any use which he sees fit. He is, as a general rule, to manage it as the representative of the district, and for school purposes only. He must find some express provision of statute authorizing him to permit it to be used for any other purpose before he is justified in doing so, provided objection is made by an interested party. The only provision of the statute of such a nature is found in section 52, of title 7, of chapter 555, of the Laws of 1894, which allows the trustee "to permit the schoolhouse, when not in use by the district school, to be used by persons assembling therein for the purpose of giving and receiving instruction in any branch of education or learning or in the science or practice of music." It can not be claimed that the leasing in the present case was for such a purpose as is here mentioned. In this case, the house was given over to the use of a secret society. The people of the district who were not members of the society, were excluded. The persons who were thus permitted to use it, did not assemble for the purpose of giving and receiving instruction, but for the promotion of temperance. However laudable the purpose of their assembly, it is not a purpose recognized by the State. I am, therefore, of the opinion that the leasing complained of was unlawful and that the appeal must be sustained.

It may be proper to say, however, that it has always been the practice of this Department to refrain from preventing the use of school property for other than school purposes, when such other use does not interfere with the use for which such property is maintained, and when such other use is acquiesced in by the taxpayers and electors of the district. This has unquestionably been a wise policy. Frequently, in the rural school districts, the schoolhouse is the only suitable place in the district for holding a meeting of any character, and such policy has greatly promoted the convenience as well as the intellectual and moral activity of the people of the district. But when a school building is used for any other purpose or in any manner which interferes with its use for school purposes, or where there are differences of opinion among the

people of the district as to the advisability of using the schoolhouse for any other purpose than school purposes, it becomes the duty of the Department to strictly observe and enforce the laws governing the matter.

I concur fully with Superintendent Draper in the reasons stated by him in, and the decision rendered by him therein, and feel it my duty to observe and enforce the provisions of the school laws governing the matter of the use of schoolhouses for other than school purposes, and to sustain the appeal herein.

The appeal herein is sustained.

I find and decide, That the acts and decisions of William D. Winston, as sole trustee of school district no. 10, town of Marcy, Oneida county, in consenting or permitting a branch or lodge, or by what other name known, of a society or association known as the Patrons of Industry of the State of New York, to hold meetings in the schoolhouse in said school district, were, and are, without authority of, and in violation of, the school law of the State.

It is ordered, That said William D. Winston, as such sole trustee of said district, forthwith notify the officers and members of said society or association, so holding and attending at said meetings, that no further meetings shall be or will be permitted to be held in said schoolhouse in said district; and that the consent and permission heretofore given by him, that such meetings be so held, are canceled, withdrawn and revoked.

It is further ordered, That the said William D. Winston, as such sole trustee of said school district no. 10, town of Marcy, Oneida county, be, and he hereby is, enjoined and restrained from consenting, permitting or allowing said branch or lodge of said society or association of the Patrons of Industry of the State of New York, and the officers and members thereof, to hold any meeting or meetings thereof in said schoolhouse in said district from and after the date at which he shall receive notice of my decision and orders herein.

4941

In the matter of the appeal of M. L. Twiss and Charles E. Morse v. Andrew McCutcheon, L. S. Potter and Stevens S. Smith as trustees of school district no. 3, Java, Wyoming county.

Under the provisions of the school law and the decisions of this Department, a sole trustee has not, neither has a board of trustees of a school district, legal authority to consent to, or permit, the use of the schoolhouse, school site or appurtenances, or any portion thereof in his or their school district, for any purpose whatever except for maintaining and conducting schools therein, and for holding school district meetings; or by persons assembling therein for the purpose of giving and receiving instruction in any branch of education or learning or in the science or practice of music; or for examinations appointed by school commissioners or for holding teachers institutes.

Decided June 8, 1901

A. J. & J. Knight, attorneys for respondents

Skinner, *Superintendent*

This is an appeal from the action of the trustees of school district 3, Java, Wyoming county, in permitting the schoolhouse or building of the district to be used for other than school or educational purposes.

The appellants, as residents and qualified voters in such school district, allege, in substance, in their appeal, that on February 8, 1901, a drama was enacted in the hall in the second story of the building of said district, and that in the evening after the close of the drama, a dance was held in said hall; that on February 28, 1901, said hall in the school building was occupied by a traveling show called the "German medicine company," and such company, by its agents and servants, continued to occupy such room in giving shows and exhibitions and selling medicine up to and including March 13, 1901; that the appellants and other residents of said school district object to the use of said school building or any part thereof, for other than school or educational purposes.

Trustees McCutcheon, Potter and Smith have made answer to the appeal, and admit substantially the allegations in the appeal as to the use of said room or hall, and allege upon information and belief that such use of said room or hall meets the approval of a large majority of the taxable inhabitants of the district and representing most of the taxable property therein. The respondents alleged that none of such entertainments injured the school building in any way, and that no objection to such use of the hall was made to them or either of them prior to said entertainments or any of them, by any person *taxable* in said district. It appears that last year a new school building, consisting of two stories, the upper story being a hall, was erected in said district at an expense of about $3000; that in the years 1899 and 1900 several appeals were brought to me from proceedings of school meetings in said district relative to a change of the school site and the erection of a new school building; that in a decision rendered November 22, 1899, in the appeal of Frank H. Hall and others, decided September 9, 1899, I stated that a school meeting in the district could *not* legally vote a tax to construct a two-story building, the second story of which was to be used for a *public hall* to be used *for other than school purposes,* that is, for shows, entertainments, meetings of secret and other societies and for other purposes for which *public halls* are used; that in a decision rendered by me on June 12, 1900, I stated that the facts established called for the erection of a new school building that would have two rooms to conduct the school, and another room in the second story to be used in *school examination, school exhibitions, the observance of Arbor day, Flag day, lectures upon educational topics, etc., etc.*

Subdivision 6 of section 47, article 6, title 7 of the Consolidated School Law of 1894, chapter 556 of the Laws of 1894, enacts that the trustee or trustees of every school district shall have the custody and safekeeping of the district schoolhouse or houses, their sites and appurtenances, and such has been the law of this State for over fifty years.

The provisions of law above cited constitute the trustee or trustees of school districts the custodian or custodians of the schoolhouse or houses, and their sites and appurtenances for the purposes of public instruction and for holding the annual and special school meetings of said district or districts under the school law, and for no other purposes whatever. By said provision of law such school property does not become the private property of the trustee or trustees, and he or they can not put it to any use which he or they see fit. By section 52 of article 6, title 7, of the Consolidated School Law of 1894, it is enacted: "The trustees, or any one of them, if not forbidden by another, may freely permit the schoolhouse, when not in use for the district school, to be used by persons assembling therein for the purpose of giving and receiving instruction in any branch of education or learning, or in the science or practice of music."

Section 52, above quoted, is precisely the same as section 52 of the sixth article of title 7 of the Consolidated School Act of 1864. Said section 52 was enacted to prevent disputes continually arising about the right and power of trustees to permit the schoolhouse to be used for any purpose except school or educational purposes.

Since the adoption of section 52 the sole trustee of a district or a board of three trustees, if no one of the three objects, had and have the power to freely permit the use of the schoolhouse of their respective districts, when not in use for a district school, to be used by persons assembling therein for the purpose of giving and receiving instruction in any branch of education or learning, or in the science or practice of music. The education or learning mentioned in section 52 means such as is taught in schools, academies and colleges; the science or practice of music means such as is taught in the schools and conservatories of music. Section 52 does not permit the school building to be used for religious meetings or Sunday schools, or for theatrical or vaudeville exhibitions, or for dancing, or for meetings of any religious, charitable, benevolent or other societies or associations, or for meetings of any political party.

By section 15, title 5, and section 2, title 10 of the Consolidated School Law of 1894, chapter 556 of the Laws of 1894, trustees of school districts have the power, and it is their duty, to grant the use of school buildings for all examinations appointed by school commissioners under the provisions of the school law, and in which to hold teachers institutes.

It is clear that under the provisions of the school law and the decisions of this Department a sole trustee or a board of trustees of a school district has not the legal right or power to consent to or permit the use of the schoolhouse, school site or appurtenances, or any part thereof, in his or their school district, for any purpose whatever except for public instruction, the conduct of the school therein and for school meetings, and for the purposes mentioned in section 52 of article 6, title 7; section 16, title 5, and section 2, title 10 of the Consolidated School Law of 1894.

When the schoolhouse in a school district, or any part thereof, is used for any other than for school or educational purposes, or in any manner that inter-

feres with such use, or where there are differences of opinion among the qualified voters of a district as to the advisability of using the schoolhouse, or any part thereof, for other than school or educational purposes, or where *any one or more of the qualified voters of the district object to such use,* it becomes the duty of the State Superintendent of Public Instruction, upon appeal to him, to strictly observe and enforce the provisions of the school law. (See decisions 3577, by Superintendent Draper, July 31, 1887; 4334, Johnson v. Winston, by Superintendent Crooker, March 7, 1895; 4419, Martin and another v. Weaver, by Superintendent Skinner, January 16, 1896; 4450, Mayer v. Barnes, by Superintendent Skinner, May 11, 1896.)

I decide that the action on the part of Messrs McCutcheon, Potter and Smith, as trustees of school district 3, town of Java, Wyoming county, in consenting to and permitting the use of the hall of the schoolhouse of the district on February 8, 1901, for the enactment of a drama and for dancing therein, and for consenting to and permitting the use of said hall, commencing on February 28, 1901, to and including March 13, 1901, by a traveling show called the "German medicine company," in giving shows and vaudeville exhibitions and selling medicines, was without authority of law and in violation of the provisions of the school law of this State, and contrary to the rulings of this Department.

The appeal herein is sustained.

It is ordered that Andrew McCutcheon, L. S. Potter and Stevens S. Smith, as trustees of school district 3, Java, Wyoming county, be, and each of them is, hereby enjoined and restrained from consenting to, permitting or allowing the school building of said district, or any portion thereof, to be used for any purpose whatever other than for maintaining a school therein, and for holding school meetings, and for the educational purposes contained in section 52 of article 6, title 7; section 16, title 5, and section 2, title 10 of the Consolidated School Law of 1894, chapter 556 of the Laws of 1894.

3968

In the matter of the appeal of Simon Clark and others v. Edward Clark, as trustee of school district no. 12, town of Pompey, Onondaga county.

An organization known as the "Grangers" was permitted to use schoolhouse as a place for meetings, for suppers and entertainments. Fuel provided by the district was used. District furniture has been damaged. *Held,* unlawful.

Decided April 20, 1891

Draper, *Superintendent*

This appeal is brought by several taxpayers of district no. 12, town of Pompey, Onondaga county, from the action of the trustee of said district in permitting the schoolhouse to be used by an organization known as the Grangers for meetings, for suppers and entertainments.

The evidence presented shows that fuel, provided by taxation upon the district, has been used by this organization, for which the district has not been recompensed.

That the furniture has at times been removed from the schoolhouse to better accommodate the organization so using the building and has been damaged in consequence, and a stove so removed rendered unfit for use.

No answer has been interposed. In determining this appeal, which I sustain, I will quote as far as applicable from a decision in a similar case.

The law constitutes the trustee the custodian of the schoolhouse. But it does not thereby become his private property, and he can not put it to any use which he sees fit.

He is, as a general rule, to manage it as the representative of the district, and for school purposes only.

The only provision of statute which would authorize it to be used for any other purpose is section 52 of title 7 of chapter 555 of the Laws of 1864, which allows the trustees "to permit the schoolhouse when not in use by the district school, to be used by persons assembling therein for the purposes of giving and receiving instruction in any branch of education or learning or in the science or practice of music."

It can not be claimed that the use of the school building in the case presented, was for such a purpose as is here mentioned. In this case the use of the house was given over to a social society, for the purpose of holding meetings of the society, entertainments and suppers. Such use was not for the purpose of giving and receiving instruction.

I am therefore of the opinion that the use of the building as complained of was unlawful and that the appeal must be sustained.

The views of the State Superintendent upon the practice of using school property for other than school purposes, is set forth in the concluding paragraph of decision no. 3577, reported on page 641 of the Code of Public Instruction, edition of 1887.

3999

In the matter of the appeal of H. D. Freer v. A. W. Van Aken, trustee of school district no. 5, town of Esopus, county of Ulster.

A single elector of a district objected to the action of the trustee in permitting the use of the school grounds on a certain evening by a local military band, composed of pupils of the school, for the purpose of a musical entertainment.

The evidence shows that no injury was done to school property; in fact it was improved and the grounds rendered more sightly. *Held,* that trustee had power to grant such use under the statute.

Decided September 12, 1891

Draper, *Superintendent*

Appeal by a taxable inhabitant of school district no. 5, town of Esopus, county of Ulster, from the action of the trustee of said district in permitting a

local organization, known as the St Renny Cornet Band, to occupy the schoolhouse grounds on the 25th day of July last, for the purpose of a musical entertainment and picnic. It is alleged by the appellant that by such use the schoolhouse grounds and the trees thereon were damaged.

An answer has been interposed by which it appears that the members of the band are pupils of the school, and that the entertainment was given by the band for the purpose of raising a sum of money with which to provide equipments for the organization. It is claimed by the trustee that the grounds were in better condition for the use of the pupils of the school after the concert than before, for the reason that the members of the organization caused the grass to be neatly trimmed and otherwise improved. It is further made to appear that but one elector of the district objected to the use of the grounds.

In view of these circumstances and the fact that the statute contemplates the use of the school building, when not in use for the district school by persons assembling therein, for the purpose of giving and receiving instruction in any branch of education or learning or in the science or practice of music, and the further fact that, at the last annual meeting held in the district, the action appealed from was brought to the attention of the meeting, and by a unanimous vote sustained, I have concluded to dismiss the appeal.

5221

In the matter of the appeal of Joseph H. Burtis, a taxpayer, from the action of the annual meeting in 1905 in school district no. 17, Hempstead, Nassau county.

It is not proper nor does the law sanction an appropriation of the district's funds for the erection of horse sheds upon a schoolhouse site.

An order will be made prohibiting the erection of such buildings upon the school grounds and also prohibiting the use of the district's funds for such purpose.

Decided October 31, 1905

Francis B. Taylor, attorney for appellant

Draper, *Commissioner*

The moving papers in this appeal show that service of such papers was legally made on the clerk and the trustee of school district no. 17, Hempstead, Nassau county, on the 7th day of October 1905. No answer has been received at this Department and under the rules of practice the material allegations are regarded as admitted.

The annual meeting voted an appropriation of $200 for the purpose of erecting horse sheds upon the schoolhouse site. The pleadings show that Sunday school is usually held in this schoolhouse. Appellant alleges that the main purpose of erecting such sheds is for the accommodation of those who drive to the schoolhouse on Sundays to attend Sunday school. Several affidavits

of residents of the district are submitted to sustain this allegation. No answer having been made there is no denial of this allegation.

It is not proper nor does the law sanction an appropriation of the district's funds for a project of this nature. It is not only improper and illegal to appropriate funds for this purpose, but it is also a violation of the spirit and the letter of the law to erect upon the school grounds buildings for this purpose. This Department has repeatedly held that when objection is raised by a taxpayer of the district the schoolhouse can not be used for holding Sunday school or other religious exercises. The particular purpose for which these sheds are to be used is not the only objection to be offered to their erection. They would occupy space on the school grounds which should be reserved for the children for purposes of recreation. They would be quite sure to prove objectionable from the point of sanitation and cleanliness. In addition to the impropriety of erecting them there is no authority of law for the erection of such buildings.

The appeal herein is sustained.

It is ordered, That the trustees of said school district no. 17, Hempstead, Nassau county, be, and they hereby are, restrained from proceeding with or completing the erection of sheds upon the school grounds of said district.

It is further ordered, That the trustees of said district no. 17, Hempstead, Nassau county, be, and they hereby are, restrained from raising by tax upon the taxable property of the district the said $200 or any portion thereof, voted at the annual meeting of the district to be used for the erection of sheds on said school grounds.

It is also further ordered, That the trustees of said district no. 17, Hempstead, Nassau county, be, and they hereby are, restrained from paying for the erection of said sheds or for any work done toward the erection of said sheds, any of the funds of the said district.

SITES

3383

Upon a vote to change the schoolhouse site, the intention of the statute is to preserve the record, not merely of the majority, but of those who constituted the majority of the legal voters of the district who were present and took part in the proceedings. The names of the voters as well as the way they voted must be recorded.

Decided November 19, 1884

Ruggles, *Superintendent*

The appeal is brought from the action of a special school meeting, changing the schoolhouse site. The objection raised is that the ayes and nays taken in designating the site in question were not recorded as required by law.

Section 20, title 7 of the Code of Public Instruction, distinctly requires that the site of the schoolhouse "shall not be changed, unless a majority of all the legal voters of said district present and voting, to be ascertained by taking and recording the ayes and nays, at a special meeting called for that purpose, shall be in favor of such new site." It appears from the evidence that a tally was kept of the number of voters in favor of and against the proposition, and this was the only record made of the vote. I am of the opinion that this is not the record contemplated by the statute. The legislative construction of constitutional provisions, similar in character to this statute, has been generally and concurrently in favor of the view that a record should be made of the persons voting for or against the bill on resolution. Thus the Constitution of the State of New York, article 3, section 15, provides that, "no bill shall be passed unless by the assent of a majority of all the members elected to such branch of the Legislature, and the question upon the final passage shall be taken immediately upon its last meeting, and the yeas and nays entered on the journal." This has been construed to mean that the names of members shall be recorded upon the journal as voting either yea or nay. It seems to me to be obvious that the intention of the statute is to preserve the record, not merely of the majority, but of those who constituted the majority of the legal voters of the district who were present and took part in the proceedings. I deem the failure to make such record fatal to the action of the meeting in designating the site.

4233

In the matter of the appeal of D. J. Tysen, Thomas Smith and W. R. Harris from proceedings of a special school meeting held on December 13, 1893, in school district no. 3, towns of Southfield, Middletown and Northfield, Richmond county.

Where, at a school meeting duly called and held, a new schoolhouse site is designated, and the meeting votes to levy and raise by tax a sum of money for the purpose of building a new schoolhouse, and that such tax be raised by instalments, such vote can not be reconsidered except at an adjourned general or special meeting, to be held within thirty days thereafter, and the trustees of such school district have no legal authority to call a special meeting of said district after said thirty days to either directly or indirectly reconsider or rescind the vote taken at said former meeting relative to voting a tax to build a schoolhouse to be raised by instalments.

Where a schoolhouse site, designated at a school meeting, is proved to be unfit in a sanitary sense, by reason of the proximity to it of swamps and lowlands which necessarily render the site dangerous on account of liability to malarial infections, the action of said meeting in the selection of such site will, upon appeal, be set aside.

Decided April 12, 1894

Crooker, *Superintendent*

The appellants herein have appealed from certain proceedings had and taken at a special school meeting, held on December 13, 1893, in school district no. 3, towns of Southfield, Middletown and Northfield, Richmond county, relative to the designation of a schoolhouse site, and voting a tax to pay for the same, and in rescinding or reconsidering a vote taken at a special meeting of said district held on July 8, 1893, voting a tax for the building of a new schoolhouse upon a site designated at such meeting, said tax to be raised by instalments.

The grounds of the appeal are, that the school site designated at the meeting on December 13, 1893, is not central as to population or territory, and is unhealthy, and that the alleged reconsidering or rescinding the vote of the meeting of July 8, 1893, to raise a tax for the building of a new schoolhouse upon the site designated at such meeting, said tax to be raised by instalment, was in violation of the provisions of the school laws.

The appellants annex to their appeal the certificate of the health officer of each of the towns of Southfield and Middletown, stating in substance that they had visited a lot of land designated as a schoolhouse site at said meeting of December 13, 1893, and found that said lot slopes from the eastern and southern boundaries so that the northwestern corner is within forty feet of a large pool of stagnant water, and another such pool is close to the northern boundary; that about 200 feet from the lot in a northwesterly direction lies a large swamp, which, together with said pools, must be a fruitful source of malarial infection; that, in their opinion, the proximity of the swamp and pools of stagnant water rendered the lot totally unfit for the location of a schoolhouse.

The respondents, the trustees of said district, have interposed an answer to the appeal, in which the proceedings of the special meeting held on December 13, 1893, alleged in the appeal, are not denied, except they allege that the said schoolhouse site designated at said meeting is centrally located, and is a healthy site, and annexed a certificate signed by three physicians, namely, Doctors Walser, Michtold and Beyer, stating in substance that they had examined a site said to be selected for a school site on property of one Robert Jones, more particularly described in the schedule annexed marked "A," and that said site is on elevated ground higher than almost the entire surrounding country to the south and southeast all the way to the ocean, and that it naturally slopes toward the south and southeast; that, in their opinion, said site is unobjectionable in regard to healthfulness, and appears to them certainly preferable, from its elevation, to ground to the south and southeast toward the ocean.

Such certificate is not in the handwriting of either of the physicians by whom it is signed; that on the back of the certificate is "Schedule A" in a different handwriting purporting to give the metes and bounds of the site designated at said meeting of December 13, 1893.

A reply on the part of the appellants to the answer of the respondents has been made, in which the appellants aver, upon information and belief, that the respondents showed to Doctor Walser a different lot from the one designated for a site at the special meeting, and thereby secured from him a comparative indorsement of the lot purporting to be the lot designated, and apparently with a view of deceiving this Department. The information given to appellants upon which their belief is founded is based upon a copy of a letter from Doctor Walser, sent to the respondents, a copy of which is annexed to the reply herein, and a letter of Doctor Walser to Mr Tysen (one of the appellants), which is annexed to said reply. In his letter to the respondents Doctor Walser states in substance, that when called to New Dorp to express an opinion in reference to a schoolhouse site he was shown the southerly slope of an elevation on Prospect street, about 350 feet from "a spring" as the most central and desirable site, the only other place being "a hollow some distance from the center of population, and only eight to ten feet above the level of the sea"; that it was not a very desirable site, but as represented to him, at least by comparison, he gave his approval; that on a second visit with Engineer Hastings, the said engineer pointed out to him the lot designated for a site at the meeting of December 13, 1893, and that the lot shown to him on his first visit was *not* the lot voted on by the school meeting; that the pond was *not* "a spring," but surface drainage, the slope of the lot was on the *northerly* side of the same hill and *only* 125 *feet* from the marsh or pond; that the other lot was south *not* eight feet above sea level but fifty to fifty-five feet; that he, therefore, concurred with Doctors Feeney and Thompson in condemning as a site for a schoolhouse the lot designated at the meeting of December 13, 1893. In the letter of Doctor Walser to Mr. Tysen he states that "Doctors Michtold and Beyer

received the same verbal description of the schoolhouse site as I did, and there was no description of the schoolhouse site attached to our *paper which we signed.*"

It seems to be clearly established that Doctors Walser, Michtold and Beyer were not shown the lot designated by the school meeting on December 13, 1893, as a school site, and that the opinion expressed by them, as stated in their certificate attached to the answer herein, was in relation to some other parcel of land than said selected site and that the description of the site selected, as written upon the back of said certificate, entitled " Schedule A," *was not written thereon at the time they signed the certificat*e.

Said reply has also attached a certificate of Doctor Barber, the health officer of the town of Northfield, in which he states, in substance that he has examined the site designated at the meeting of December 13, 1893, and its surroundings, as to its fitness for a school site, and that in his opinion it is not sanitary, and, therefore, unfit for such a purpose owing to proximity of swamps and low lands on the northerly border, which necessarily must be dangerous on account of liability to malarial infection; that said lot slopes principally toward the north, and near its northern corner is a swamp which is shown upon a diagram annexed to the reply, drawn by one Joseph Hastings, engineer (upon the back of which diagram Doctor Barber has affixed his signature), which swamp is 125 feet distant from said lot; that owing to the conformation of the land the soakage and surface drainage from the hill render a considerable portion of the land, lying between the lot and swamp proper, of a swampy nature, and, therefore, not healthy.

There is also annexed to said reply a diagram made by Engineer Hastings, of the lot of land 200 feet square and designated by said special school meeting of December 13, 1893, as surveyed by said engineer, giving the metes and bounds as stated in the resolution adopted at said meeting designating said site, and upon said diagram is shown the swamp hereinbefore referred to, lying northwesterly of and 125 feet from the northwesterly line of said lot; such diagram having upon it the signature of Doctor Barber.

From the proofs presented, in my opinion, the appellants have established, by a preponderance of proof, that the lot of land designated as a school site at the special meeting, held on December 13, 1893, as described in the resolution adopted at said meeting, is not a proper or fit site for a schoolhouse; that it is not sanitary, and therefore, unfit for the site of a schoolhouse, by reason of the proximity to it of swamps and low lands, which necessarily render the site dangerous on account of liability to malarial infection.

From a copy of the call of the respondents for the special meeting of the qualified voters of district no. 3, towns of Southfield, Middletown and Northfield, held on December 13, 1893, as annexed to the appeal herein, it appears that notice was given therein that the meeting was called for the purpose of, among other things, " rescinding resolutions passed at the special meeting held

July 8, 1893, in relation to the selection of a new site, and the appropriation of money for the erection of a new schoolhouse," also, to appropriate money for the purchase of the site and for the erection *of a new schoolhouse.*

It appears that at a special meeting of said district, held on July 8, 1893, a new schoolhouse site for said district was duly designated, and that the said meeting voted to levy and raise by tax a sum of money then and there designated, for the purpose of building a new schoolhouse, and voted that the said sum be raised by instalments; that said special meeting, when it adjourned, adjourned without day.

By section 19 of title 7 of the Consolidated School Law of 1864, as amended, it is provided, "*and no vote to levy any such tax shall be reconsidered except at an adjourned general or special meeting to be held within thirty days thereafter,* and the same majority shall be required for reconsideration that was had to impose such tax."

The special meeting of July 8, 1893, was adjourned *sine die,* and hence there was no *adjourned special meeting held within thirty days* after said July 8, 1893, at which said vote to levy the tax for a new schoolhouse could be lawfully reconsidered or rescinded. There is no authority in the school laws by which the voters of said school district could or can reconsider or rescind, either directly or indirectly, the vote adopted on July 8, 1893, to levy a tax for the construction of a new schoolhouse in said district; nor did the trustees of said district have any power or authority, under the school laws, to call a special meeting of the voters of said district to rescind such vote.

I am of the opinion that so much of the proceedings of said special meeting of December 13, 1893, as voted to levy or raise by tax any sum of money for constructing a schoolhouse in said district, or as, directly or indirectly, reconsidered or rescinded said vote adopted on July 8, 1893, is, and are, illegal and void.

The appeal herein is sustained.

It is ordered, That so much of the proceedings, action and decision of said special meeting of said school district no. 3 of the towns of Southfield, Middletown and Northfield, Richmond county, held on December 13, 1893, as designated a new school site on Prospect place, and authorized the trustees of the district to purchase the same at the price of $1500; and that a tax of $1600 he raised to provide for the purchase price of said site and the lawful expenses and charges that may be connected therewith, be, and the same hereby, are and each of them is, vacated and set aside.

It is further ordered, That so much of the proceedings, action and decision of said special meeting as aforesaid, as voted to levy a tax for $5000 to be raised in instalments for the purpose of building a new schoolhouse upon such site, designated at such meeting, be, and the same hereby are, and each of them is, vacated and set aside as illegal and void.

5209

In the matter of the appeal of Harvey Hall, Hugh Clemons, Wilson Smead and James Bonner, majority members of the board of education of union free school district no. 1, towns of Hadley and Luzerne, Saratoga and Warren counties, from the refusal of Amasa Woodard, Paul King and Joseph H. Malone to sign certain notices for the sale of bonds and also their refusal to sign such bonds.

The action of a district meeting in designating a site will not be set aside on the allegation that the purchase price of such site is excessive unless such allegation is clearly sustained.

A site is worth as much for school purposes as it would be worth for manufacturing or other purposes.

Decided September 29, 1905

Frank Gick, attorney for appellants

Draper, *Commissioner*

Decision no. 5197 was rendered in this appeal on the 24th day of August 1905, sustaining the appeal and ordering the respondents herein to join with the majority members of the board of education of union free school district no. 1, towns of Hadley and Luzerne, Saratoga and Warren counties, in signing certain notices for the sale of bonds and to also sign such bonds.

On September 6, 1905, attorney for appellants filed a petition with this Department for the removal of said respondents as members of the board of education of said union free school district no. 1, towns of Hadley and Luzerne, on the ground that they had wilfully refused to obey the said order of August 24, 1905. Such petition was supported by the affidavit of Hugh Clemons, one of the appellants herein, to the effect that he had presented notices for the sale of such bonds to said respondents and that they had refused to sign them and that they had also told him they would not sign the bonds.

Thereupon an order was made by me directing the said Amasa Woodard, Paul King and Joseph Malone, respondents herein, to appear before me in my office in the Capitol in the city of Albany, on the 14th day of September 1905, at 11 o'clock in the forenoon to show cause why they should not be removed from the offices of trustees of said union free school district no. 1, towns of Hadley and Luzerne.

The said respondents appeared in person at the time fixed for a return on the said order to show cause why they should not be removed from office and acknowledged that they had refused to sign the said notices of the sale of bonds. They gave as their reason for not signing such notices that the site which had been designated was assessed by the town assessors at $1300 and that the district had fixed the purchase price at $5300. They alleged that the price paid was largely in excess of the real value of such site and that the action of the district in voting to pay such amount was a great injustice to the taxpayers of the dis-

trict, causing a waste of several thousand dollars. The following determination was then agreed upon:

The determination for the present is that the Commissioner of Education will require the trustees refusing to sign such notice and bonds to sign the same, unless, as the result of an investigation which the Commissioner will have made, he shall become satisfied that the proposed site is not a suitable one for the district, or that the price of said site is not a just one, and upon the further understanding, to which the refusing trustees assent, that they will abide the determination of the Commissioner, without further objection.

I then directed Thomas E. Finegan, the chief of the Law Division of this Department, to examine the site in question and to make a thorough investigation of the value of such site as compared with the value of other property in that community. Mr Finegan made such examination and reported as follows:

Albany, N. Y., Sept. 27, 1905

Hon. A. S. Draper
Commissioner of Education
Albany, N. Y.

DEAR SIR: In compliance with your order of the 13th inst., directing me to make an examination of the site designated by a special meeting of school district no. 1, towns of Hadley and Luzerne, I respectfully submit the following report: On September 19th, I wrote Mr Hall, president of the board of education, that I would be at Luzerne on September 26th to examine the site and to give a hearing in order to ascertain its value as compared with other property in that village. I also wrote Mr King of the respondents. I advised both parties that I would receive such evidence as they might be able to produce that would have any bearing on the value of the property in question. At the hearing both parties were represented by counsel, Frank Gick appearing for appellants and William T. Moore for respondents.

The site in question is centrally located as to territory embraced in the district and as to school population. That portion of the district located in the village of Luzerne contains 168 children of school age and that portion of the district located in the village of Hadley contains 63 children of school age. The site is dry and the grade is such as to afford good drainage on each of the four sides. It contains 1.6 acres which is large enough to afford ample room for a suitable building and a playground of sufficient size. The rear of the site borders on the Hudson river and is about 25 or 30 feet above the water. This is the only criticism which can be made on this site. This does not appear to be a serious one. Proper safeguards may be erected on the rear of this site to avoid the danger, if any, of the children falling or running over the rocks into the river. The site also contains several large matured shade trees. I examined several pieces of property which had been considered in the selection of a site and which were suggested by respondents as being available and desirable for such site. None of these appears to be anywhere near so desirable for a schoolhouse site, from any consideration, as the one selected by the district meeting.

The site selected is known as the Riverview site. There was a hotel on it which burned down some years ago. There is still upon it a barn. It is generally agreed that the expense of erecting such barn must have been $3000. Mr

King, of respondents, agreed that such barn is now worth $2000. I examined several pieces of property with Mr Hall of appellants and Mr King of respondents. The following table will show the assessed valuation of several of the principal pieces of property in this district and the value which respondents and appellants placed upon them:

Property	Assesssed valuation	Estimated value by respondents
Arlington Hotel	$3 000	$10 000
Amasa Woodard	900	4 000
Rockwell Hotel	3 000	17 000
E. M. Garner, residence	800	4 000
Holleran	550	2 500
Palmer	475	4 000
		By appellants
Portous	$750	$4 200 to $5 200
E. M. Garner, ⅛ acre	400	2 500
William J. Hall	600	5 000
Morton	2 900	15 000
Conklin	300	1 200
Wayside Hotel	7 800	35 000 to 40 000
Garner Homestead	600	4 000

The above table fairly represents the assessed valuations and the estimates of the actual value of property in these villages. It will be observed from this table that property is assessed at one-sixth to one-third its actual value. The site in question is assessed at $1300 and was purchased at $5300.

In February or March last the site of the Rockwell hotel was purchased for $4500. It contains 1.5 acres. It is located on the same street and a short distance above the schoolhouse site, but contains less land. It was stated and not disputed that the Garner lot which is located next to the Riverview site was purchased four years ago at $1000 and contains less than one-half acre. The grist mill property sold for $4000 within the last year and is assessed for only $1000. The estimated value of property contained in the above table appears to be conservative as the Rockwell hotel was erected the present season at a cost slightly in excess of the estimated value. The Garner residence was erected four years ago at an expense of $3500 and its estimated value is $3000. The price which the district voted to pay for this property is all the property is worth. The transaction may even be looked upon as an excellent sale on the part of the owner of such property. However, property is worth no more for manufacturing, hotel or other business purposes than it is worth for school purposes. A school district may reasonably pay for a school site as much as an individual or a corporation may pay for such site or similar sites for business purposes. Taking this principle and the facts above stated into consideration, I am of the opinion that the Riverview site designated at a special meeting of the district is not only a most excellent and desirable one, but that the price paid is not an exorbitant one for such property.

Respectfully yours

THOMAS E. FINEGAN
Chief of Law Division

In view of all the facts brought to my attention by the several appeals resulting from this controversy and passed upon by me during the past year, and also of the facts set forth in the above report, I must decline to modify the said order of this Department, made on the 24th day of August 1905, and must hold that all questions involved in this controversy shall be settled as agreed between respondents and myself at the hearing in my office on the 13th day of September, and as fully hereinbefore set forth.

5189

In the matter of the appeal of Clayton L. Ensign, George E. Merrill and Charles Shutter from the action of a special school meeting of school district no. 6, Sheridan, Chautauqua county.

A site is not legally designated unless a resolution is adopted describing the boundaries of such site in metes and bounds. The vote by which such resolution is adopted must be by taking and recording the ayes and noes.

Decided July 7, 1905

Warner & Farnham, attorneys for appellants

Draper, *Commissioner*

The appellants herein ask that the proceedings of a special meeting held in district no. 6, Sheridan, Chautauqua county, on the 17th day of May 1905 be declared void. This request is based on two alleged irregularities. It is claimed that sufficient notice of this special meeting was not given and that the designation of a new site was not in conformity to the provisions of the Consolidated School Law. This appeal was filed in this Department June 15, 1905, and an answer thereto should have been filed within ten days thereafter. No answer has been received and no request for an extension of time in which to file an answer has been received. Under the rules governing the practice of appeals before this Department, material allegations not denied are regarded as admitted.

This district is a common school district and notice of special meetings therein must be given as provided by sections 2 and 6 of title 7 of the Consolidated School Law. Under section 6 of this title an annual meeting may adopt a particular method of giving notice of special meetings and such method shall continue in vogue until rescinded or modified by a subsequent annual meeting. It is not shown that this district ever adopted a particular method of giving notices of special meetings and notice of such meetings must therefore be given as provided by section 2 of title 7. This section provides that notice of special meetings must be given to each inhabitant of the district entitled to vote at district meetings by reading the notice in his hearing, or in case of his absence from home, by leaving a copy or so much thereof as relates to the time, place and object of the meeting at his residence. Such notice should have been given at least five days previous to the date fixed for the special meeting.

The notice of the special meeting in question was not given in this manner. It was given by posting notices in several conspicuous places in the district. This was not sufficient and does not satisfy the requirements of the law. This Department has uniformly held that failure to give notice of a meeting as the law directs is sufficient ground for setting aside any action that may be taken at such meeting.

It appears that one of the things which this meeting did, was to designate a site. Subdivision 7 of section 14, title 7 of the Consolidated School Law provides that a site shall be designated at a special meeting and by written resolution containing a description thereof in metes and bounds. The vote on such resolution must be by taking and recording the ayes and noes. The vote designating this site was by ballot and no resolution describing the boundaries of such site in metes and bounds was offered. The site was not legally designated.

Repairs to the school property in this district appear to be necessary. Appropriations to make such repairs should be voted by the district. All proceedings, however, in relation thereto must be in accordance with the law governing the same. Another meeting should be called by the trustee and notice thereof given as the law requires. If a change in the site of the schoolhouse should be made the provisions of subdivision 7, section 14, title 8 and of section 19, title 8 should be observed.

The appeal herein is sustained.

It is ordered, That all proceedings of the special meeting of school district no. 6, Sheridan, Chautauqua county, held on the 17th day of May 1905, be, and they are, hereby declared void.

5270

In the matter of the appeal of Lincoln Sackett and others from the action of a special meeting of school district no. 9, town of New Lebanon, county of Columbia, in designating a site on the 30th day of June 1906.

The action of a meeting in designating a site so far from the center of the district as to operate as a hardship to a portion of the children of a district and to interfere with their regular attendance upon school will be set aside.

Decided September 11, 1906

Draper, *Commissioner*

At a special meeting of school district no. 9, town of New Lebanon, Columbia county held on the 30th day of June 1906, a new site for a schoolhouse was designated. The law authorizes the voters of a school district to select a site. The action of a meeting in selecting a site will not be interfered with by this Department unless it is shown that the site selected is unsanitary or that by reason of its distance from the remote parts of the district it operates as a hardship upon the children required to walk to and from school. No irregularity of procedure is alleged. It is not claimed that the site chosen is unsanitary.

This appeal is brought by twenty-three residents of the district upon the sole ground that the site chosen is in an extreme end of the district and that some of the children will therefore be required to travel two and three-quarters miles to attend school.

The pleadings show that the district embraces the village of Lebanon Springs. This village is located south of the center of the district. The site chosen is still south of the village and within one-half a mile of the southern boundary of the district. The distance from one end of the district to the other appears to be more than three miles. Some of the children will be required to travel as alleged two and three-quarters miles to reach school in the morning and the same distance to return in the afternoon, making a distance of five and one-half miles which these children must travel daily in order to attend school. This imposes too great a burden upon children of tender ages. It is claimed by appellants and not denied by respondents that a site equally as good in every way as the one selected could be designated west of the village which would bring all children within a walking distance of the schoolhouse. By selecting a site in this section of the district the children living in the village would have no farther to walk than they would to attend school at the site selected. None of the children living south of the village would have more than one mile to walk and the children living in the northern part of the district would then have a little over four miles to walk each day instead of five and one-half miles. Appellants also state that this arrangement will be satisfactory to them. When small children are required to travel long distances daily to attend school a reduction in such distance of only two-thirds mile is an important consideration.

The appellants claim that if any of the children reside more than two miles from the schoolhouse the district is required by law to provide transportation for such children to and from school. There is no provision of law nor is there a decision of the Commissioner of Education establishing any fixed limit whereby a district is required to provide transportation. The rule is that a parent is required to get his children to and from school and provide transportation when necessary. A district maintaining a home school is not required to provide transportation for children unless it is clearly shown that the distance is too great for the children to walk and that it is absolutely impossible for the parent to provide transportation.

It appears clear that the meeting did not give proper consideration to the rights of the people living in the northern part of the district and that in selecting such site the meeting imposed an unnecessary burden upon the children living in the northern part of the district which will operate as a hardship and interfere with their regular attendance at school. I therefore conclude that it is my duty to set aside the action of the meeting in adopting the site in question and to direct the trustee to call another meeting for the purpose of selecting a site which shall correct the injustice which has been imposed upon certain residents of the district in the designation of this site.

The appeal herein is sustained.

It is ordered, That the action of said school district no. 9, town of New Lebanon, in designating a site on the 30th day of June 1906, be, and the same hereby is, vacated.

It is also ordered, That the trustee of said district no. 9, town of New Lebanon, be, and he hereby is, directed without unnecessary delay, to call a special meeting of said district to designate a site which shall conform to the views expressed in the foregoing opinion.

5234

In the matter of the appeal of James R. Yates and others from the action of a special meeting in school district no. 12, Rotterdam and Niskayuna, Schenectady county.

The site of a populous district rapidly developing and increasing in population should be selected so as to equalize as far as possible the distance which pupils residing in all sections of the district will be required to travel to attend school.

Decided October 17, 1906

Elmer E. Barnes, attorney for respondent

Draper, *Commissioner*

District no. 12, Rotterdam and Niskayuna, Schenectady county, has voted to erect a new schoolhouse. At a special meeting of the district held July 13, 1906, it was decided to build such schoolhouse upon the present site. This appeal is from such action and the principal ground upon which the appeal is brought is that the present site is not centrally located.

This district embraces a populous region adjoining the eastern boundary of the city of Schenectady. About three years ago the boundary lines of the city of Schenectady were extended and a portion of the western part of this district was included within the city limits. Before the absorption of the western portion of this district by the city of Schenectady the schoolhouse was quite centrally located both as to distance and school population. Since the western portion of the district was annexed to the city of Schenectady the schoolhouse of this district has been in the extreme western end of the district. It appears from the evidence submitted that the northern, eastern and southern sections of the district are rapidly developing and increasing in population. The residents of these sections of the district feel that since a new building is to be erected it should be built upon a site which will equalize the distance which the children of the district will be required to walk to reach school. Their claim is not unreasonable but appears fair and just to all. Upon the other hand, to require the children from the northern, eastern and southern sections of the district to travel to the center of the district as they are required and then go to the extreme western end of the district is not only unjust but would operate as a hardship upon the younger children. The action complained of must therefore be set aside.

It appears that three proposed sites near the center of the district have been considered but that a majority of the residents are not satisfied with them. It is alleged by respondents that these proposed sites are on low ground and that they are unsanitary. If this is true a site should be proposed which is not open to this criticism. To ascertain whether a suitable site could be selected near the center of the district I directed Mr A. E. Hall, Inspector of Buildings in this Department, to make an examination of the district. Mr Hall's report shows that by proper grading the proposed site on State street near the center of the district would be satisfactory. He also reports that a most admirable site could be selected near the center of the district on State street nearly opposite the State street site which has been under consideration.

The district will be permitted to select its site but the one designated must be free from sanitary objections and must be one which shall afford equal school facilities to all the children in the district. The trustee should therefore call a special meeting of the district to designate a site and in his call should include such proposed sites as meet the conditions above described.

The appeal herein is sustained.

It is ordered, That action of the special meeting of school district no. 12, Rotterdam and Niskayuna, Schenectady county, held on the 13th day of July 1906, in directing that the new schoolhouse authorized by that district shall be erected upon the present site, be, and the same hereby is, vacated.

It is also ordered, That the trustee of said district be, and he hereby is, directed to call a special meeting of said district for the purpose of designating a new site which shall be central and sanitary.

5321

In the matter of the appeal of certain electors of school district no. 2, of the town of Brutus, Cayuga county, from the action of the board of education, taken at a meeting held March 11, 1907.

The general rule of this Department has always been that before its aid can be invoked to interfere with the action of a district meeting regularly and lawfully taken, in designating a site it must be shown that such site is unsanitary, does not afford adequate facilities, or that it is inaccessible to some portion of the district and operates as a hardship upon the children residing therein.

Decided June 22, 1907

John T. Kingston Esq., attorney for appellants
Hon. T. E. Hancock, attorney for respondent

Draper, *Commissioner*

School district no. 2, town of Brutus, includes within its boundaries the village of Weedsport. At the annual meeting of this district in August 1906 the voters authorized the erection of a new schoolhouse at a cost of $30,000 and they also directed the board of education to call a special meeting of the

district to designate a site. The board of education called this special meeting for November 14, 1906. In its call of such special meeting the board submitted four propositions on the question of a site. The voters therefore had an opportunity to select one of four proposed sites. These four were as follows:

1 The site upon which the present schoolhouse is located.

2 The present site and an adjoining lot known as the Walrath property.

3 A site known as the Bircher property.

4 A site known as the Stevens property.

The first proposition to build the new schoolhouse on the present site received 26 votes. The second proposition to purchase the Walrath lot adjoining the present site as an addition to such site received 12 votes. The third proposition to designate the Bircher site received 6 votes. The fourth proposition to designate the Stevens property for a site received 84 votes or a majority of 40 over the three other propositions.

The regularity of the notice given and the form of procedure at the special meeting are not questioned in any way whatever by appellants. It appears that all the voters of the district received due notice of such meeting and that it was generally understood that the four sites above stated would be voted upon.

A faction in the district appears to be dissatisfied with the site selected and it appears that such faction desires another lot known as the Sturge property selected for a site. The matter came informally before this Department by correspondence and upon request from the district an inspector of this Department met the board of education and residents of the district and examined all pieces of property which had been considered in connection with the designation of a site, including the Sturge property. It was the opinion of the inspector that the old site and the Walrath property adjoining was the most desirable one on which to erect a new building. He strongly recommended this site. In view of the feeling which it was apparent existed in the district the inspector suggested that the board of education should call another special meeting and submit the site designated at the November meeting, the Sturge site and the old site with the adjoining Walrath lot to be voted upon. It does not appear that the inspector ever recommended the Sturge property as a suitable site for this new building. He suggested that it should be included in the proposed sites simply because certain residents of the district wanted an opportunity to vote upon it. It also appears that at such time the board of education had an option upon the Walrath lot. The board of education at a meeting held January 14, 1907, authorized the call of a special meeting to submit to the voters of the district the three proposed sites from which a site should be selected. At a meeting of the board of education held March 11, 1907, the action of the board taken at the January meeting authorizing the call of another special meeting was rescinded and a contract for the purchase of the Stevens property pursuant to the action of the special meeting of November 1906 was authorized.

It is from this action of the board that this appeal is instituted, and an order prayed for, directing the board to call a special meeting and submit the question of the designation of the site to the voters of the district once more.

The board of education in rescinding its resolution authorizing another meeting predicated its action upon the statement that the owner of the Walrath property had withdrawn the option given to the board upon his property and refused to sell such property. This is not denied by appellants. In fact appellants do not appear to be interested in having submitted to the voters of the district the proposition including the Walrath property. It is to be remembered that this proposition at the November meeting received only 12 votes and that at such time the owner offered it for sale.

The real question in this appeal therefore is whether the Stevens property or the Sturge property shall be selected as the district site. The pleadings of appellants and the argument of their attorney were directed mainly to this one question. The moving papers contain numerous photographs to show the adaptability of the Sturge property for a site and to also show that the surroundings of the Stevens property are such as to render that property unfit for a site. The map submitted by appellants in their moving papers show that the Sturge property contains a little over 1 acre of land and that the Stevens property contains a little over 3 acres. Appellants do not show that the general location or surroundings of the Sturge property render it more suitable for a site than the Stevens property. One fact is clear and that is that a site containing only 1 acre of land is inadequate for a district of the population of the Weedsport district. The Stevens site which contains three acres has a distinct advantage over the Sturge site.

The general rule of this Department has always been that before its aid can be invoked to interfere with the action of a district meeting regularly and lawfully taken, in designating a site it must be shown that such site is unsanitary, does not afford adequate facilities, or that its inaccessibility to some portion of the district operates as a hardship upon the children residing therein. None of these conditions are even alleged to exist in this case.

The appeal herein is dismissed.

It is ordered, That the restraining order made by me in this proceeding on the 20th day of March 1907, be, and it hereby is, vacated.

5345

In the matter of the appeal of William J. Burnham from the action of a meeting of union free school district no. 7, town of Corinth, county of Saratoga.

The Commissioner of Education will not interfere with the action of a district meeting in regularly designating a site unless it is shown that such site is unsanitary or not adapted for such use or that it is not centrally located and thereby operates as a hardship upon the children of some section of the district.

Decided September 28, 1907

T. J. Dillon, attorney for appellant.

S. M. Richards, attorney for respondents

Draper, *Commissioner*

In 1905 union free school district no. 7, town of Corinth, county of Saratoga, authorized the erection of two new primary school buildings at a cost of $10,000 each. There has been a contention over the designation of a site for one of these buildings. The site on which the present building is located is wholly inadequate. Such site should be enlarged or a new site designated. A special meeting was held to consider the proposition to enlarge such site. This proposition was defeated by a decisive vote. Another special meeting was held several months thereafter to vote upon the proposition to designate a new site. At such meeting a new site was designated known as the cemetery site. The vote by which such site was designated was quite as decisive as the vote by which the proposition to enlarge the old site was defeated.

The regularity of the procedure in designating such site is not in any way whatever questioned by appellants. It is conceded that the site chosen is sanitary and free from physical objection. The sole claim is that the site is not centrally located and that the title thereto is not clear. This site is only 1000 feet from the site on which the present building is located and which site appears satisfactory to appellants. It can not be held that this difference in distance between the two sites in question is sufficient to warrant my interfering with the action of the residents of the district. The action of a district meeting in regularly designating a site should stand unless it is shown that such site is unsanitary or not adapted for such use or that it is not centrally located and thereby operates as a hardship upon the children of some section of the district. The site in question appears free from all of these objections.

The contention that the title to the site is not clear does not appear to be sustained.

This district voted a tax for the erection of two new buildings about two years ago. Because of a controversy over the site for one of these buildings no progress has been made toward the erection of such buildings. The board of education should now proceed to give effect to the wishes expressed by the voters of the district.

The appeal herein is dismissed.

5186

In the matter of the appeal of H. H. Van Sickle from the action of school district no. 8, towns of Seneca and Geneva, Ontario county.

School authorities are required by direct provision of law to provide school buildings erected to meet sanitary requirements so that the health of children shall not be endangered. They must be governed by the same principle in selecting sites and are bound to provide sites which shall afford children an opportunity to attend school without being subject to the danger of bodily injury. If, in attending school on this site, children are exposed to undue risks such site is an improper one and the district should not erect a new building thereon.

Decided May 15, 1905

Draper, *Commissioner*

In 1893 school district no. 8, towns of Seneca and Geneva, Ontario county, sold a portion of its site adjoining the highway known as Castle road to the Rochester and Eastern Rapid Railway Company. This company has constructed a trolley line which extends along the Castle road and the southern boundary of the site of said school district. In the latter part of November 1904 the school building of this district was burned. At a special meeting held in February 1905 the district voted to erect a new building on the present site.

The appellant claims that the trolley line is so close to the district site that children can not reach the school grounds or leave them without being subjected to the danger of injury to person or loss of life and that the present site is not therefore a proper one on which to erect a new building.

School authorities are required by direct provision of law to provide school buildings erected to meet sanitary requirements so that the health of children shall not be endangered. They must be governed by the same principle in selecting sites and are bound to provide sites which shall afford children an opportunity to attend school without being subject to the danger of bodily injury. If, in attending school on this site, children are exposed to undue risks such site is an improper one and the district should not erect a new building thereon.

Many good reasons exist for building on the present site. It is centrally located in the district. It is in an improved condition containing many well-developed shade trees. It also contains a good well. Brick, stone and other material from the remaining portions of the former building are on the grounds available for use in erecting the new building. All these conditions render the old site a desirable one on which to erect a new building. These conditions, however, should not have a prevailing influence if the use of this site is to expose the children to danger.

The district site is inclosed on all sides by a substantial fence four feet high. The entrance to the site is from the highway known as the Johnson road on the east side through a closed gate. The trolley line in question extends along the south side of the district site. The Johnson road intersects the trolley tracks at right angles. To reach the trolley tracks children in the school building must go from such building through the gate at the entrance to the grounds on the Johnson road, a distance of 37 feet and must thence go south over the Johnson road some distance. The children are fully protected while on the school grounds. The only apparent danger to which they are subject is in crossing the trolley tracks in going to and returning from school. It is impossible to obtain a site which would relieve all children from the necessity of crossing these tracks to attend school. The distance from the school building to the tracks and the manner of approaching such tracks do not appear to expose the children to greater danger than is usual in crossing the tracks of any trolley line.

It appears proper to refer to correspondence on this question between the Law Division of this Department and residents of said school district. An ex-parte statement of this case was submitted to this Department asking for an

opinion as to the wisdom of building a new schoolhouse on the site in question. This statement was referred to the Law Division for consideration. On the conditions set forth in such statement the chief of the Law Division advised that it was not wise to erect a new building on such site. The statement on which such advice was given showed that the exit from the school grounds was on the south side and directly to the trolley line and that the distance from schoolhouse to the tracks was only 16 feet. Had this been the case it would have been unwise to have erected a building on this site.

The pleadings do not show the exact distance from the intersection of the Johnson road and the trolley tracks to the entrance gate to the school grounds. It seems advisable to locate such gate near the center of the east side of the grounds so as to bring it a reasonably safe distance from the trolley tracks. This action should be taken by the district.

The appeal herein is dismissed.

5455

In the matter of the appeal of Millard Davis and others to set aside a special school meeting in district no. 6, town of Olive, Ulster county.

Schoolhouse site; former site acquired by New York City for Ashokan dam. Where the title to a site and schoolhouse had been acquired by the city of New York for the construction of the so-called Ashokan dam, the trustees of the district are justified in calling a special meeting to vote upon the selection of a new site. The action of the meeting in selecting a new site and voting to build a new schoolhouse thereon will not be disturbed on the assumption that the city of New York would permit the use of the old schoolhouse for a considerable time.

Accessibility of site. The selection of a site should not be set aside on the mere possibility that its convenience and accessibility may be affected by prospective changes in the location of certain highways.

Notice of meeting. Appellants waived failure to serve notices of a special meeting upon them by appearing at the meeting and taking part in its proceedings.

Consent of school commissioner. Section 118 of the Education Law of 1909, requiring the consent of the school commissioner to a change of the site of a schoolhouse owned by the district, does not apply where the former site has been acquired by a municipality for a public purpose.

Description of site. The site selected at a district meeting was described in writing by metes and bounds on a paper presented by one of the trustees; this description was then read to the voters present and a motion was made to purchase the site described; the description of the site was then included in the minutes of the meeting, but there was no prefix giving it the form of a resolution. It was held that this technical defect did not nullify the action of the meeting in selecting the site.

Decided June 4, 1910

Arthur E. Rose, attorney for appellants
Frank W. Brooks, attorney for respondents

Draper, *Commissioner*

This appeal is brought to set aside the action of a special meeting in school district no. 6, town of Olive, county of Ulster, held February 15, 1910, in select-

ing a schoolhouse site for such district and providing for the erection thereon of a new schoolhouse.

It appears from the papers filed that the present schoolhouse and site belonging to such district have been acquired by the city of New York for the construction of the so-called Ashokan dam, under the provisions of chapter 724 of the Laws of 1905, being an act providing for an additional supply of pure and wholesome water for the city of New York. The title to such site and schoolhouse has already vested in the city, and the district has been paid therefor the sum of $1300, which amount is now available for the purchase of a new site and the erection of a new school building. The district is still using the old schoolhouse, under an apparently tacit agreement with the authorities of the city of New York. The appellants claim that the district has been assured by the city officials that notice will be given the district when the schoolhouse must be vacated, so that ample time will be afforded for the erection of a new schoolhouse. The respondent trustees deny knowledge of any such assurance. They rightfully insist that if any definite action had been taken by the city officials in respect to the continued use of the district property, they would have been notified. The uncertainty of the district's tenure of the property used by it for school purposes, and the fact that money was available for the purchase of a site and the erection of a schoolhouse, justified the call of a special meeting with a view of providing suitable school accommodations for the district when compelled to vacate the property acquired and paid for by the city. The trustees were authorized to call such a meeting and the qualified electors of the district could properly pass upon the question of expending the proceeds of the sale of the district property for the purchase of a new site and the erection of a new schoolhouse, and their action should not be disturbed upon the assumption that there was no necessity for immediate action.

It is asserted by the appellants that the construction of the Ashokan dam and the acquisition of lands therefor by the city of New York may so change the location of the Ulster & Delaware Railroad and of public highways in the district as to make the site selected unsuitable and inconvenient for school purposes. The papers presented contain no specific allegations as to such changes of location, and the assertion seems based on mere conjecture. The respondents deny that any radical changes of location are contemplated, and insist that even if new roads are laid out the site selected will retain its accessibility. Under present conditions the site is located near the junction of three public highways. There is no proof that the location of either of these highways is to be changed, so as to make the site less accessible to any of the patrons of the school. The selection of the site should not be set aside on the mere possibility that its convenience may be affected by prospective changes in the location of certain highways.

Certain defects are alleged pertaining to the notices of the meeting and the proceeding thereat. Some of the petitioners appeared at the meeting and complained that they had not been served with notices of the meeting. Having

appeared at the meeting they waived any objection which they might have legally made to the sufficiency of the notices. It appears also that one of the petitioners was the clerk of the district who undertook to serve the notices of the meeting upon the qualified electors of the district. If there was any fraud or wilful omission to give proper notice, it was that of one of the petitioners, and it would be inequitable to permit the other petitioners to profit by his wrongful act. But there is no charge of fraud or wilful omission, and under the statute (Education Law, § 90, as amended by L. 1910, ch. 140), the proceedings can not be invalidated for want of due notice to all qualified electors in the district, unless it shall appear that the omission to give the notice was wilful and fraudulent.

It is also insisted that the selection of the site was ineffectual because the school commissioner failed to give his consent in writing as required by section 118 of the Education Law of 1909. This section refers to a change "of the site of a schoolhouse owned by the district," and has no application to this case. The site of the schoolhouse in this district had been acquired by the city of New York, and was not owned by the district when the new site was selected. The written consent of the school commissioner was not required to make the selection of a new site effectual and valid.

The statute (see Education Law of 1909, § 96, subd. 7) provides that:

The designation of a site for a schoolhouse can only be made at a special meeting of the district, duly called for such purpose by a written resolution in which the proposed site shall be described by metes and bounds, and which resolution must receive the assent of a majority of the qualified voters present and voting, to be ascertained by taking and recording the ayes and noes.

The appellants insist that this provision was not complied with. The minutes of the meeting are annexed to the petition and show that two sites were under consideration. One of the trustees read written descriptions of both sites. One of these sites was designated as the Morrison lot and the other as the McKelvy lot. There were no voters present in favor of the Morrison lot. The McKelvy lot is described in the minutes as follows:

Land of J. and M. McKelvy, as follows, viz commencing at an apple tree along the road (east side) then south 209 feet to a stake, then east 209 feet to a stake, then north 209 feet to a stake, then west 209 feet to the apple tree, place of beginning, being at or near the place where the two proposed highways to be built around the Ashokan Dam join the highway on the McKelvy flat.

A motion was made and seconded "that the district purchase the McKelvy lot for a schoolhouse site." The names of the voters present and voting in favor of such motion are recorded in the minutes of the meeting. There were no votes against such motion.

The minutes of the meeting also contain the following:

The next question voted was: Do you want to authorize the trustee and committee to be named to use the money received from the sale of the old schoolhouse property (Dist. no. 6) for buying schoolhouse site and building a new

schoolhouse? Motion made by Chas. Fenny and seconded by Daniel Lane that we do so, after which it was voted on and carried unanimously.

The names of those voting in favor of such motion are then recorded in the minutes.

The appellants have raised the question that the selection of the site was not by a "written resolution" as required by the above quoted provision of the Education Law of 1909, and of section 119 thereof, which is to the same effect. There was a lack of formality in the presentation of the question of the selection of a site. The purpose of the statute was to inform the qualified electors of a district as to the quantity and location of the land to be acquired as a site, and also to furnish the trustees with definite knowledge as to the particular land which they are to purchase. It appears that the trustees staked out and measured the two sites considered by the meeting. Each was sufficiently described to leave free from doubt the quantity and location of the land. The description of the McKelvy lot was in writing; it was read to the voters present at the meeting and duly entered on the minutes. There could have been no uncertainty as to the character, extent and location of the site selected. There was thus a substantial compliance with the evident purpose of the statute. The only omission was the prefix required to give the act of selection the technical form of a resolution. School meetings are not always conducted strictly in accordance with parliamentary rules. Technical failure to comply with such rules will not necessarily nullify their proceedings. So in this case, a technical omission in the form of the resolution selecting the new site, should not be held to defeat the unanimous act of voters present at the meeting. There was an apparent attempt to comply with the terms of the statute requiring a written resolution containing a description of the site to be selected. The action taken by the meeting in selecting the site did not, because of the technical defect insisted upon by the appellants, prejudice their rights. An administrative act by a public officer or meeting is not void because of a failure to strictly observe statutory directions, if the performance of such act accomplishes the substantial purposes of the statute, and does not adversely affect the rights of interested parties (see Lewis-Sutherland Statutory Construction, § 611). This principle is established by competent judicial authority and needs not be elaborated upon. The appellants are not injured by the failure of the meeting to observe the technical requirements of a formal resolution; since there is ample proof that the evident purpose of the statute as to the selection of a site has been substantially accomplished, it would not be equitable to nullify the selection of the site because of the technical defect under consideration.

Some question is also raised as to the suitability of the site selected. There is proof that a majority of the pupils are more conveniently served by the site selected than by the one formerly occupied. The appellants have furnished no map and have submitted nothing which indicates that a schoolhouse may not be properly built upon such site, except that it is near highways which, when completed, will be much used by automobiles, and that the route of the Ulster &

Delaware Railroad may be changed so as to come dangerously near such new site. These alleged conditions are not established by a preponderance of evidence. The presumption is that the site selected is a suitable one. The appellants have not overcome this presumption.

The appeal is dismissed.

4547

In the matter of the appeal of Stanley E. Filkins and others v. board of education of union free school district no. 12, towns of Ridgeway and Shelby, Orleans county.

The qualified voters of a school district at a school meeting at which it is voted to construct a new school building upon a site owned by the district, have authority to designate the particular spot or place upon such site where such new building shall be erected. In the absence of any such special designation by the district meeting the trustees or boards of education have full power and authority to designate the place upon such site upon which such building shall be erected, and this Department will not interfere with such action or decision.

Decided May 15, 1897

S. E. Filkins, attorney for appellants
Edmund L. Pitts, attorney for respondents

Skinner, *Superintendent*

The appellants in the above-entitled matter appeal from the action of the board of education of union free school district no. 12, towns of Ridgeway and Shelby, Orleans county, taken on April 2, 1897, in locating the place for a new high school building ordered to be built, at a school meeting of said district, upon a schoolhouse site owned by such district, and upon which site there is now situate a schoolhouse, by the adoption of the following resolution, namely: "That the high school be placed facing South Academy street, and that the northeast corner of the new building be placed forty-five feet directly west of the southwest corner of the present building."

The appellants allege several grounds for such appeal. Seven of the nine members of the board of education have joined in the answer to the appeal. It appears from the papers filed herein that on March 12, 1897, such union free school district owned certain property situate in said district known as the central school grounds upon a portion of which was situated a school building; that on March 12, 1897, at a school meeting duly called and held in such district the construction of a new high school building on said central school grounds was duly voted, but such meeting did not designate the particular location or spot upon such central school grounds where such new school building should be constructed; that at such meeting a committee, consisting of five persons, was appointed to advise with the board of education of the district with reference to the erection of such new school building; that the members of the said board

of education and of such advisory committee viewed the grounds and discussed the location of the new building and held several meetings, and gave full opportunity to the inhabitants of the school district to express their views thereon, and at a meeting of such board of education held on April 2, 1897, adopted the resolution hereinbefore set forth and from which this appeal is taken, locating the new building.

It further appears that at the time of the adoption of such resolution the members of such board were divided as follows: Five being for the resolution, and four against; but at the time of the filing of the answer to the appeal herein, the members stand seven in favor and two against the location of the new building as designated in such resolution.

The qualified voters of the school district, present at the meeting at which it was voted to construct the new school building, had authority to designate the particular place or spot upon the central school grounds where such new building should be erected. In the absence of any such special designation by such district meeting, it was competent for the board of education of the district, and it had full power and authority, to designate the place or spot upon such grounds on which, in its judgment it would be for the best interests of the district that the new building should be erected.

This Department will not interfere with such action and decision of the board of education of the district.

The appeal herein is dismissed.

5073½

In the matter of the appeal of James V. Rose from proceedings of special meeting held March 2, 1903, in school district no. 7, Corning, Steuben county.

In notices of special meetings in common school districts to consider the proposition to designate a new schoolhouse site, the Consolidated School Law does not require that such notice should contain a description of a new site by metes and bounds.

A resolution presented at any duly called meeting, designating a new schoolhouse site, must contain a description by metes and bounds. In common school districts, at a meeting duly called, a vote may be adopted for the purchase of a site and the sum to be appropriated is not limited but a tax for the purchase of such site can not be raised in instalments but must be levied in one sum. There is no provision of the Consolidated School Law forbidding the erection of a schoolhouse near a building used as a hotel.

Under the provisions of the liquor tax law of the State the traffic in liquor can not be permitted in any building, etc., which shall be on the same street or avenue and within 200 feet of a building occupied exclusively as a church or schoolhouse.

Decided April 30, 1903

Leslie W. Wellington, attorney for appellant
Sebring, Cheney & Rogers, attorneys for respondent

Skinner, *Superintendent*

This is an appeal from the proceedings of a special meeting held March 2, 1903, in school district 7, Corning, Steuben county, relative to the designation of a new schoolhouse site, and the erection of a new schoolhouse thereon.

The appeal herein was filed March 13, 1903. An answer to the appeal by Frank H. Rose, trustee, and Alfred G. Wilcox, district clerk, was filed March 23, 1903, and to such reply a rejoinder was filed April 6, 1903.

The appellant alleges in substance the following grounds for bringing his appeal:

The special meeting was not legally called; the notice of such meeting was not in compliance with the requirements of the school law; the resolution adopted designating a new school site was not in accordance with the school law; the vote upon the resolutions was not as required by the school law; votes by persons not qualified were received; the site designated is not a suitable one.

The pleading and proofs herein are voluminous and have been carefully read and considered.

The first contention of the appellant that the special meeting held in said district March 2, 1903, was not legally called, nor was a proper legal notice thereof given, nor did the notice as given comply with the requirements of the Consolidated School Law, is not well taken.

The proofs herein show that the notices were printed, except the signature of the trustee and district clerk, the date when so signed and the day in March when the meeting was to be held and each notice was signed by such district officer. The district clerk served such notice upon all the qualified voters of the district at least six days before March 2, 1903, in the manner prescribed by sections 2 and 6, article 1, title 7 of the Consolidated School Law upon each of the qualified voters of the district, except Edwin F. Van Etten who was present at the meeting. The notice stated fully the purposes for which the special meeting was called, namely, whether the school site of the district should be changed and a new site acquired; if the meeting should vote to change the site, then for it to designate a new site and authorize its purchase; if a new site was designated to decide whether the district would authorize the erection of a new schoolhouse thereon and provide for its construction; to authorize the raising of money sufficient to purchase the new site, if one should be designated, and to construct a new schoolhouse, if one should be voted.

After the organization of said special meeting a resolution was offered that school district 7, Corning, Steuben county, change the site of the schoolhouse owned by it in the village of Gibson and purchase a new site for the schoolhouse. An objection to the voting upon such resolution was made on the ground that the notice of the meeting did not contain a description of the proposed new site by metes and bounds. This objection was not well taken. Section 19, article 2, title 7 of the Consolidated School Law provides that "so long as a district shall remain unaltered, the site of a schoolhouse owned by it, upon which there is a schoolhouse erected or in process of erection, shall not be changed, nor such

schoolhouse be removed, unless by the consent in writing of the school commissioner having jurisdiction; nor with such consent, unless a majority of all the legal voters of said district present and voting, to be ascertained by taking and recording the ayes and noes at a special meeting called for that purpose, shall adopt a written resolution designating such new site and describing such new site by metes and bounds."

This provision does not require that the notice of the special meeting to be held in district 7 to consider the change of the school site therein should contain therein a description of a new site by metes and bounds but that any *resolution* presented for the action of the meeting designating a new site must contain such description. The resolution offered, to which objection was made, was not one designating a new site but to ascertain the views of the voters present as to whether a change of site was desired.

It appears that 99 persons voted upon such resolution, namely: 55 aye and 44 no, showing a majority of 11 for the resolution. The appellant claims that 10 of the persons who voted aye were not qualified voters. Admitting, for the purpose of argument only, that such claim is valid, the resolution was adopted by a majority of one. The respondents have established that all of said 10 persons were qualified voters. The rule is well settled that proceedings will not be vitiated by illegal votes unless a different result would have been produced by excluding such votes. It is also well settled that a party knowing a person to be unqualified and permitting him or her to vote without challenge will not be allowed to object to the proceedings of the meeting because such unqualified person participated in them.

A resolution in writing was then offered that said district designate as a new site a certain parcel of land described therein by metes and bounds and the trustee be authorized to purchase such land for said district for the sum of $700. The vote thereon was ascertained by taking and recording the ayes and noes, 69 persons voting, and the resolution was adopted by a majority of 43, 56 voting aye and 13 no. March 14, 1903, Fred J. Smith, school commissioner of the second commissioner district of Steuben county, approved in writing such new site so designated at such district meeting.

A resolution was adopted that said district erect a new schoolhouse upon the lot selected as a new site at an expense of not to exceed $3000, the plans of such building to be approved by the school commissioner, the vote thereon being 48 ayes and 2 noes.

The following resolution was adopted:

Resolved, That a tax of $500 be levied forthwith upon the taxable property of school district 7, Corning, Steuben county, to be used towards the purchase price of the new school site selected and designated by said district and the construction of a new school house thereon; and that the trustee raise the balance of the sum needed to purchase said new site and construct said new schoolhouse, not exceeding the sum of $3200, by issuing the bonds or other obligations

of said district payable in instalments of $400 and interest each year hereafter, until fully paid, beginning with 1904.

Such resolution was adopted by an aye and no vote of 48 ayes and 2 noes.

Section 17, article 2, title 7 of the Consolidated School Law enacts that "no tax voted at a district meeting for building, hiring or purchasing a schoolhouse or an addition to a schoolhouse, exceeding the sum of $500 shall be levied by the trustees, unless the commissioner in whose district the schoolhouse of the district, so to be built, hired or purchased, or added to is situated, shall certify, in writing, his approval of such larger sum."

Before any action is taken by Trustee Rose relative to the erection of the new schoolhouse in his district, he should obtain from School Commisioner Fred J. Smith his certificate in writing approving the expenditure of the sum of $3000 for such new schoolhouse.

Under the school law, the amount a school district can vote for a site is unlimited, but the tax for the purchase of a site *can not* be raised in instalments, but must be levied *in one sum*. Trustee Rose must levy a tax of $700 for the purchase of the site, instead of $500 voted at the meeting. The sum of $3000 voted for the building of the new schoolhouse may be levied in equal annual instalments under the provisions of section 18, article 2, title 7 of the Consolidated School Law of 1894, as section 18 was amended by section 1, chapter 274, Laws of 1895.

The contention of the appellant herein that the new school site designated by the meeting is within less than 100 feet of a hotel in which the traffic in liquor is carried on and therefore would be detrimental to the good morals of the pupils attending a school in a house thereon is not well taken.

It appears that Benjamin F. Edger is the owner of a building situated in such school district, in which he resides with his family and conducts a hotel. Said hotel entrance is 146 feet from the nearest point of the new school site; the corner of the hotel nearest to the new site is 114 feet from the nearest point of such site. It is proposed to place the new schoolhouse near the center of the new site and well back from the street, at a distance of 246 feet from the entrance to said hotel and the nearest point of the new school building from the nearest point of the hotel will be about 200 feet.

There is no provision of the school law forbidding the erection of a schoolhouse near a building used as a hotel. Subdivision 2 of section 24 of the liquor tax law provides that the traffic in liquor shall not be permitted in any building, yard, booth or other place which shall be on the same street or avenue and within 200 feet of a building occupied exclusively as a church or schoolhouse; the measurements to be taken in a straight line from the center of the nearest entrance of the building used for such church or school to the center of the nearest entrance of the place in which such liquor traffic is desired to be carried on.

The appellant herein has failed to sustain his appeal by a preponderance of proof and his appeal should be dismissed.

Appeal dismissed.

3525

J. C. Fargo and others from the action of the district meeting held in joint school district no. 11 of the towns of New Hudson, in Allegany county, and Lyndon, in Cattaraugus county, on May 29, 1886.

Two months and a half delay in bringing an appeal sufficient to bar it unless satisfactorily explained.

The Department will not enjoin trustees from proceeding to erect a new building upon an old site as directed by a school meeting, in order to afford time to work up sentiment for a change of site.

Decided August 26, 1886

Draper, *Superintendent*

This is an appeal by J. C. Fargo, a resident voter and taxpayer of the district, and others, from the action of the district meeting in joint district no. 11, towns of New Hudson, in Allegany county, and Lyndon, in Cattaraugus county, alleged by the appellants to have been held on May 29, 1886, at which a resolution was adopted to build a schoolhouse for said district, and appointing Arden M. Franey and Addison S. Thompson as a committee to act with the trustee in carrying out such resolution. The appellants ask that the building of such schoolhouse be stayed pending a decision upon this appeal.

The appellants allege the following grounds of appeal:

1 That the present schoolhouse site is in the northern part of the district; that the district was formed more than thirty years ago by adding or annexing the southern portion to the northern, and at that time the present site was adopted.

That the present site is not in the center of the district, and that more taxpayers reside south of than north of said site.

That appellants propose at once to take such proceedings as will cause the present site to be abandoned, and one selected further south, and in the geographical center of the district.

2 That the special meetings, at which the present acting trustee was elected and the resolutions adopted, were not regularly called, and the proceedings thereof irregular.

3 That contracts have been entered into for an amount in excess of the amount authorized by the district.

The appeal in this proceeding was taken on the 11th day of August 1886, nearly two months and a half after the date of the meeting as alleged by appellants from the proceedings of which this appeal is taken.

But the respondents aver, and have filed affidavits of at least three persons to prove it, that the said meeting alleged to have been held on May 29th was, in fact, held on the 1st day of May, which was a regularly adjourned meeting day.

Appellants have in no manner excused their delay in taking this appeal; they are clearly barred by their laches, but I have not been content to dismiss

the appeal upon a technicality, and I have carefully considered all the papers submitted by the appellants and the respondents on this appeal, and I am forced to the conclusion that the best interests of the district would be subserved by carrying out the direction of the district meeting and completing the schoolhouse on the present site, so as to resume sessions of the school as soon as possible.

For thirty years this has been the site of the schoolhouse, and as there is no evidence of opposition to such site until very recently, I must assume that it has been a very satisfactory location for the school. Besides, the purchase of a new site involves the loss of the old with but little compensation therefor, owing to the fact that the grant thereof to the district was conditional, the expenses attending purchase of new site, expense of moving buildings, etc., all lead me to the conclusion that the voters at the district meetings and the officers who are carrying out the directions of such meetings, acted, and are acting in good faith, and for the best interests of the district and the school therein.

Reasoning as I have done, I am compelled to deny this application for a stay of proceedings and dismiss the appeal.

Where trustees purchase a site designated by the district, an appeal from their action will not lie; it should be brought from the proceedings of the meeting in designating that site.
Decided July 9, 1860

Van Dyck, *Superintendent*

This is an appeal from the action of the trustees in purchasing a schoolhouse site, and contracting for the building of a schoolhouse thereon.

The acts complained of were under the authority and direction of votes of the inhabitants, duly convened in district meeting. The appeal should have been brought from these proceedings before thirty days had expired, and before the trustees, in obedience to the votes of these meetings, had contracted for the site and for the building of the house. The district is bound by these contracts, and the matter has now passed beyond the reach of equitable interposition by this Department, and must, therefore, be permitted to take its natural course.

3675

In the matter of the appeal of Walter Tait and others, from the action of John H. Berry, supervisor of the town of Rossie, county of St Lawrence.

The action of a supervisor, now school commissioner, in refusing to consent to a change of the schoolhouse site, will be sustained when it is made to appear that the district meeting has neglected definitely to designate the site.

A district meeting can not delegate authority to a committee to purchase a site and to take as much land as may be deemed necessary.

Decided March 28, 1888

Draper, *Superintendent*

At a special meeting held in district no. 3 of the town of Rossie, St Lawrence county, on the 22d day of October 1887, a motion was adopted, by a vote of 35 to 23, that the site of the schoolhouse be changed to a proposed site on a lot belonging to D. W. Church. After this action, it was resolved that a committee, consisting of Walter Tait and others, be appointed to confer with the supervisor of the town and procure his consent to the proposed change. Subsequent to this, the committee acted pursuant to its directions, and, after some delay, the supervisor notified the committee that he would withhold his consent. From the refusal of the supervisor, this appeal is taken.

Able counsel on each side have been at great pains to prove that the old site or the proposed one was best suited to the educational interests of the district, and innumerable reasons have been urged to show that each location was the best and that the other was altogether undesirable. So elaborate and painstaking has been this work on each side, that I find myself, after listening to a most elaborate argument and after reading the unduly voluminous papers in the case, in difficulty about reaching a conclusion in the premises.

It is customary to sustain the action of a majority of voters as expressed in a district meeting in a matter of this kind, unless it shall be made clearly to appear that such majority is not acting wisely. Before it should be held that the majority is not acting wisely, that fact should be made clearly to appear, and it devolves upon the minority to show it. This fact is not shown with any such clearness as to satisfy me of the unwisdom of the act of the majority in desiring to change. But the looseness with which the district meeting transacted its business is such as to prevent me from overruling the supervisor, if I should otherwise feel it my duty to do so. The district meeting did not designate any specific site with definiteness and certainty. It did nothing more than to resolve that the schoolhouse site be changed to the lot of D. W. Church. The proposed site was not to occupy the whole of Church's lot. The site which it is proposed to take, is not only not described by metes and bounds, but it is not even stated how much land it was proposed to take. The size of the lot does not appear to have been determined upon in the district meeting. A district can not delegate authority to purchase a site to a committee. It is alleged that the committee which was appointed was to take so much of Church's land as it thought to be necessary, and to locate a site upon one side or the other of his lot, as it thought best. The committee does not seem to have reported to the meeting, and has never, so far as the papers show, determined just where the new site shall be located or just how large it shall be. This indefiniteness of action is sufficient alone to render it impossible for me to overrule the refusal of the supervisor, and the appeal is dismissed.

3681

In the matter of the appeal of E. P. Abbott, T. N. Carr and others, members of the board of education of union free school district no. 1, town of Whitestown, county of Oneida v. Robert A. Jones, as supervisor of the town of Whitestown.

Until a new site has been designated, a supervisor (now school commissioner) is not bound to consent to a change of site.

A mere resolution in favor of the purchase of a new site is insufficient. The supervisor is entitled to know what site is to be selected before he is called upon to pass judgment upon the proposed change of site.

Decided April 23, 1888

Harry S. Patten, attorney for respondent

Draper, *Superintendent*

In the above district a special school meeting was held November 22, 1887, for the purpose of considering the advisability of purchasing a new site and erecting a new schoolhouse. The statement of the appellant shows that at such meeting the following resolution was proposed:

Resolved, That union district no. 1, in the town of Whitestown, appropriate $16,000 with which to purchase and improve a new site, to erect thereon a new brick schoolhouse, and to equip the same with proper furniture and apparatus.

The resolution was amended so as to make the amount appropriated $10,000 instead of $16,000, and was then adopted.

Subsequently to this, application was made to the supervisor of the town of Whitestown for his consent to the change of site. Consent was refused, and from such refusal this appeal is taken.

The papers in the case are very voluminous, containing much irrelevant matter and indicating a marked division of sentiment and much feeling among the inhabitants of the district. It seems to be practically conceded on both sides that the district ought to have increased and improved school accommodations. The principal disagreement seems to be over the question whether a new building shall be erected upon the present site or upon a different one. On the one side it is attempted to be proved that the present site is too small, lies below the level of the highway and is wet and unhealthy. On the other side it is denied that the present site is unhealthy and is asserted that if it is too small it can be enlarged by the acquisition of adjacent land. The assertions of the parties are so antagonistic that, from them, I have not been able to arrive at any confident conclusion as to the truth of the matter and have, consequently, been put to the trouble of a personal inspection of the premises. From such an inspection I am of the opinion that the district ought to have a new school building and that the present site is, in its present extent and condition, not suitable for the erection of a new and proper building and for the needs of the district. It is not large enough and it needs raising up several feet. It seems

to be conceded that it is wet. It is in close proximity to steep declivities and running water. Whether or not sufficient adjacent land can be acquired to permit the placing of the new building back a proper distance from the highway or to permit the arrangement of suitable school grounds in the rear of the building is doubtful. If that could be done it would seem that the other difficulties could be overcome. In any event it seems to me that the expense of enlarging and suitably improving the present site would not be far short of the cost of a new site and perhaps would exceed it. That, however, is a matter for the district to determine. It is only for the Department to see to it that proper and suitable school facilities are provided. The district must say in what manner it will provide them. The majority of the electors represented in a district meeting have decided that a change of site shall be made. Upon the facts of the case I should uphold that decision if the meeting had gone on and designated another site which promised to be an improvement upon the present one. But this is an appeal from the refusal of the supervisor to consent to a change. In my opinion the action of the district meeting was incomplete and the application to the supervisor premature. He could not properly be asked to consent to a change until he was shown what it was proposed to change to. If we are to assume that the present site is unsuitable, either because of its extent, its condition, its proximity to adjacent banks and streams, or its location in the district, matters will not be mended until not only a different one but a *better* one shall be chosen. Upon this point the appellants cite a decision of Superintendent Rice, in 1856, as sustaining the right of the district to exact the consent of the supervisor before designating the new site and solely with reference to the circumstances of the old one. But that case does not sustain the proposition, for it was an instance where the district had been altered and it was held that no consent whatever was necessary. If the district in the present case had been changed no consent would be necessary. I am clearly of the opinion that in cases where the consent of a supervisor is necessary, the location and circumstances of the new site are elements which must properly be taken into consideration by him in determining his action in the premises. The supervisor in the present case might, therefore, very properly have refused to consider the matter at all until the district had decided upon the site to which it proposed to change and it would have been better if he had done so.

The appeal can not be sustained. The district can hold another meeting and take action looking to the designation of a new site. Having done so, it can renew its application to the supervisor, who would probably be guided in his determination by the views hereinbefore expressed. The resolution of the district meeting is ineffectual for the erection of a building upon the present site, for it contains no reference to such action. Such a course would involve the necessity of further action.

The appeal is dismissed.

3644

In the matter of the appeal of Silas F. Overton and Jesse G. Case, trustees of school district no. 7, in the town of Southold, county of Suffolk, v. Henry A. Reeves, supervisor of said town.

When a district meeting determines, by an undisputed vote, that a change of site for a new school building is desirable, it is the duty of the supervisor of the town to consent, unless there are most substantial reasons why the site should not be changed, or the one proposed purchased. The people of the district, who are to be taxed for the expense, are best able to determine what they can afford to do, and where they desire to locate the schoolhouse, and their determination will be upheld, unless manifestly against the educational interests of the district.

Decided November 23, 1887

Jesse L. Case, Esq., attorney for appellant
Timothy M. Griffing, Esq., attorney for respondent

Draper, *Superintendent*

At a special school meeting held in district no. 7, in the town of Southold, Suffolk county, on the 25th day of June 1887, it was duly voted by a majority of the legal voters of said district present, and voting at said meeting, ascertained by taking and recording the ayes and noes, that the trustees of the district should be authorized to take necessary measures to procure, by the right of eminent domain, an acre of land for a new schoolhouse site, which was specifically mentioned and described in the resolution adopted by the meeting. Subsequently to this action of the district meeting, the trustees of the district made application to the respondent, as supervisor of the town of Southold, for his consent to the proposed change of site. The supervisor declined to give such assent, and from his refusal so to do this appeal is brought.

It is the policy of this Department to sustain the right of the majority of voters in district meetings to do whatsoever they may determine to be best, unless their determination shall appear to be clearly without authority of law, and against the manifest educational interests of the district. It must be assumed that the vote of the majority assembled in the district meeting in determining the question as to whether a new school building should be erected upon the present site, or upon a new site, will, ordinarily, best indicate the wisest thing to do. In any event, the majority of a district ought to have an opportunity to locate a new schoolhouse which they have determined to build at such place as they think best. The provision of law which requires that a change of site should have the approval of the supervisor was intended as a check upon unwise or inconsiderate action, and, as such, is undoubtedly a proper and wholesome provision. But the reasons assigned by the supervisor for withholding his consent to a change which is desired by a majority of the electors in the district must be strong, if not overwhelming reasons, why it is not to the educational advantage of the district that the change should be made. The supervisor, in the present case, assigns as his reasons for withholding his consent that the

present school site has been in use a great many years; that the elevation is higher, the soil more gravelly and, while he practically concedes that it is not sufficiently large for the purposes of the new building, he says that it may readily be enlarged by adding to it adjacent territory. The trustees of the district, and numerous other residents of unquestioned standing, insist that the proposed site is much preferable to the old one; that it is not practicable to add to the old site by acquiring adjacent land, for the reason that there are valleys or gullies near the same which, during a part of the year, are filled with water to so great an extent as to make that land entirely unsuitable for a school site. The supervisor states that this land can be drained by culverts, and also that the proposed site will cost the district more than it would cost to acquire additional land adjoining the old site. It seems to me that these are questions which must properly address themselves to the people of the district, and that their determination of them ought to be sustained. If they prefer to pay a larger sum for the new site than for acquiring additional territory adjacent to the old one, they ought to have the privilege of doing so.

Taking all the circumstances into consideration, I have arrived at the conclusion that no sufficient reason is assigned for overruling the majority of the district meeting touching the location of their new schoolhouse, and that I ought to sustain the appeal, and it is so ordered.

3555

In the matter of the appeal of Coleman Townsend from the proceedings of district meeting, held in district no. 3, town of Carmel, Putnam county.

The proceedings of a district meeting, at which the site of a schoolhouse was changed, will not be set aside when it appears that every possible effort was made to give notice of the meeting to every voter, and all the voters attended the meeting but three, and they had been duly notified.

Unless it is made to appear that a sufficient number were ignorant of the meeting, and were opposed to the action taken, to have changed the result, the proceedings of the meeting will be sustained.

When it is claimed that illegal votes were cast at a district meeting it must clearly appear that there were a sufficient number of such to have changed the result before the State Superintendent will set aside regular action taken at such meeting.

Decided January 5, 1887

F. S. Barnum, Esq., attorney for appellant

Draper, *Superintendent*

This is an appeal from the action of an adjourned meeting in district no. 3, town of Carmel, Putnam county, held at the schoolhouse in said district upon the sixth day of October 1886, in voting to change the site and erect a new schoolhouse.

It appears that the legal voters in this district are very nearly evenly divided upon the expediency of changing the site and erecting a new school building.

At the meeting called for the purpose of determining the matter, 43 persons voted for the change of site and 37 against, and upon a motion to raise $1000 for the purpose of building a new schoolhouse 38 votes were cast in the affirmative and 37 in the negative. It is now alleged by the appellant (*a*) that notice of this meeting was not served upon all the legal voters of the district; (*b*) that several persons voted in the affirmative, and were counted, who were not entitled to vote; (*c*) that the new site is not convenient to the greater number of patrons of the school, and is not as suitable for school purposes as the old one, because of its proximity to an ore mine and a stream of water. The respondent, in his answer, swears that he is 54 years old and is well acquainted with the voters of the district, and that every possible effort was made to serve each one, and that every voter of the district was present at the meeting, except three, all of whom had been notified. I am satisfied of the good faith and the active efforts of the trustee in giving general notice of the meeting, and this Department has never required more, unless it is made to appear that a sufficient number were ignorant of the meeting and all opposed to the action taken to have changed the result.

The evidence is conflicting as to the qualification of certain voters who were counted upon the determination of the question. I am unable to pass upon this branch of the case with any degree of confidence, but the appellant has failed to show to my satisfaction that a sufficient number of illegal voters voted in the affirmative upon the motion to adopt a new site, to have changed the result.

I am led to give considerable weight to an affidavit of the school commissioner of Putnam county, who swears that he attended the meeting in question and witnessed the deliberations and proceedings taken thereat, and that he saw no irregularities in the conduct of the meeting, and furthermore, that he is familiar with the old site and the proposed site, and that while "both locations are sufficiently central, yet the new site is quite as convenient as the old, and is much preferable by reason of the grounds being more spacious, dry and healthy, and much better adapted in every respect to the requirements of a proper site for a schoolhouse."

In view of the foregoing considerations, the appeal is dismissed.

3629

In the matter of the appeal of Theron Van Auken and others v. Edwin J. Cook, sole trustee of school district no. 20, town of Phelps, Ontario county

Trustee refused to call a special meeting to locate a site for a new schoolhouse. Ordered that a meeting be called.

Decided July 21, 1887

Draper, *Superintendent*

This is an appeal by several residents and taxpayers, appearing to represent a clear majority of the electors as well as the owner of the large part of the taxable property of the district, from the refusal of the trustee to call a special meeting to consider the location of a new school building which it is proposed to erect.

The trustee answers that several special meetings have already been held, at which different determinations, touching the subject, have been arrived at, and that much bitterness exists in the district over the matter, and that another meeting will make matters worse and more complicated, rather than better.

It seems that at one meeting it was agreed to accept an offer of William P. Dimock to exchange the present site for an acre of land which he would give. Subsequently Mr Dimock's offer was reduced to one-half an acre. Then a special meeting voted to reconsider the former action and refused to accept the half acre and change the site. Following this, it appears that Mr Dimock renewed his offer, or made another, which a majority of the patrons of the school seemed desirous of accepting.

The majority of the electors of this district ought to have the right to set the new schoolhouse where they want it. I am unwilling to believe that the people in a school district in Ontario county can not assemble in a special meeting, treat each other as well as people in civilized society are accustomed to, and intelligently decide by the vote of the majority where it is best to put the new building. I am in favor of giving them the opportunity. I can not think the refusal of the trustee is based upon sufficient reasons.

The appeal is sustained and the trustee is directed to call a special meeting of the district to consider the location of a new school building within fifteen days from the time this decision shall be filed in the district clerk's office.

3542

Leander Cole v. the trustees, etc., of school district no. 1 of the towns of Roxbury, Prattsville, Conesville and Gilboa, in the counties of Delaware, Greene and Schoharie.

The proceedings of a district meeting, properly called and conducted in an orderly manner, changing a schoolhouse site, will not be disturbed, unless it is made to appear clearly that the site selected is unsuitable or would not be convenient to the greater number of patrons.

But little weight can be given to the statement of a public officer made for the purpose of impeaching his own official act.

Decided November 24, 1886

Draper, *Superintendent*

This is an appeal by Leander Cole, a resident and taxpayer, against the action of the district meeting held September 9, 1886, in joint school district no. 1 of the towns of Roxbury in Delaware county, Prattsville in Greene county, and Conesville and Gilboa in Schoharie county, in voting to change the site of the district schoolhouse.

There is no allegation against the regularity of the proceedings. The school meeting was regularly convened. Due notice was given to all, and it seems that all of the duly qualified voters of the district were present at the meeting. It

is said that the resolution changing the schoolhouse site was taken inconsiderately, but it is shown to have been under discussion some three-quarters of an hour. The proposition to change the site has since received the approval of the supervisors of the four towns in which the district is located. One of these supervisors makes affidavit, in which he swears that he gave his assent under a misunderstanding of the circumstances, and regrets that he did it; and one or two of the others are alleged to have made statements somewhat in the same direction. It is impossible to give much weight to such statements on the part of a public officer, made for the purpose of impeaching his own official act, and there seems to be no reason why the action of the meeting should be set aside on this account. The main question for me to determine is, whether the change in the site will be to the convenience of the greater number of patrons of the school or not. The statements of the respective parties upon this subject are exceedingly contradictory. It must be assumed that the majority of legal voters assembled in a school meeting will locate the school site at the point which is best calculated to promote the convenience of the greater number in the district. Before the Department will be justified in overturning the action of the majority, it must have clear proof to the contrary. There is no such clearness of proof in this case. The new site has been conveyed to the district free of cost. It is said to be not more than fifty-six rods from the old site. There is considerable proof that the old site is not a suitable one for a schoolhouse, being surrounded by the forest and not in sight of any house, and dangerously near a high precipice overhanging the Schoharie creek, while the new site is said to be removed from the precipice and in sight of three residences. In all sparsely settled school districts some people must be farther from the school than others, and be inconvenienced by the long distance which their children are obliged to traverse. That is undoubtedly true in this case; but the proofs do not show that the greater number are put to increased inconvenience by this change, while I think that it is proved that the proposed site is more suitable for school purposes than the old.

I am unable to sustain the appeal, and it will be dismissed.

3509

In the matter of the appeal of William McCune from the proceedings of a special school meeting in school district no. 14, Bovina, Delaware county.

Notice of a special school meeting sustained when objection raised is frivolous.

Unintentional omission to serve notice upon each school elector will not render void the proceedings of a meeting when it does not appear that any one has been injured by such omission.

The designation of a schoolhouse site controlled by school district.

The State Superintendent of Public Instruction will not dictate in such a matter and will not interfere or set aside a designation unless proceedings therefor were clearly illegal or against the educational interests of the district.

Decided June 5, 1886

Draper, *Superintendent*

This is a proceeding by William McCune, a taxable inhabitant and legal voter in school district no. 14, Bovina, Delaware county, N. Y., appealing from the proceedings of a special meeting in said district held March 10, 1886.

The appellant alleges substantially as the grounds of this appeal:

1 The notice for the meeting was defective for the reason that it did not state that a tax was to be voted at the meeting for any purpose whatever.

2 The notice was not served upon all the voters of the district, and that the omission to serve was wilful and fraudulent; also that the notice as served upon several of the voters did not state that the meeting was called for the purpose of changing the schoolhouse site.

3 There is no necessity for a change of site. The site designated is not a proper one for school purposes and the owner of the land is unwilling to sell the same to the district.

From an examination of the testimony in the case, it appears that a special meeting was called in said district by the service of the following notice:

To the Inhabitants of School District No. 14 of the Town of Bovina:

Take notice that a special school meeting of district no. 14 will be held at 7 p. m. on the 10th day of March 1886, at schoolhouse in Rushland, for the purpose of taking into consideration the propriety of enlarging the schoolhouse so as to accommodate two teachers, or of purchasing a new site and building a new schoolhouse and transacting such other business as may legally come before such meeting.

Dated *February 27, 1886*

[Signed] JOHN F. MILLER
Trustee

The special meeting so called was held on the 10th day of March 1886, and 36 voters out of a voting population of nearly 100 were present. The meeting adopted a resolution designating a new site for the schoolhouse by a vote of 29 to 4. The resolution properly designated a new site by metes and bounds, and was adopted by taking and recording the ayes and noes. A tax of $500 was voted to pay for the new site. The meeting then adopted a resolution to build a new schoolhouse upon the new site, and directing the levying of a tax of $1500 to pay for the same, less the amount received from the old house and site, the trustee being directed to make such sale at public auction.

I will examine the objections in the order of their statement:

1 The notice clearly set forth that the object of the meeting was to take "into consideration the propriety of enlarging the schoolhouse so as to accommodate two teachers, or of purchasing a new site, and building a new schoolhouse . . ."

The meeting could not very well provide for the purchase of a new site, and the erection of a new schoolhouse without voting a tax for the same. It seems to me that the objection that the notice did not say a tax would be raised

after stating that the meeting was for the purpose of providing for the purchase of a new site and the building of a new schoolhouse is frivolous. No one could be misled by such omission. Will any one pretend that he was led to believe by the wording of the notice that the meeting was only for the purpose of selecting a new site, and resolving to build a new schoolhouse, and there stop? I think not. While it could well have inserted in the notice that the meeting would levy a tax for these purposes, I think the notice was broad enough, and that the words "purchasing a new site, and building a new schoolhouse" necessarily implied the levying of a tax therefor.

2 The appellant alleges that the notice was not served upon all the voters of the district. He presents the affidavits of four persons, L. Washburn, John W. Browley, Gilbert J. Dickerson and John Hastings, who say when the clerk read the notice to them he did not say that one of the purposes of the meeting was to change the site. Thomas Miller stated that when the clerk attempted to serve the notice on him he told him he knew of the meeting, and the clerk need not read the notice. Three others, William J. Oliver, Maggie Coulter and George L. Davidson, filed with their affidavits the notice served upon them, which does not state the object of the meeting. Julia McSherson says no notice whatever was served upon her.

The statute provides that the notice for a special meeting "shall state the purpose for which it is called, and no business shall be transacted at such special meeting, except that which is specified in the notice," and it also provides that "the proceedings of no neighborhood or district meeting, annual or special, shall be held illegal for want of a due notice to all of the persons qualified to vote thereat unless it shall appear that the omission to give such notice was wilful and fraudulent." There is no question but what the original notice embraced the notice of a proposed change of site. The clerk swears that he read the whole of the notice to the four persons first named, and would have read it to Browley had he not stopped him. There is no question but what the written notices served upon William J. Oliver, Maggie Coulter and George L. Davidson were not full; but the clerk explains the omission by stating that Oliver resided at so great a distance away that he sent the notice to him, and that Davidson and Maggie Coulter were not at home when he called to notify them, and he left the short or slip notice for them. Julia McSherson, he admits was not served, but he says that her husband told him it would not be necessary for him to do so, as he would tell her. While the appellant makes a charge that many persons were not notified of the meeting, the above are all that he shows to have received defective notices or to have been entirely omitted in the service of the notices. Out of a voting population of nearly 100, it is not surprising that some should have been omitted in the service of the notice; this is the reason for the provision of the statute, that such omissions must appear to have been wilful and fraudulent before the proceedings of the meeting can be set aside. With the exception of Hastings, it is not claimed that any of the nine persons mentioned above were misled, or would have attended the meeting had they been notified

that the purpose of such meeting was to change the schoolhouse site. It does not appear that any of the eight remained away from the meeting, while it does appear that three or four were present and participated in the proceedings. In regard to Hastings, it appears that he is the owner of the proposed site, and it is conclusively shown that before the meeting he had several conversations with different persons about the location of a schoolhouse site and as to what he would sell the district a site for. Knowing that this subject was being agitated in the district, and that a special meeting had been called, he remained away from the meeting. A careful examination of the testimony fails to show that there was any wilful or fraudulent intent on the part of either the clerk or the trustee in failing to serve the notice upon every voter in the district. And there is a complete failure on the part of the appellant to show that anyone has been injured by the alleged irregularity in the notice or the service thereof, and that the results of the meeting would, under any circumstances, have been different.

3 This brings me to the last objection of the appellant. An effort has been made to show that the old site is sufficient for the district, and that the new site, as designated by the meeting, is not a suitable one for school purposes. From an examination of the testimony, I am of the opinion that the appellant fails to establish either of these allegations. School districts have control of the designation of their schoolhouse sites, and this Department will not dictate in the matter, and will only set aside the proceedings designating or changing a site unless such proceedings are illegal or grossly opposed to the health and welfare of the school. It is no ground for appeal or reason for this Department to set aside the designation of a schoolhouse site for the reason that the owner of the land refuses to sell the same to the district. The law provides the procedure to obtain title, and in this case it appears that proceedings have already been commenced in the county court for this purpose.

The appeal is overruled, and the action appealed from affirmed.

3637

In the matter of the appeal of David Sliter v. George L. Hull, sole trustee of school district no. 16, town of Middletown, Delaware county.

A school trustee was directed by the district to purchase forty-nine square rods of land for the purpose of enlarging the schoolhouse site, for a reasonable compensation. The trustee agreed with the owner to submit the question of value to three arbitrators, and each agreed to abide the result, the trustee assuming to bind the district by written articles. The arbitrators considered the matter and decided that fifty-eight square rods were worth $300. In determining this, they took into consideration the inconvenience the owner, whose other lands adjoined, would sustain by having the school site adjoin his property; also, the expense he would be compelled to meet in erecting a division fence.

Held, That the selection of arbitrators was illegal; that while the district empowered the trustee to determine the reasonable compensation with the owner, it did not empower these other persons to do so for him. The decision of the arbitrators can not in any event be sustained, for they did not determine the question (that is, the value of forty-nine square rods) submitted to them. They also considered matters in determining what should be paid for the land, which they ought not to have done.

Decided October 6, 1887

Draper, *Superintendent*

At the last annual school meeting in school district no. 16, of the town of Middletown, Delaware county, a motion was made and adopted by a majority vote, as shown by the official record of the meeting, "to enlarge the schoolhouse site by buying a piece of land containing forty-nine square rods, beginning at the junction of the Margaretville and Arkville roads, and running easterly along the center of the Arkville road seven rods; thence running at right angles northerly seven rods to stake and stones; thence westerly to the center of the Margaretville road; thence along the center of said road seven rods to the place of beginning, and that the school district pay the owner a reasonable compensation for said land." No provision was made as to the manner of determining what "reasonable compensation" was. Under such circumstances, it must have been left for the trustee to determine. It seems that the trustee negotiated with the owner of the land for the purchase thereof, and that the two, being unable to agree as to a price, they finally agreed to submit the matter to the determination of three arbitrators. They entered into a written stipulation, in which it was agreed by the owner that he would deliver a sufficient conveyance of the property to the trustee on or before a specified time in consideration of the payment to him of the sum which the arbitrators should find to be a just compensation for the value of the land. It was agreed by the trustee for and on behalf of the district, that upon the delivery to him of the conveyance of the property, he would pay to the grantor such sum of money as the arbitrators should certify to be the value of the property. It was also stipulated in this arbitration agreement that the costs and expenses thereof should be a charge upon the district. The parties to the arbitration respectively entered into bonds, in which the owner of the land bound himself to abide by the determination of the arbitrators, and the trustee assumed to bind the district in like manner. The arbitrators named in the agreement acted in the matter, and finally made and signed a decision or award, in which they found that the value of fifty-eight square rods of land was $300.

Mr Sliter brings an appeal from the acts of the trustee as above set forth, and asks that his course in submitting the matter to arbitrators be set aside, and that he be enjoined from levying a tax upon the district with which to raise the sum found by the arbitrators to be the value of the land in question. He objects to the course of the trustee on the ground, first, that the district never authorized the trustee to submit the question to arbitration; second, that the school law provides the method for acquiring the title to land needed for school purposes and for appraising the value thereof; third, that the arbitrators took into

account the expense of building a fence, to which expense the grantor would be subjected in consequence of the conveyance, and also that they took into account the annoyance which a school in the neighborhood would be to the grantor; fourth, that the arbitrators fixed the value of fifty-eight square rods of land, when the school meeting authorized the purchase of but forty-nine, and when only the value of forty-nine rods was submitted to arbitration; fifth, that the arbitrators fixed the value of the land too high; sixth, that the trustee had no right to bind the district to pay the expenses of arbitration. There would seem to be no question about the right of the trustee, under the action of the district meeting, to have determined in his own mind what was "reasonable compensation" for the site which the meeting voted to purchase. But the trustee went further than this. Rather than exercise his own judgment in the matter, he saw fit to submit the question of value to three other persons. Perhaps this was the only way in which he could hope to reach an agreement with the owner of the land. It is extremely doubtful if he had the right to do this. While the district meeting may have been willing to leave it to the trustee to have determined upon his own judgment what the value was, they may not have been willing to leave it to other persons. Whether the trustee had the right to enter into any such arrangement is doubtful, but it is not essential to the determination of the specific question here presented to decide that question. If he had the right to enter into any such agreement as he did, he clearly had no right to undertake to charge the district with the expense of the arbitration. Furthermore, this arbitration could not be upheld for another reason. If there is any rule of law which is well settled, it is that the decision of arbitrators is binding upon the parties to the arbitration only when the arbitrators act *wholly* within the terms of the submission. If they acted contrary to the arbitration agreement, or if they undertook to decide a question other than the exact question submitted, their decision is vitiated. In the present case the district voted to purchase forty-nine square rods of land. The trustee submitted the question as to what was "reasonable compensation" for forty-nine square rods of land to three arbitrators. They reported that fifty-eight square rods was worth $300. They did not decide the question submitted to them, and so their decision could not in any event be binding upon anybody. Whether there is force in the other objections raised by the appellant, it is unnecessary to inquire.

In view of the foregoing considerations, it becomes necessary to sustain the appeal and set aside the acts of the trustee in the premises.

3667

In the matter of the appeal of Henry M. Stilwell and others v. school district no. 3, town of New Utrecht, Kings county.

A district meeting voted in August to purchase a site for a schoolhouse, authorized a tax to pay for the same and to erect a schoolhouse thereon.

The tax was levied, the money needed to purchase site was collected, and the title to the property was acquired by the trustees.

At a subsequent meeting of the electors held in December following, which was very largely attended, it was voted to purchase a different site and sell the one first purchased. This last selection was approved by the board of supervisors of the county.

Held, That the action of the latter meeting was regular, and being the expression of a largely attended meeting of the electors, will be sustained, in the absence of any evidence to show that the site selected was not a desirable one.

Decided February 1, 1888

Isaac F. Russell, attorney for the appellants
Hubbard & Rushmore, attorneys for the respondents

Draper, *Superintendent*

At a special school meeting held in district no. 3, of the town of New Utrecht, Kings county, on the 5th day of August 1887, called for the purpose of purchasing a site and erecting a new schoolhouse, it was determined to purchase a site 100 feet wide between Fifty-sixth and Fifty-seventh streets, being 100 feet east from Twelfth avenue. It was also voted to raise the sum of $1200 to pay for such site, and also the sum of $10,000 to erect the building. Soon thereafter the purchase price was raised and paid for the site, and the title thereto was duly conveyed to the district. The deed of conveyance contains the following covenant, namely, "The parties of the second part (the trustees of the school district) further covenant and agree to erect and build on said lots a substantial schoolhouse to cost no less than $5000."

At the annual school meeting, on the last Tuesday of August, no action concerning the purchase of the site was taken.

A special district meeting was held on the 5th day of December 1887, under the call of two of the trustees, for the purpose of considering propositions to sell the site recently purchased and to purchase a different one located on Fifty-third and Fifty-fourth streets and Fourteenth avenue. At such meeting the majority voted against the proposition to sell the site recently purchased.

On the 22d day of December 1887, another special district meeting was held under the call of all three trustees of the district, for the purpose of again considering a proposition to sell the site and purchase a different one, and the proposititon to sell was adopted by a majority vote. It was then voted to purchase the site on Fourteenth avenue, and the action was subsequently approved by the board of supervisors of Kings county.

From such action this appeal is taken. The appellants claim (*a*) that the determination to purchase the first site could not be disturbed after the expiration of the time allowed for appeal; (*b*) that the first site is best suited to the needs of the district; (*c*) that it is against public policy to uphold a continuous agitation of such a matter in dispute; (*d*) that the district meeting was bound to rescind the resolution of August 5th before taking different action, which was not done; (*e*) that the determination of December 12th could not be set aside by a subsequent meeting, but, if it was to be done at all, it must be through an appeal to the Department; (*f*) that the meeting of December 22d could not purchase the site on Fourteenth avenue, for the reason that the notice of the meeting con-

tained no reference to that site; (*g*) that the grantors of the site conveyed to the district, and also third parties, have acquired rights under the resolution of August 5th which must be respected.

The three trustees of the district, answering the appeal, uphold the action of December 22d, and say (*a*) that they have procured the grantor of the site purchased to release the district from the covenant to build; (*b*) that at the first meeting but 28 persons were present and voted; at the second meeting there were 98, and at the last there were 141; (*c*) that the Fourteenth avenue site is the better one and more fully meets the convenience of the district; (*d*) that the action of the board of supervisors in authorizing the sale and purchase is conclusive.

The several meetings seem to have been assembled upon proper and sufficient notice and to have proceeded with regularity. No high-handed proceedings are shown which would be sufficient to invalidate the action taken. The manner of taking a vote upon a proposition to change a site which the statute requires, seems to have been observed. The fact that the meetings grew in size from 28 voters at the first one to 141 at the last, is of considerable importance and should give greater weight to the later action. It is true that the Department discourages the agitation of a matter about which opinions differ after an authorized and regular determination of it. If the trustees in this case had refused to call the second or third special meeting and an appeal had been taken from such refusal, unusual circumstances must have been shown before the Department would have required them to issue a call. But the meetings have been held and the result seems to show that the earlier decision was not in accordance with the wishes of a majority of qualified electors of the district. The only ground for refusing to call further meetings is the presumption that the earlier ones are expressive of the will of the district. That presumption has been overturned in this case. While the way of appeal was open to such persons as objected to the site determined upon at the first meeting, it can hardly be denied that they also had the right to ask that another meeting should be held and to overturn the first action by vote of the electors of the district if the majority were opposed to it. There is little force to the claim that the last meeting must reconsider the resolution designating a site before selecting another site. In this case the previous action was an accomplished fact and could not be reconsidered. All that could be done was to vote to sell the site already purchased and to purchase another. I am of the opinion that the notice of the meeting of December 22d was broad enough to justify the action taken. It was not necessary to specify a particular site. To my mind the most serious question raised by the appellants is that in relation to the covenant in the deed by the trustees to build a schoolhouse on the ground conveyed. But for the fact that it appears, and is not controverted, that the grantors have waived their right to the performance of the same, I should have the greatest difficulty in upholding the action of the meeting of December 22d. As it is shown that question is eliminated from the case, I can not think that any other persons acquired rights because of the action of August 5th, which the district is legally bound to respect.

Inasmuch, then, as no irregularity on the part of the district meetings is shown, and as the requirements of the statute touching a change of sites seem to have been observed, I come to the question whether the action appealed from was contrary to the educational interests of the district. In this branch of the case the burden is upon the appellants to show that the site last chosen is unsuitable. They fail to do so. Indeed it is clear that that site is more accessible to nearly all of the residents of the district than the other. It also faces three streets. All three of the trustees of the district are in favor of it. No reason is shown why it is not as well suited to the needs of the district as the other. This being so, the will of the majority of the people of the district ought to govern in the matter, and as they have proceeded without irregularity their determination must be upheld.

The appeal is dismissed.

3639

In the matter of the appeal of Edward D. Baker, Dwight Merrill and Hosea Dimmick v. union free school district no. 1, of the town of Norwich, county of Chenango.

The action of a district meeting which is regularly called and orderly in its deliberations, which directs the purchase of a new site and the construction of a new school building will never be disturbed by the State Superintendent unless it is most clearly shown that the action taken is adverse to the interests of education.

Notice that a proposition to raise $40,000 to erect a new schoolhouse and purchase a new site would be submitted at the next annual meeting in the district was given, as the statute requires. It is now objected, on appeal, that the notice should have specified the amount which it was proposed to expend for the building and how much for the site, separately.

Held, That the notice was sufficient and that the objection should have been raised at the meeting.

Decided October 21, 1887

Draper, *Superintendent*

At the annual school meeting in district no. 1, of the town of Norwich, county of Chenango, held upon the 30th day of August 1887, a resolution was adopted directing the trustees of said district to cause to be built a new school building for the use of the schools of the district, and also directing the said trustees to obtain the title by purchase, or by legal proceedings, of a new site which was specifically described in the resolution. It was also voted that the sum of forty thousand ($40,000) dollars be raised upon the taxable property of the district, payable in ten equal annual instalments for the purpose of paying for such building and site, and that the trustees borrow the money, or so much of said amount as should be necessary, at the lowest practicable rate of interest, and issue bonds or other evidences of indebtedness therefor. The notice of such proposed action, signed by the board of education, had been given in accord-

ance with the provisions of the statute. The appellants object to and appeal from this action upon several grounds. It is particularly claimed that the notice of the action taken was not in accordance with the provisions of section 10 of title 9 of the Consolidated School Act, as amended by chapter 595 of the Laws of 1886, in that the amount which it was proposed to expend for a site, and the amount which it was proposed to expend for a building, should have been specified separately in the notice of the proposed action, which was not done. I do not think the objection has force. The portion of the statute which covers the question is as follows:

"But no addition to or change of site, or purchase of a new site, or tax for the purchase of any new site or structure, or for the purchase of an addition to the site of any schoolhouse, or for building any new schoolhouse, or for the erection of an addition to any schoolhouse already built, shall be voted at any such meeting, unless a notice by the board of education stating that such tax will be proposed and specifying the amount and object thereof shall have been published once in each week for the four weeks next preceding such district meeting," etc.

I hardly think it can fairly be claimed that this provision of the statute required the board to specify the amount as to each particular item for which it was proposed to ask the favorable consideration of the district meeting. In the notice the board stated that "a proposition or resolution will be submitted to such meeting to raise by tax upon the taxable property of said district the sum of $40,000, to be assessed and levied in ten annual instalments, for the purpose of erecting a new school building and for the purpose of a new site, to be designated by such meeting, on which to erect such building and to provide for the payment thereof by the issuing of bonds to be paid in ten equal annual instalments. I think this was a sufficient compliance with the requirement of the statute. Furthermore, if there was objection to the sufficiency of the notice, it seems to me that it should have been raised at the district meeting when the resolution was proposed for action, and if there was a desire that the proposition to erect a new building and the proposition to change the site should have been acted upon separately, a division of the question should have been sought at the time of action upon the resolution. This was not done, and I feel obliged to dismiss the appeal, so far as this objection is concerned.

The other objections of the appellants have reference to the advisability of the proposed action. It is claimed that the present site is sufficient, and that the proposed one is not the most advisable, and that the expense thereof is not necessary.

This Department never overrules the action of a district meeting for such reasons as this, unless it is most clearly shown that the action taken is adverse to the interests of education. That fact is not made to appear in this case. It is to be assumed, in the absence of such proof, that the legal voters of the district know better what it is advisable to do in such a matter than the Superintendent at his distance from the scene.

The appeal is dismissed.

3906

In the matter of the appeal of George E. Soper v. school district no. 5, of the town of Smithtown, in the county of Suffolk.

Land to be leased for school district purposes must be clearly described so as to guide the trustee in carrying out the intent of the district meeting. Failure to so describe held sufficient ground for setting aside the action of the meeting.

Decided September 8, 1890

Draper, *Superintendent*

At a special meeting held in the above-named district on the 20th day of May 1890, it was assumed by the meeting to lease one-half acre of land adjoining the present schoolhouse site for an indefinite term, at a nominal rent of one dollar per year. The half acre referred to was not described by metes and bounds, and the vote upon the proposition was not taken by calling and recording the ayes and noes. The appellant objects to this proceeding and brings his appeal for the purpose of determining its legality. Numerous residents of the district answer the appeal and strenuously uphold the proceeding.

The law does not favor the leasing of lands for schoolhouse purposes by common school districts. Without holding that the action of this meeting amounted to a change in their schoolhouse site, and that it could only be effected by the taking and recording of the ayes and noes upon a resolution specifically describing the land by metes and bounds, I still have no hesitation in arriving at the conclusion that the action of the meeting in this case ought not to be upheld. The action of the meeting does not even locate the land which it has proposed to lease upon one side or the other of the school building. The trustee is to be guided by the action of the district meeting, and from such action it is impossible for him to determine the land of which he has official care and control. I think this is a fatal defect. If the district proposes to lease land in this manner it must clearly indicate in its action the location and boundaries of the parcel leased, and the length of time for which the lease is to run.

From these considerations it follows that the appeal must be sustained and the action appealed from set aside.

3612

In the matter of the appeal of Ebenezer W. Taylor and others from the action of a special school meeting held in school district no. 2, town of Red House, county of Cattaraugus, November 13, 1886.

The vote of a district meeting changing a site set aside and a special meeting ordered to determine the question, where it appeared the vote was nearly even for and against, and that the failure to give due notice of the meeting had prevented the attendance of certain voters, who, by their votes, would have changed the result, if present.

Decided June 23, 1887

Coke & Whipple, attorneys for appellants

James G. Johnson, Esq., attorney for respondents

Draper, *Superintendent*

This is an appeal by Ebenezer W. Taylor, district clerk of school district no. 2, town of Red House, county of Cattaraugus, and other residents thereof, alleged by appellants to be a majority of the legal voters of said district, from the action of the school meeting held in said district, November 13, 1886, at which meeting it was decided to build a new schoolhouse upon the old site.

It appears from the pleadings of the respective parties that the vote for the new building stood 15 for and 14 against.

The district clerk unintentionally omitted to give notice of the meeting to several alleged legal voters who state under oath that if they had been notified and in attendance at the meeting, they would have voted in the negative.

The real difficulty in this district appears to be that the district is nearly six miles in length. The present site is situated about two and one-half miles from one extreme end and three and one-half miles from the other.

The opponents of the new building are desirous of having two schoolhouses erected, which will give better accommodation to the children of the district. The evidence shows that there are about one hundred children of school age in the district and that about fifty attend school. The papers do not disclose where the children reside with respect to the present site, or the assessed value of the property of the district liable to taxation for the support of the school.

I have hesitated about disturbing the action of the meeting appealed from, and would not if the vote had not been so nearly even.

I prefer to hold that the legal voters of a district know their wants in relation to school matters, and to leave them to determine such matters except when a clear abuse of power appears. In view of the want of notice to some of the electors of the district, I have concluded to sustain this appeal and set aside the action of the school district meeting appealed from, in order that an unquestionable decision as to the building of a schoolhouse may be made by all the legal voters of the district, or at least by such as take sufficient interest to attend the meeting.

The district clerk is hereby directed within twenty days from the date of this decision to give notice of a special meeting, to be held at least fifteen days subsequent to the first posting of the notices thereof, for the purpose of determining the wishes of the legal voters in regard to building a schoolhouse or houses or any change of site or the advisability of requesting the school commissioner to divide the district or the establishment of more than one school in said district. The clerk will not only give personal notice, but in view of the importance of this proposed meeting, post at least three written or printed notices in conspicuous public places in the district.

3809

In the matter of the appeal of Joseph H. Ramsey v. school district no. 5, of the towns of Cobleskill and Schoharie, county of Schoharie.

The action of a district meeting in designating a site for a school building set aside, when it was shown that a series of meetings had been held and a different site named at each, and at the last meeting but few voters were present, not supposing an attempt would be made to change the site previously selected.

Special meeting ordered to select a site.

Decided September 18, 1889

J. G. Runkle, attorney for appellant

Draper, *Superintendent*

It seems that between the 1st day of February 1889, and August 6, 1889, no less than eight special school meetings were held in the above district to consider the matter of changing site and erecting a new schoolhouse. Action was taken from time to time, only to be overthrown and made away for something else at a subsequent meeting. Frequently the action of the several meetings was impulsive and inconsiderate. Much of the time it was irregular and ineffective, because not taken in compliance with the provisions of the statute. It appears that at a meeting held on the 22d day of March one site was designated, but the vote was not taken by ayes and noes and recorded. At a meeting held on the 19th of April another site was named. The clerk's minutes do not show that the ayes and noes were taken and recorded, but the appellant undertakes to supply the deficiency by showing that it was done in fact, although not appearing in the record. Still another site was named at a meeting held on the 22d day of June. The clerk's record shows that upon this last occasion the detail vote was fully recorded. The appellant, however, attacks the action of June 22d on the ground that the meeting was attended by but few, and does not represent the desires of the majority of the people of the district. He says the people had become tired of attending meetings, and did not suppose any attempt would be made to overthrow the action of April 19th.

After careful consideration, I have concluded to direct that another meeting be held to select a site. There is good reason to believe that the last site chosen does not have the approval of the greater number of residents of the district. I do not feel justified in upholding the action of April 19th, for, technically at least, it was set aside by a subsequent district meeting. The district has appropriated $2000 for a new site and building. This ought to secure a very creditable building for the district, and it should be located where the majority of voters deliberately determine to have it. After the large experience which the district has had in the way of special school meetings, it ought to be able to decide by a majority vote, where the new building had better be located, and the minority ought to be willing to accept the determination cheerfully.

The appeal is sustained, so far as it concerns the action of June 22d and the subsequent action of the trustee predicated thereupon. The temporary

injunction heretofore granted herein, is made permanent. The trustee is directed to call a special meeting for the purpose of selecting a site, at which care shall be taken to describe the new site with particularity, and the vote in determining the same shall be taken by ayes and noes, and recorded.

3587

In the matter of the appeal of E. D. Girvan and others, from the proceedings of a district meeting held February 28, 1887, in school district no. 3, town of Harrisburgh, county of Lewis.

When a district meeting is held on a very stormy night, and at a time when roads in the district were almost impassable — in consequence of which voters were unable to attend — and by a very close vote of those present a change of site is decided upon, and such vote results in much apparent dissatisfaction in the district, the action of the meeting will be set aside, and a special meeting ordered to obtain a clear expression of the voters of the district upon the proposed change of site.

Decided April 15, 1887

Draper, *Superintendent*

This appeal is taken by legal voters in school district no. 3, town of Harrisburgh, county of Lewis, from the action of a district meeting at which it was agreed to change the site by a vote of 11 to 9. The grounds alleged by the appellants are:

1 That a majority of the district are opposed to the contemplated change.

2 That at the time of the meeting at which the change was voted the weather was so severe and the roads in such condition that legal voters opposed to the change could not get to the meeting.

3 That the contemplated site is not centrally located, is low and at times inundated, has no wholesome drinking water near it, and in winter could not be reached by many children after heavy snowstorms.

4 That the present site is sufficient for the wants of the district.

The trustee and his associate respondents deny that the present site is suitable, that the contemplated site is not centrally located, or that it is low ground and inundated, as alleged by the appellants; they allege that the present site is simply held by the district conditionally, the district not being the owner of the fee; that it is insufficient in size, and that adjoining land can not be secured for its enlargement.

In deciding this appeal it is proper that I should advise against the practice of erecting school buildings upon sites of which the district is not the absolute owner. I wish to encourage, as far as possible, the purchase of sites by districts when a new schoolhouse is to be constructed. The site to be selected should be as nearly centrally located for the convenience of patrons of the school as possible. It should be a healthful spot, and one easy of access at all times

of the year. I find the evidence presented upon this appeal very conflicting upon this point. It appears that the selection of the contemplated site was secured by a very close vote, and that enough legal voters were prevented by stormy weather from attending the district meeting to have changed the result. A site chosen should be the choice of a majority of the legal voters of a district after deliberate consideration, and one which the supervisor of the town will approve of, as required by the statute. I have concluded therefore to sustain the appeal, in order to give the legal voters of the district an opportunity to give full and fair expression of their opinion upon the selection of a site, but not intending to declare any opinion as to the desirability of the contemplated site. The proceedings of the meeting held on the 28th day of February last are set aside, and I hereby order a special meeting of the legal voters to obtain such an expression, and the trustee is hereby directed to cause such a meeting to be called within ten days after receiving a copy of this decision.

The appeal is sustained.

3549

In the matter of the appeal of Joseph W. Rood, from the proceedings of district meeting held in district no. 16, town of Pomfret, Chautauqua county, October 5, 1886.

PENDENCY OF APPEAL DOES NOT STAY PROCEEDINGS

Committee to purchase site. District meeting can not delegate the authority to determine a site.

Proceedings of a district meeting will not be set aside for the reason that the records of the meetings were not properly kept. There must be specific acts complained of, and it must appear that there has not been opportunity for an expression of the will of the district, or that it has been thwarted.

Decided December 15, 1886

Draper, *Superintendent*

Two appeals are here presented, the first being an appeal by Joseph W. Rood, a resident and taxable inhabitant of school district no. 16, in the town of Pomfret, Chautauqua county, whereby the appellant seeks to have the proceedings of a district meeting, called by School Commissioner E. J. Swift, upon the formation of the said district, and held September 23, 1886, set aside upon the following grounds, namely: that the district is illegally organized; that the pendency of an appeal taken in 1877, from the refusal of a former school commissioner to form the district operates as a stay, and prevents the formation of the new district; that a pending appeal from the action of the present commissioner, E. J. Swift, in forming said district, stays all proceedings, and the first meeting could not legally be held pending such appeal; that the meeting was not properly conducted; that certain district officers were not properly chosen; that

other irregularities occurred in the conduct of said meeting. The respondents present several affidavits in answer to the appellant's affidavits, and controvert many of the allegations.

By the second appeal the appellant seeks to set aside the proceedings of a district meeting held in said school district no. 16, on the 5th day of October 1886, upon the following grounds: that the district is illegally organized and established as stated in the former appeal; that no person had a right to call said meeting; that the record of the meeting is defective, among other defects failing to show the time and place of meeting; that the action of the meeting held October 5th, in selecting a committee to procure a site for a schoolhouse, was illegal. The appellant's allegations upon this appeal are also controverted by several affidavits.

The several appeals from this school district and the character of the affidavits presented on both sides indicate a divided and unfortunate feeling among the people of the district upon school matters, which should not exist. Educational interests should not be allowed to suffer because of the quarrels and disagreements of the voters of the district. In a previous decision, I have sustained the action of the commissioner in forming this district. So much then of the appellant's ground of appeal is, therefore, disposed of, and the only questions left for consideration are those relating to the calling and conduct of the meetings of September and October. The first was properly called by the commissioner. The proceedings were not so orderly as they should have been, but it is rarely the case, where intense feeling has been engendered in a district that they are. The school district having been formed, it was next in order to elect district officers. This has been done, and to perfect the school organization and advance the interests of education, I have determined to overrule the appeals above entitled, except as hereinafter stated.

It is claimed that the records of the meetings were not properly kept. I regret that this is too often the case at school meetings. Carelessness and negligence are usually the cause of it. I would regard these appeals more favorably if the appellant had selected some particular action of the meetings for complaint, instead of making such general charges against everything done and attempted to be done to form the district, select officers and provide for a school.

The delegation of power by the district meeting held October 5th, to a committee to select and purchase a site, is illegal. The statute does not authorize such a proceeding. The district meeting alone has the power to designate a schoolhouse site, and so far as this action is concerned, the last above entitled appeal is sustained.

I have therefore reached the conclusion to dismiss the foregoing appeals, except so far as the action of the second meeting of the inhabitants of the district at which they attempted to delegate the power of selecting and purchasing a schoolhouse site to a committee, and the appeal from that action is sus-

tained. The trustee of the district is hereby directed to call a special meeting of the qualified voters of the district within thirty days from the date of this decision for the purpose of taking action upon the selection of a schoolhouse site.

3779

In the matter of the appeal of James Stratton, trustee of school district no. 12, town of Owego, county of Tioga, from the proceedings of an adjourned district meeting held October 5, 1888.

The action of a district meeting in selecting a schoolhouse site will not be sustained when it does not clearly appear that a majority of the inhabitants present and voting at a district meeting called for that purpose, voted in favor of the selection of the site, nor when the site was not sufficiently described in order to enable the trustee, or any other person, to procure a title to the same.

Decided April 13, 1889

Sears & Lynch, attorneys for appellant
George F. Andrews, attorney for respondent

Draper, *Superintendent*

This appeal is brought by the trustee of school district no. 12, town of Owego, county of Tioga, for the purpose of having certain acts of a district meeting held on the 1st day of October 1888, and at an adjourned meeting held on the 5th day of October 1888, construed and passed upon. The appeal papers were served upon a resident of the district, one Robert Burgett, who has made answer thereto, although he is at loss to know why he should have been made the respondent in the matter of the appeal.

The facts, as shown by the pleadings are, that on the 24th day of September last the school building was destroyed by fire, and that only the foundation walls remain; that the site is not owned by the district and that the rights of the district thereto will cease whenever the same ceases to be used for school purposes.

A meeting was called for the 1st day of October last, which was held for the purpose of determining whether a schoolhouse site should be purchased, and to consider the building of a new schoolhouse. At the meeting held pursuant to such call, a motion was made to locate the schoolhouse on the top of McLeon's hill on James Stratton's corner, which was a different location from that upon which the schoolhouse stood which had been destroyed by fire. A motion was also made that the schoolhouse site should be six rods square, and the further motion was made to pay James Stratton $10 for his site. All these motions were declared carried by the chair, the vote having been taken viva voce, and votes being cast both for and against each of the motions. Subsequently the meeting was adjourned, as the appellant alleges, for the purpose of considering plans and

specifications for a new school building, but this is strenuously denied by the respondent, who alleges that there was no reservation whatever in relation to the adjournment. At the adjourned meeting, a motion was made to locate the site at a different place than that selected at the previous meeting, and this motion was declared out of order by the chairman, who stated that the only business was to consider plans and specifications for building a schoolhouse. A majority of the voters present at the meeting substituted another chairman, and the meeting proceeded by calling the roll and taking and recording the vote by ayes and noes to select a site on the farm of one Peter Moot, which is a different site both from the one previously selected, and the one upon which the schoolhouse which was destroyed by fire had formerly stood.

It is alleged by the respondent that James Stratton owns no real estate within the district, and that the intention evidently was to select a portion of land owned by one Edna Stratton.

My decision is that the proceedings of the first meeting can not be sustained, for the reasons:

First, that I am unable to determine, from any evidence before me, that a majority of the inhabitants present and voting were in favor of the proposed Stratton site.

Second, the site was not sufficiently described in order to enable the trustee, or any other person, to procure a title to it.

In relation to the second or adjourned meeting, I must hold that that meeting was simply a continuation of the meeting of October 1st, and that any business which could lawfully be transacted at the meeting of October 1st, could also be considered at the adjourned meeting. I must also hold that the proceedings of the second meeting can not be sustained because it does not appear that the resolution by which the Moot site was selected was described by metes and bounds as the law requires, and so as to enable the trustee to acquire title to the same.

All proceedings which have, therefore, been taken as appears by the papers presented, in relation to the selection of a new site, are hereby vacated and set aside, and the trustee of the district is directed to forthwith call a special meeting of the inhabitants, to be held within fifteen days from the date of this decision, for the purpose of determining upon a school site, and for considering the erection of a new school building thereon.

I hereby direct that all questions relating to these subjects shall be determined by a call of the roll of the qualified voters of the district, and the taking and recording of the vote by ayes and noes, and that, in the selection of a site, if the site is to be changed, the meeting shall describe and designate the same by metes and bounds, as required by law.

The appeal from the proceedings of the second meeting is sustained, as well as the counter-appeal which is made by the respondent from the proceedings of the first meeting.

4262

In the matter of the appeal of James W. Hughes and William O. Ross from action of special meeting held May 26, 1894, in school district no. 3, town of Southfield, Richmond county.

Where an appeal is taken from the action of a school meeting, duly and legally designating a schoolhouse site and authorizing the trustees of the district to purchase the same, and the appellants fail to show by preponderance of proof that they are injured by the action of said meeting in the designation of said site, or that the site will not be accessible for school purposes, or that it is not a suitable site for school purposes, the appeal should be dismissed.

Decided July 25, 1894

Crooker, *Superintendent*

On May 26, 1894, a special school meeting of the qualified voters of school district no. 3, town of Southfield, Richmond county, was held, upon notice duly and legally given, to consider and vote upon the matter of changing the schoolhouse site and authorizing the trustees to purchase a new site; for building a new schoolhouse; for bonding the district for raising money to build and furnish schoolhouse; for selling old schoolhouse and site, etc., etc.

That at said meeting a resolution was presented and adopted for the selection of a new schoolhouse site for said district, said site being offered by D. J. Tysen for the sum of $500, and which new site was described by metes and bounds, being a plot of land 200 feet by 200 feet. That the vote upon said resolution was ascertained by taking and recording the ayes and noes of the legal voters of said district, present and voting at said meeting, the result of said vote so ascertained being 47 ayes and 28 noes. That said resolution also contained a clause authorizing the trustees of said district to purchase said new site. That a resolution was also adopted at said meeting authorizing the trustees of said district to sell the old (or present) schoolhouse and site.

The appellants herein appeal from so much of the action and decision as relates to the selection of a new school site, or the change of the present schoolhouse site, on the grounds:

1 That the resolution was not in accordance with the requirements of the school law, and was calculated to force two sites upon the district, if the district did not subsequently abandon the present site; and,

2 That the appellants are the owners of a reserved strip of land lying along and northerly of the lot designated at the meeting as a school site, and that no action having been taken at said school meeting to acquire access across said strip, school children living north of Tenth street in said district would be trespassers upon the reserved lands of such appellants in gaining access to the school site and house.

It is alleged in the answer of the trustees of said district to the appeal herein, and not denied by the appellants, that the school site selected and designated on May 26, 1894, is the same site selected in 1892, approved by School Commissioner

Kenney and also approved by me in an appeal to me relative to such site, and that the present school commissioner, Mrs West, has approved of, and consented to, such site, and that the trustees have entered into a contract for the purchase of said site in accordance with the vote of such meeting. Under the provisions of subdivision 6, of section 16, title 7, of the Consolidated School Law of 1864 and the amendments thereof, in force on May 26, 1894, the qualified voters of any common school district have the power, by a majority vote, to designate a site for a schoolhouse, or, with the consent of the commissioner or commissioners within whose district or districts the school district lies, to designate sites for two or more schoolhouses for the district. Under the call for the meeting of May 26, 1894, the meeting had authority to designate and direct the purchase of a new or additional school site, or to change their school site. The action of the meeting in designating a new or additional school site, and directing its purchase by the trustees, and in authorizing the sale of the school site and schoolhouse then owned by the district, was in fact a change of school site. This the meeting had the power to do under sections 20 and 21, title 7 of the School Law of 1864 and amendments, with the consent of the school commissioner, which consent has been given. The trustees of said district having become (and the district having become by reason of its action at said meeting) legally responsible by a valid contract to purchase said site, in pursuance of a resolution of the district, it has become an established site so that the resolution designating it and directing its purchase can not be rescinded under the general principle that a resolution that has been executed can not be revoked to the prejudice of those who have acquired rights and assumed liabilities under it.

The main ground of this appeal appears to be that the appellants claim that there is a reservation of a strip of land five feet in width, their property, lying along the entire southerly side of Tenth street, and that the land for a school site designated by said meeting is upon lands outside and beyond said reserved strip and completely cut off from access to and from said site to the streets of New Dorp.

I do not think the appellants, upon the proofs presented in said appeal, have sustained said claim. The map annexed to the appeal herein, I assume, is a full and correct map of the property at New Dorp of the appellants, and that seems to be all that it claims to be. The map does not show the " farming lands " mentioned in the appeal lying southerly of Tenth street, easterly of New Dorp avenue and westerly of Beach avenue, except in a very limited way, and is not sufficiently plain and clear to warrant me in finding in this appeal that the appellants have established said claim.

It is in proof that at said meeting of May 26, 1894, and at which the appellants were present, a contract was read by which the owner of the land which was voted as a school site, D. J. Tysen, agreed to open a street fifty feet wide through his property from New Dorp avenue to and in front of said new site, and which street will afford access to said school site, as appears to me from said map annexed to the appeal and Beers's map of Staten island, filed by respondent

in this appeal, without any trespass upon the land of appellants, and afford accommodation for the larger number of pupils in the district who will attend at the schoolhouse to be erected upon said site. The appellants in their reply to the answer of the respondents herein, state that said contract was not acted upon by the district meeting and is not filed with the district clerk, and that as they (the appellants) understand it, it amounts in legal effect to a mere gratuitous and revocable easement, leaving it in Tysen's power to close the road after he shall have opened it. The respondents, the trustees of the district, say in their answer herein that they appealed to Tysen to open the street and that he agreed to do so and executed a contract to that effect, which contract was read at the district meeting. A copy of said contract has been filed by the respondents with their rejoinder and I am of the opinion the contract is made for a valuable consideration and the trustees of the district can compel the performance by Tysen of his covenants therein.

It was not necessary that the meeting should take action upon said contract nor that it should be filed with the district clerk.

The burden of proof is upon the appellants. It is for them to show that they are injured by the action of said meeting in said designation of a new site or change of site; that the site will not be accessible for school purposes; that it is not a suitable site for school purposes. In this the appellants have failed and the appeal herein should be dismissed.

Appeal dismissed.

4319

In the matter of the appeal of George Stephan and Joseph Karl from proceedings of special meeting held October 2, 1894, in school district no. 11, town of Allegany, Cattaraugus county.

In rural school districts some of the children must be farther from the schoolhouse than others and be inconvenienced by the longer distance which they are obliged to travel; but it must be assumed that the majority of the legal voters, assembled in a school meeting in any such district to locate a new school site, will so locate it at a point which, in their judgment, is best calculated to promote the convenience of the greater number of the children of the district in attending the school. This Department will not be justified in vacating the action of the majority of such meeting, unless there is clear proof that such majority has acted to the contrary.

Decided February 11, 1895

F. M. and E. F. Kruse, attorneys for respondents

Crooker, *Superintendent*

This appeal is taken from the action of a special school meeting held on October 2, 1894, in district no. 11, town of Allegany, Cattaraugus county, in voting to abandon the schoolhouse, or discontinue the schools located at North Pole and Rock View in said district and to purchase a site on the Brandle farm, and erect a schoolhouse thereon.

The appellants do not claim that said special meeting was not duly and legally called and held, nor that the action of the meeting in discontinuing the said two schools and designating the new schoolhouse site and for the erection of a new schoolhouse thereon was not duly and legally had, nor that the new site is not a proper and healthy one. The main grounds upon which said appeal is taken are that the new site designated is not centrally located and that the greater number of children in the district who will attend the school, if a schoolhouse is erected upon such site, will be required to travel a long distance, and in some cases, over roads that in the winter are filled with snow.

It is claimed in the appeal that persons voted at said meeting who were not qualified voters in the district; but the appellants have failed to establish affirmatively that any such persons voted, or that if they voted, such votes were cast for the resolution or resolutions adopted; nor do they show that if such votes were excluded the resolution or resolutions would have been defeated.

The appellants and respondents each annex to their papers a map of the district, but small in size, without having marked thereon the number of children of school age, and the roads marked thereon upon which such children reside, or the portions of the district upon which they reside. Neither party claims their map is correct and accurate, and each denies the correctness and accuracy of the other party's map. Neither party has furnished a copy of the proceedings of said special meeting of October 2, 1894, each stating in his own language the substance of the action of said meeting in reference to the discontinuance of the two schools, and the designation of a new schoolhouse site and the erection of a schoolhouse thereon.

As to the main question presented by the appeal for decision, namely, whether such new site is convenient for the greater number of pupils who would attend the school, and the distance such pupils will be required to travel to attend said school, the proofs are somewhat contradictory.

From the proofs presented the following facts are established: that said school district no. 11, town of Allegany, Cattaraugus county, was formed many years ago, and is about three miles in length and about two miles and one-fourth in width; that at one time it had four schoolhouses, and on October 2, 1894, said district had three schoolhouses, one known as the North Pole schoolhouse, situate about three-fourths of a mile from the northern boundary of said district; the Rock View schoolhouse, situate about one and one-half miles from the northern boundary of said district and near the center of said district; and the Knapp's Creek schoolhouse, situate near the southerly boundary of the district, and in southwest square lot of said district; that running from the northern boundary of said district is what is known as the "main road" which runs nearly south by the North Pole schoolhouse and thence southwesterly by the Rock View schoolhouse and down to Knapp's Creek and near the Knapp's Creek schoolhouse near the southerly boundary of said district; that from said main road, near the North Pole schoolhouse, there is a road known as the "Four Mile Road" running in a southeasterly direction to the eastern boundary of said district; that

from said main road near said North Pole schoolhouse there is a road running west, known as the "Stephen Hollow Road"; that out of said main road a short distance northerly of the Rock View schoolhouse, there is a road known as the "Bucker Hollow Road," running in a southeasterly direction.

It further appears that the northerly portion of said school district was, and still is, settled by a farming community; that in 1876 oil was discovered in said school district, and all of said district lying south of the two north tiers of lots developed into good oil territory and became filled up with persons dependent on oil producing for a livelihood; that the schoolhouse at North Pole was constructed several years prior to 1876 and the increased population consequent upon the discovery of oil in the district necessitated the erection of three additional schoolhouses, namely, one at Rock View and one at Knapp's Creek, and one other which has been abandoned; that since the oil in said district has been exhausted a large share of the population, dependent upon its production, has left the district; but the clearing up of the land and taking up of new farms, the placing of rough timber land under cultivation, the erection of farmhouses and buildings, have been, and still are, going on in the center and southern portion of said district.

It further appears that on or about July 23, 1894, F. H. Chapin, school commissioner of the first commissioner district of Cattaraugus county, condemned the schoolhouse at North Pole; that at a special meeting of the district, held on September 12, 1894, it was voted to build a new schoolhouse at North Pole to take the place of the Rock View and North Pole schoolhouses, such school building to be built on the same site on which the North Pole schoolhouse stood; that subsequently said school commissioner refused to approve the said site for the new schoolhouse for the reason that said site was not a suitable one; that thereupon the said special meeting of October 2, 1894, was called and held and at said meeting, by a vote of 23 in favor and 18 against, a new schoolhouse site was designated, located on the Brandle farm, and that a new school building be erected thereon and the schools held in the North Pole and Rock View houses respectively be discontinued or abandoned.

The exact point on the main road between the North Pole and Rock View schoolhouses, at which the new school site is situate, does not appear by the proofs; but it seems to be situated about half way between said schoolhouses. That the children who attended the school at North Pole and Rock View respectively, will be required to travel about one-third of a mile farther to attend the school to be maintained upon the new site designated.

In the rural school district some of the children must be farther from the schoolhouse than others, and be inconvenienced by the longer distance which they are obliged to travel. It must be assumed that the majority of the legal voters assembled in a school meeting will locate the school site at a point which, in their judgment, is best calculated to promote the convenience of the greater number of the children of the district attending the school. Before this Department will be justified in overturning the action of the majority it must have clear proof to the contrary, and there is no such clearness of proof in this appeal.

The appellants allege in their appeal that on account of none of the inhabitants of Knapp's Creek village being residents of the territory in which the children will attend the proposed new school, but attending the school in Knapp's Creek, that such inhabitants are not interested in the state of the proposed new school, and that at said special meeting fourteen persons, residents of Knapp's Creek, attended and voted. It is clear that all qualified voters of said school district no. 4, town of Allegany, Cattaraugus county, no matter in what portion of the said district they resided, or at which one of the schools maintained in the district their children attended, had the right, under the school law, to attend any and all meetings of said district, and to vote upon all questions brought before said meeting.

The appellants herein have failed in establishing that any improper means were used by the respondents, or any one, to induce the voters of said district to attend such special meeting, or in voting at said meeting.

On petition of the appellants herein I made an order, dated October 27, 1894, staying all proceedings on the part of the trustees of said school district no. 11 and of each of them, under and pursuant to the proceedings of said special meeting of October 2, 1894, until the hearing and decision of the appeal herein, or until a further order should be made by me in this appeal.

The appeal herein should be dismissed.

It is ordered, That the appeal herein be, and the same hereby is dismissed.

It is further ordered, That said order made by me herein on said October 27, 1894, staying all proceedings on the part of the trustees of said school district no. 11, and of each of them, under and pursuant to the proceedings of said special meeting of October 2, 1894, be, and the same hereby is, vacated and set aside.

4915

In the matter of the appeal of board of education of union school district no. 5, Southold, Suffolk county, from proceedings of special meeting held October 22, 1900, in said district.

A special school meeting held in a union school district whose limits do not correspond to those of an incorporated village or city, pursuant to a notice issued by the board of education, which was published in the only newspaper published in the district, for two weeks only was not a legally called meeting under the provisions of the Consolidated School Law of 1894. Said school law requires that in the designation of a site or sites for school purposes, at a meeting in a union school district, such designation must be by written resolution containing a description thereof by metes and bounds, and such resolution must receive the assent of a majority of the qualified voters present and voting at such meeting, to be ascertained by taking and recording the ayes and noes, that is the clerk of the meeting should record the name of each person whose vote is received on such resolution and set opposite to each name whether such person voted aye or no.

Decided December 19, 1900

Skinner, *Superintendent*

This is an appeal by the board of education of union school district 5, Southold, Suffolk county, from the proceedings of a special meeting held in said school district on October 22, 1900. The clerk of the district acknowledged in writing upon the appeal that a copy thereof was served upon him on November 12, 1900. On November 17, 1900, there was filed in this Department an affidavit of Joseph W. Hallock, the printer and publisher of the *Long Island Traveler,* which paper is published in said school district 5, Southold, Suffolk county, of a notice of a special meeting called by the board of education of such district, to be held in the schoolhouse on Main street, in the village of Southold, October 22, 1900, for the purpose of determining whether such district should purchase either of the two parcels of land named therein for a school site, or purchase a parcel of land of one acre, described therein, adjoining the present school site, for the enlarging of such present site; and that such notice was published in said paper once in each week for two successive weeks, the first publication being made October 12, 1900. On said November 17, 1900, there was also filed in this Department a copy of the proceedings taken at such special meeting held in said district October 22, 1900, verified by the affidavit of W. Y. Fithian, clerk of the district.

The grounds alleged by the appellants for bringing their appeal are that such meeting was not duly and legally called, and that the vote upon the resolution to designate a new schoolhouse site was not ascertained by taking and recording the ayes and noes of the persons present and voting thereon.

No answer has been filed in this Department to such appeal, and under the uniform rulings of this Department the material allegations contained in the appeal are deemed admitted.

It appears that October 22, 1900, a large number of the inhabitants of such school district assembled at the school building therein, and such meeting was called to order by the president of the board of education, and a chairman of the meeting was elected, District Clerk Fithian acting as clerk, and two persons were appointed inspectors of election; a written resolution was offered for action by the meeting that the Oak Lawn avenue lot, being one of the parcels of land mentioned in the call for the special meeting published in the *Long Island Traveler,* be chosen for the new school site of the district. The chairman decided that the vote upon such resolution must be by ballot, such ballot to have written thereon by the voters the words "yes" or "no." A ballot was thereupon taken upon such resolution, which resulted in 167 votes being cast, of which 89 were in favor of the Oak Lawn avenue lot and 78 votes against said lot. The chairman declared that such lot having received a majority of all the votes cast, such lot had been chosen for the new schoolhouse site.

Section 10, article 2, title 8 of the Consolidated School Law of 1894, as amended by section 15 of chapter 264 of the Laws of 1896, provides that a majority of the voters of any union school district, other than those whose limits correspond to those of an incorporated village or city, present at any annual or

special district meeting, duly convened, may authorize such acts and vote such taxes as they shall deem expedient . . . or for the purchase of other sites or structures, or *for a change of sites . . .* ; but *no addition to or change of site or purchase of a new site,* or tax for the purchase of any new site or structure, or *for the purchase of an addition to the site of any schoolhouse . . .* , shall be voted at any such meeting unless a notice by the board of education, *stating the object thereof, shall have been published once in each week for four weeks next preceding such district meeting, in two newspapers, if there shall be two, or in one newspaper, if there shall be but one,* published in such district.

Such section also provides that the designation of a site or *sites by the district meeting shall be by a written resolution containing a description thereof by metes and bounds,* and such resolution must receive the assent of a majority of the qualified voters present and voting at said meeting, *to be ascertained by taking and recording the ayes and noes.*

This Department has uniformly ruled that the provisions of the school law requiring that a vote taken at a school meeting shall be "ascertained by taking and recording the ayes and noes of the qualified voters present and voting," means that the clerk of the meeting shall record the name of each person whose vote is received, and set opposite to each name whether such person votes aye or no.

Under the provisions contained in section 10 of article 2, title 8 of the Consolidated School Law of 1894, as amended by section 15 of chapter 264 of the Laws of 1896, it is clear that the meeting held in union school district 5, Southold, Suffolk county, October 22, 1900, was not a legal meeting, for the reason that the notice of such meeting was not given in the manner required by said section 10, above cited.

The notice of such meeting should have been published in *two* newspapers, if there were two, or in *one* newspaper if there was but one published in the district, *once in each week for the four weeks preceding such district meeting,* and the first publication should have been made full four weeks, that is, 28 days, preceding such meeting. This Department has uniformly advised that under section 10 the safer course is the insertion of such notice once in each week for *five* weeks, that is, five insertions.

Assuming, for the purpose of argument only, that legal notice was given of the special meeting held October 22, 1900, the Oak Lawn avenue lot was not legally designated as a new school site for the district, for the reason that a written resolution containing a description of such new site by metes and bounds was not presented to or acted upon by such meeting, and for the further reason that the vote taken at such meeting, relating to the desigation of a new site, was not ascertained by taking and recording the ayes and noes of the qualified voters attending and voting thereon.

The appeal herein is sustained.

It is ordered that the special meeting held October 22, 1900, in union school district 5, Southold, Suffolk county, be, and the same is hereby, vacated and set aside.

3974

In the matter of the appeal of Fayette Balcom v. the trustees of school district no. 11, towns of Caneadea and Rushford, county of Allegany.

The trustees of a school district proceeded, under the provisions of chapter 800 of the Laws of 1866, to take proceedings to acquire title to certain land for a school site. Appeal is taken from the trustee's action.

The district has acquired title to the site. *Held*, that the matter is one over which this Department has no jurisdiction. Relief must be sought before the courts.

Decided April 21, 1891

Draper, *Superintendent*

This is an appeal from the action of the trustees of school district no. 11, towns of Caneadea and Rushford, county of Allegany, in proceeding to acquire title to certain lands for a school site, which proceedings were instituted under the provisions of chapter 800 of the Laws of 1866.

From the answer of the respondents, it appears that the proceedings have been carried so far that the district had, at the time the appeal was brought, acquired title to the land to which the appeal refers. This proceeding which has been instituted by the respondents, is a matter before the courts, over which the courts have exclusive jurisdiction, and this Department has none. Whatever relief the appellant may consider himself entitled to, must be sought for before the proper tribunal.

I therefore dismiss the appeal.

3798

In the matter of the appeal of James D. Smith v. school district no. 8, of the town of Martinsburgh, county of Lewis.

Proceedings of a district meeting designating a new site, directing removal of the old schoolhouse thereto, and that the same be repaired, will not be disturbed, although there was some confusion at the meeting, particularly so in view of the fact that the site has been secured and paid for, the house removed and repaired, before action was commenced.

Decided July 29, 1889

Draper, *Superintendent*

This is an appeal from the action of a district meeting in the above-named district, held on the 1st day of July 1889, designating a new site, directing that

the old schoolhouse be removed to it and repaired, and that an addition to the same should be erected to cost not to exceed $750.

While it is apparent that there was some confusion at the meeting and that some of the proceedings complained of were hasty, if not precipitated, I fail, nevertheless, to discover any sufficient ground for setting aside the action complained of. Particularly so, in view of the fact that the new site has already been purchased and paid for, and the building removed to it.

The appeal is dismissed.

3852

In the matter of the appeal of Franklin D. Rice v. school district no. 8, of the town of Homer, in the county of Cortland.

Selection of a site for schoolhouse by a district meeting will not be disturbed unless it can be conclusively shown that the proceedings therefor were irregular, and not in conformity to the statute, or that the action was ill advised, and not for the educational interests of the district.

Decided January 8, 1890

Franklin Pierce, attorney for appellant
William D. Tuttle, attorney for respondent

Draper, *Superintendent*

This is an appeal from the action of a special meeting in the district above named, held on the 1st day of October 1889, in selecting a new site for a schoolhouse.

The papers are voluminous, and I have read them with care. There are two questions to be considered. First, whether the action taken was regularly taken, and in the manner directed by the statute; and, second, whether the action taken was manifestly against the educational interests of the district. I find no allegation against the regularity of the special meeting. Such action seems to have been taken with deliberation, and all the requirements of the law seem to have been complied with. This being so, it is to be upheld, unless it is clearly shown to be against the educational interests of the district. The papers show great differences of opinion concerning the propriety of taking the site which the trustee was directed to purchase. Strong affidavits are not lacking on either side. The burden of proof is upon the appellant; it is for him to show by overwhelming evidence, if he can, that the site is not suitable for school purposes. This he fails to do, in view of the statements of the opposition. If persons failed to attend the meeting, that was their own fault. The deliberate determination of a district meeting must be upheld, unless it appears very clearly that it was ill advised. The State Superintendent, at a distance from the scene of controversy, and without being able to personally inspect the site, is not justified in overruling the determination of a district meeting unless the proof is clear and strong, that he

should do so in order to save the district from a great error. The proofs in this case do not satisfy me that it is my duty to intervene.

I observe that the point is made in the papers that the trustee has purchased the new site of his own father. I know of no legal reason why he could not do this, and in view of the fact that he followed the specific directions of the district meeting as to the site and price, I fail to see any other reason why his act should be set aside because of that relationship.

The appeal is dismissed.

3668

In the matter of the appeal of George Bielby, W. H. Hamlin and others v. school district no. 25, town of Sanford, Broome county.

The inconvenience of a few families when a large majority of the district are suited with the school site selected, not a sufficient cause for reversing the action of a district meeting in designating such site.

Decided February 21, 1888

C. T. Alverson, attorney for appellants
John Swart, attorney for respondents

Draper, *Superintendent*

This is an appeal from the action of a special meeting held December 9, 1887, in school district no. 25, town of Sanford, Broome county, changing a site to a location about 200 rods south of the old schoolhouse, and providing for the erection of a new schoolhouse. It is conceded by the appellants that a new schoolhouse is necessary, but they object to the change in location. It is not claimed that there has been any irregularity in the proceedings which would invalidate them, nor is it said that the proposed new site is unsuitable for school purposes. It is urged that the proposed site is farther from the center of the district than the old one, and that the change will work very much to the disadvantage of some residents living in the north part of the district. From a careful reading of the papers, I conclude that the change will convenience the greater number of the residents of the district, but that it will seriously inconvenience a few families. It not infrequently happens in such matters that a few are made to suffer in order that the many may be suited. It can not be otherwise. It would seem as though two or three families who are farthest from the new site, might with propriety and advantage to them be set off into an adjoining district, and thereby be brought nearer to a schoolhouse. In any event, no sufficient reason is shown to justify me in overruling the action of the district meeting.

The appeal is dismissed.

3648

In the matter of the appeal of W. S. Hinman and others from the proceedings of certain district meetings held in school district no. 9, town of Vernon, county of Oneida, at which a change of site was voted.

The action of a majority of a district meeting in changing a site will not be set aside when all the requirements of the law have been complied with because it is alleged by appellants that the location decided upon is unhealthy, unless that fact is clearly shown.

The fact that persons qualified to vote were not aware of their rights and did not vote upon the question, is no sufficient reason for setting aside the action of a school meeting.

Decided December 9, 1887

Lynott B. Root, Esq., attorney for appellant

Draper, *Superintendent*

This proceeding is an appeal to set aside the action of a series of district meetings held in district no. 9, town of Vernon, county of Oneida, at which the subject of repairing the old schoolhouse, building a new schoolhouse, and changing the schoolhouse site was fully considered, and it was decided to build a new schoolhouse upon a new site. It appears that at the time the appeal was taken, the new site had been acquired, and contracts entered into for the building of a schoolhouse, and that the supervisor of the town had consented to the change, and the statute respecting a change of site seems to have been fully complied with.

The only ground for considering the appeal is, that the new site is not centrally located and is an unhealthy one. I do not propose to go into the question of the sufficiency of notice of the meetings, or the fact that some women who were eligible to vote were not aware of their rights in the premises.

The questions of building a new schoolhouse and changing the site were discussed and considered, in one aspect or another, at several successive meetings, and every voter of the district must have been fully aware of the question agitating the district. At each meeting it was manifested that a majority favored both propositions.

Upon the question of healthfulness of the site and suitable location, the burthen of proving the contrary is upon the appellants. This they do not do, to my mind, and I am therefore obliged to overrule the appeal.

3745

In the matter of the appeal of Cornelius O'Neill from the proceedings of a district meeting held November 7, 1888, in district no. 8, town of Massena, county of St Lawrence.

A district meeting must decide a proposed site for a school lot definitely.

The designation must be such as will enable a trustee to know precisely what land he is to purchase.

Decided January 5, 1889

Draper, *Superintendent*

This appeal is taken by a taxable inhabitant of district no. 8, town of Massena, county of St Lawrence, from the proceedings of a district meeting held in said district on November 7, 1888, by which a new site was designated.

The ground alleged for the appeal is, that the designation was too vague and indefinite. There are many other allegations, such as that the trustee of the district is ineligible to hold the office of trustee; that proper notice of the district meeting had not been given; that the location of the proposed site is near a site formerly selected, and which, on a former appeal by the appellant herein, the Department decided against; that the location of the proposed site is unsuitable and, at times, inaccessible.

Upon an examination of the proofs submitted, I find it to be conceded that the resolution designating the site was in these words: "That piece or parcel of ground (five rods one way, and eight rods the other) situated on the southeast corner of the Patrick Smith farm, bounded as follows: on the west by the new highway, on the north and east by the Patrick Smith farm, and on the south by the Joseph Hall farm."

I am constrained to hold that the above description of a lot of land to be purchased for a site is fatally defective. There must be such a designation by the meeting as will enable the trustee to know precisely what land he is to purchase. By the above description, a lot five rods front and eight rods deep, or eight rods wide and five rods deep would answer the designation. This would leave it to the trustee to determine just what the site should be, a duty the district meeting must determine.

In sustaining so much of the appeal, I do so with no intention of criticising the site selected; in fact, I am led to believe that it is a suitable selection and very centrally located. In a former decision, I did not intend it to be understood as disapproving of the site then selected. That appeal was, and this appeal is, sustained simply upon irregularities in the proceedings of the district meetings. There is no proof before me that the trustee is not a legal voter in the district.

It appears that the meeting was well attended, and that notice had been given as a previous annual meeting had directed notice to be given.

As to all other allegations of the appeal but that of the defective description, the appeal is dismissed, and sustained upon that ground alone.

A district meeting should be held to designate a site, either the one now or formerly proposed, or a new site, as a majority may prefer.

4001

In the matter of the appeal of John Wangelin and others v. school district no. 2, of the town of Colden, in the county of Erie.

Proceedings of a school district meeting changing a site for a schoolhouse, which were sustained by a bare majority, some of those voting with the majority being illegal or

questionable voters, *set aside*, when it is shown that at several successive meetings held within the period of six months previous, the proposition had been voted down.

When the question of a change of site is in doubt, *held*, that it would be better to retain the old site until the doubts are removed and a clear majority of the electors favor a change.

Decided September 15, 1891

G. H. Addington, Esq., attorney for the appellants
David J. Wilcox, Esq., attorney for the respondents

Draper, *Superintendent*

This is an appeal from the action of a special district meeting, held in the district above named on the 26th of June 1891, in voting to change the site of the district schoolhouse. It appears that meetings were held at the schoolhouse in said district, on the 10th day of January 1891, on the 24th day of January 1891, on the 21st day of March 1891, at each of which meetings the proposition to change the schoolhouse site was voted down. A fourth meeting for the same purpose was held on the 15th day of June 1891, when the proposition was defeated through the adoption of a motion to adjourn sine die. Notwithstanding these several decisions upon the proposition, a meeting was called on the 26th day of June 1891, to consider the same matter. This last meeting was not called at the district schoolhouse but at an uninhabited house, some three-quarters of a mile distant from the schoolhouse. There was considerable disorder at this meeting. The vote was larger than upon the previous occasions. It is clear to me that several persons voted on each side, who were not qualified electors in the district. By a vote of 27 to 25, it was determined to change the site.

After reading all the papers and the briefs of counsel with care, I have come to the conclusion that the proceedings of this meeting can not be upheld. There is no reason in calling meetings without limit to consider a proposition which has been repeatedly voted down, and particularly so when it is not made to appear that the proposition had been repeatedly voted down by unfair means, or by the casting of illegal votes. It is clear that the respondents resorted to most unusual and questionable means to carry their point. From such examination as I have been able to give as to the legal right of the persons voting on each side and whose right to vote is challenged, I am of the opinion that there were more illegal votes cast in favor of the proposition, at the meeting held on June 26th, than against it.

Again, a schoolhouse site should not be changed, unless after full consideration a clear majority of the qualified electors in the district are in favor of such change. If the question of a change is in doubt, it had better remain upon the old site until the doubts are removed.

The appeal is, therefore, sustained and the special meeting in the district above named, held June 26, 1891, is held to be of no effect.

3610

In the matter of the appeal of Charles G. Vandenburgh v. F. J. Farrington, supervisor of the town of La Fayette, Onondaga county.

A supervisor refused to consent to a change of site for a schoolhouse, and the trustee and many taxable inhabitants sustained him.

Held, that in view of the near approach to the annual meeting when the question can be considered, and a trustee chosen who will reflect the sentiment of the majority, the supervisor will be sustained.

Decided June 20, 1887

Draper, *Superintendent*

This is an appeal by a resident and taxpayer of school district no. 1 of the town of La Fayette, Onondaga county, from the refusal of the respondent to consent to a change of the schoolhouse site.

The appellant alleges that at a district meeting held in said district the voters present, by a vote of 41 for to 25 against, voted to change the site; that the present site is not sufficiently large to accommodate the children of the district, and the building is old and dilapidated; that the site belongs only in part to the district; that the present site was established over seventy years ago, since which time the district has been so altered that the site is no longer geographically centrally located; that the new site is eligible and will better accommodate a majority of the children of school age.

The trustee of the district and the supervisor file separate answers, and allege that the present site is owned by the district, and that the trustee holds a deed for the same; that additional land adjoining the present site can be procured for a small amount of money; that extensive repairs have recently been made upon the school building in accordance with the directions of a district meeting after a recommendation so to do by a committee appointed to examine the building by a district meeting; that the new site is low and would require filling, and that, in consequence of a deep creek crossed by a small bridge, the school building could not be moved to the proposed new site.

Ordinarily I should sustain the action of the district meeting, a majority of the voters and taxable inhabitants being present, and a preponderance of the taxable property being represented by the owners favoring the same, but finding the trustee and the supervisor both opposed, together with a large number of voters and taxpayers, I feel constrained to overrule the appeal. The present site has met the requirements of the district for over seventy years. The annual school meeting will soon be held, and the district can then register its wishes by the selection of a trustee who will reflect the sentiment of the people upon this subject, if the present incumbent fails to do so.

The appeal is dismissed.

3733

In the matter of the appeal of William Smith v. school district no. 1, town of Kortright, county of Delaware.

When it is made to appear that a site selected for a schoolhouse is not advantageously situated, the action of a district meeting in selecting such site will not be upheld.

Decided November 21, 1888

Draper, *Superintendent*

This is an appeal from the action of a special meeting held in the above-named district on the 14th day of September 1888, changing the schoolhouse site. There is no question raised about the regularity of the proceedings. The vote at the district meeting stood 23 to 22. There seems to be much feeling in the district over the matter. The opinion of the people as to the wisdom of the selection, seems to be divided about equally, and the respective parties state their views very strongly. On one side, it is insisted that the proposed site is near a swamp which is dangerous to health. At least three physicians certify to this. On the other side, it is said that the so-called swamp is only a stream of wholesome water. On one side it is said that the proposed site is uneven in surface and in no wise suitable for school purposes. On the other, it is said that the site is the best that can be procured in the village, and can be graded at small expense. On one side it is insisted very strenuously that the proposed site is located on a very narrow thoroughfare, at least forty rods distant from the main street, that this passageway is not more than fifteen or sixteen feet in width and that teams can pass only with difficulty, and that, substantially, all the children of the district would be compelled to repass through this narrow roadway, at great danger to themselves. The other side admit that the roadway leading to the proposed site is narrow, but deny that it is dangerous.

From a very careful reading of all the papers submitted, as well as from an examination of a map of the district, I am satisfied that if the schoolhouse should be located upon the proposed site, it will be a matter of regret hereafter.

The statements of the parties are so contradictory that I can not determine with any confidence all of the facts touching the proposed site, but it may safely be said that such site is not near the center of the district, nor of the village of Bloomville, which comprises the greater part of the district, and that it is not upon the main street of the village, in a place of sufficient prominence for such a building. I think that it may also safely be said that the narrowness of the passageway from the main street to the proposed site is such as to render the action of the district meeting unadvisable.

In view of the fact that the old schoolhouse in the district has been condemned as unsuitable for school purposes, it is important that the electors of the district should, without unreasonable delay, hold another special meeting, and agree upon a site which will be convenient and above criticism, and the hope is expressed that this may be done at an early day without further and unseemly controversy.

The appeal is sustained and action appealed from is set aside and declared to be null and void.

3721

In the matter of the appeal of Cornelius O'Neill v. school district no. 8, town of Massena, in the county of St Lawrence.

The action of a district meeting changing a schoolhouse site, can not be sustained unless the record of the meeting shows that the vote to change was ascertained by taking and recording the ayes and noes, and that the change was approved by the school commissioners having jurisdiction.

Decided October 25, 1888

Draper, *Superintendent*

This is an appeal from the action of a special meeting held in district no. 8 of the town of Massena, in the county of St Lawrence, in July 1888, changing the schoolhouse site.

The papers are exceedingly voluminous. I have read them with care. The appellant urges that the notice of the special meeting was not sufficiently broad to justify the action taken. He also claims that the notice was not served upon all the inhabitants; he claims also that the site chosen is located disadvantageously to the greater number of people in the district, upon a road but recently laid out. There are charges of illegal votes being cast upon each side to an extent sufficient to have affected the result. I deem it unnecessary to discuss here all the phases of the controversy presented by the respective parties. I certainly can not undertake to determine the qualifications of all the electors whose right to vote is called in question by one party or the other, and it would be necessary to do that in order to uphold the action of the meeting. I observe one fact, moreover, which seems to me to be sufficient alone to prevent me from sustaining the action of the district meeting. The law provides that a schoolhouse site shall not be changed "unless a majority of all the legal voters of said district, present and voting, to be ascertained by taking and recording the ayes and noes, at a special meeting called for that purpose, shall be in favor of such new site." The record of the special meeting does not show that the ayes and noes were recorded. This, of itself, would, in my opinion, be fatal to the proceedings. Moreover, it is not shown that the change has been officially approved by the school commissioner having jurisdiction.

In view of these considerations, I am led to sustain the appeal.

3677

In the matter of the appeal of Henry M. Choate and others v. William Thayer, sole trustee of district no. 6, town of Darien, Genesee county.

At a district meeting upon the question of approving of the trustee's action in purchasing a piece of land for enlarging a schoolhouse site, where the amount paid exceeded the sum previously authorized for the purpose, the chairman voted in the affirmative, when the vote was discovered to be a tie, and the chairman then assumed and exercised the right to break the tie and declare the motion adopted, thereby casting two votes upon the question.

Held, That the chairman had an undoubted right to cast one vote at the time the question was being considered, but his subsequent action in assuming to vote again to break a tie vote was illegal.

Decided April 6, 1888

Draper, *Superintendent*

At the annual school meeting held in district no. 6 of the town of Darien, Genesee county, in August 1887, the trustee was instructed to purchase a certain piece of land adjoining the school site, at a price not to exceed $25. He subsequently purchased a piece of land, alleged to be much smaller than the piece which he was directed to purchase, and paid therefor the sum of $50. At a special district meeting, subsequently held, the matter was considered. Upon a motion to approve the action of the trustee, two persons voted in the affirmative, who, it is alleged by the appellants, were nonresidents of the district. The chairman also voted in the affirmative. The result of the voting was a tie, when the chairman assumed and exercised the right to dissolve the tie by again voting for the proposition, and declared it adopted. The appellants insist that the same was not legally adopted. The trustee has interposed no answer to the appeal, and I am, therefore, obliged to assume that the statements set forth by the appellants are true. If they are true, the action of the meeting can not be sustained, nor can the trustee be sustained in levying and collecting a tax for the payment of the purchase price of the land referred to. The appeal is sustained and the trustee is perpetually enjoined from proceeding with the collection of the tax for the purpose mentioned, until there shall be further action in a district meeting.

3767

In the matter of the appeal of Henry C. Northam and Rufus J. Richardson v. school district no. 2, of the town of Lowville, county of Lewis.

Where a school district trustee is authorized by a district meeting to purchase such amount of land for a school site, as he may see fit, and to pay therefor such amount of money as he may determine to be proper; *held,* not to be in accordance with the plan and provisions of law, and such action is void.

for a schoolhouse site, it is fair to assume that such action is not so contrary to the

When a district meeting, by a strong and overwhelming vote, has passed upon a location interests of the school as to justify the Superintendent in interfering.

The language of the statute concerning the levying of taxes by instalments, for the construction of schoolhouses, is somewhat obscure. The purpose of the statute in directing how the vote shall be taken and recorded in cases where the amount to be raised, at different and remote times, was for the purpose of establishing a record which would sustain the validity of bonds issued pursuant thereto, and for the protection of purchasers of such securities.

A vote taken that the amount authorized for building purposes should be levied in two instalments, six months apart, was clearly to avoid the issuance of bonds and to raise the money as fast and only as fast as it should be needed for the purpose.

Decided March 18, 1889

Draper, *Superintendent*

The annual school meeting in the above-named district held on the 28th day of August 1888, considered the advisability of providing additional school accommodations in the district, and, without reaching any definite conclusion, adjourned from time to time for the further consideration of the subject. At an adjourned meeting held on the 10th day of January 1889, it was determined to erect an addition in the rear of the present building. The trustee was also authorized to purchase additional land. The vote to this effect was 63 in the affirmative and 6 in the negative. It was taken by requesting persons voting on each side to rise and be counted, and no record was made of the names of persons voting for and against the proposition. It was then moved that the trustee levy a tax of $7500, or so much thereof as might be necessary to pay for such addition, and that the same be levied in two instalments, six months apart, the first one of which should be levied at the discretion of the trustee. This motion was adopted unanimously, the record showing that 50 persons voted in favor thereof.

The appellants are opposed to this action, and raise the following objections:

1 That the action of the meeting does not clearly indicate or describe the additional land which was to be purchased, the metes and bounds thereof not being set forth.

2 That the land in the rear of the present schoolhouse is not suitable for such an addition to the building.

3 That the power to purchase an addition to a schoolhouse site can not be delegated to a trustee.

4 That the action does not instruct or limit the trustee as to the amount of money which should be expended for additional land, and the amount which might be expended for extending the building.

5 That the vote directing that the $7500 should be levied in two instalments is inoperative, because of the provisions of section 19 of title 7 of the Consolidated School Act, which requires that whenever money is raised for a new schoolhouse, by instalments, the vote authorizing the levying of the tax shall be ascertained by taking and recording the ayes and noes of the inhabitants attending and voting at the meeting.

The question most discussed by the respective parties is covered by the fifth objection of the appellants, as above set forth. The language of the statute concerning the levying of taxes for schoolhouses by instalments, is somewhat obscure. The respondents contend that the statute only requires that the vote shall be taken by recording the ayes and noes, in cases where the whole amount to be raised is ordered to be levied in separate instalments, and bonds are issued. I am inclined to think that the purpose of the statute, in directing how the vote shall be taken and recorded, in cases where the amount to be raised is to be levied at different and remote times, was for the purpose of establishing a record which would sustain the validity of bonds issued pursuant thereto and for the protection of the purchasers of such securities, and to adopt the reasoning of

the respondents, and hold that the purpose of the meeting in the present case, in directing that the amount authorized should be levied in two instalments, six months apart, was clearly to avoid the issuance of bonds and to raise the money as fast, and only as fast, as the trustees should need the same for use.

It is clear to me, however, that the trustee has no power to purchase additional land. The statutes which authorize school meetings to designate sites or additions thereto, and to levy taxes for the purchase thereof, do not permit such meetings to delegate any portion of their authority in that connection. It has been repeatedly held by this Department, through a great many years, that the resolution of the district meeting must clearly describe by metes and bounds the land authorized to be purchased, and must name the amount authorized to be paid therefor, before the purchase can be consummated, and before a valid tax can be levied. In the present case, the action of the district meeting is most indefinite and general. No certain or specific directions are given to the trustee. It is left to him to purchase such amount of land as he may see fit, and to pay therefor such amount of money as he may determine to be proper. This is not in accordance with the plan and provisions of the law, and such action is void.

I do not deem it necessary to go into the question as to whether it is advisable to purchase land adjacent to the present schoolhouse and to erect an addition thereupon, or to purchase a site elsewhere and erect a new school building. The vote being as strong and overwhelming upon that question as it was, it is fair to assume that the former course is not so contrary to the interests of the school as to justify the Superintendent in interfering. It is shown that there is room upon land now owned by the district and in the rear of the present schoolhouse for erecting the proposed addition. This being so, and the vote being practically unanimous in favor of that course, after a long and full consideration of the question, I do not feel justified in saying that it shall not be done. If it shall afterwards appear that outbuildings in the rear of the schoolhouse are so near as to be offensive, the district will be under the necessity of making other provisions for them.

The appeal is dismissed.

3778

In the matter of the appeal of Patrick Murphy v. school district no. 1, town of Bangor, Franklin county.

A district meeting which has been held for the purpose of selecting a site and voting a tax to pay for the same, pursuant to a notice which is proper in form and had been generally served upon the voters of the district, will be upheld, even though, in a few instances, without wilful intent, notice failed to reach a few of the inhabitants, the action of the meeting having been approved by a largely preponderating vote.

Before an appeal was taken a trustee, pursuant to the vote of the district meeting, had employed counsel and initiated proceedings before the county court for the condemnation of a site proposed. *Held*, too late to be entertained.

The State Superintendent of Public Instruction would not feel justified in interfering with the selection of a site shown to be adopted to schoolhouse purposes, because certain inhabitants of the district, interested in the selection of a new site, had failed to exercise their prerogatives at a district meeting. Their negligence will not be permitted to overturn the action of the residents who did attend and participate, nor to involve such residents in additional expense.

Decided March 30, 1889

John I. Gilbert, attorney for appellant
John P. Badger, attorney for respondent

Draper, *Superintendent*

A special district meeting was held in the district above named on the 14th day of December 1888, pursuant to the following notice:

Notice is hereby given that a special meeting of the inhabitants of school district no. 1, of the town of Bangor, will be held in the schoolhouse in said district, on Friday, December 14, 1888, at 7 o'clock p. m., for the following purposes: 1st. To ascertain if the district inhabitants will consent to the sale of the old schoolhouse and site. 2d. To take into consideration the purchase of a new site and the building of a new and better schoolhouse.

Dated Bangor, December 7, 1888

E. S. Russell
District Clerk
(By order of trustees)

At such meeting a resolution was offered authorizing the trustees to sell the old schoolhouse and site at public auction to the highest bidder, as soon as a larger site should be purchased and a new schoolhouse built. The ayes and noes were taken and recorded upon this motion. The result was 33 ayes and 8 noes. A resolution was then proposed authorizing the trustees to purchase a new site, which was specifically described by metes and bounds. The ayes and noes were also taken upon this resolution, and the vote resulted in 34 ayes and 9 noes. A resolution was then proposed authorizing the trustees to levy a tax for the purpose of carrying out the action previously taken. Upon the vote being taken it was declared adopted by 39 ayes and 2 noes. The meeting then selected certain persons to act with the trustee in an advisory capacity concerning the erection of the new building, and adjourned to a subsequent time, when plans for such building were considered and approved.

The appellant objects to this action, and appeals therefrom. He alleges that the notice of the meeting at which such action was taken was not sufficient under the law. He also alleges that the site selected is not a convenient one for the majority of the residents of the district, and that the action taken is not approved by such majority.

The appeal was not brought in time. The action appealed from was taken upon the 12th day of December. The papers were not served upon the respondent until the 27th day of February. I do not think any sufficient reason for the delay is shown, but still I have examined the papers.

The notice of the meeting from the action of which the appeal is taken, is shown to have been more generally served upon the voters of the district than is found to be the case ordinarily. The district clerk swears that he served said notices upon each and all of the voters of the district by reading the same to them and each of them, as he then verily believed, except in perhaps half a dozen instances, where he was unable to see the voter himself, and left word with some member of his family. In most of these exceptional cases it was shown that actual notice of the meeting reached the voter. The statute expressly provides that the proceedings of no district meeting shall be held to be illegal for the want of a due notice to all persons qualified to vote thereat, unless it shall appear that the omission to give such notice was wilful or fraudulent. This does not appear in the present case. It is not pretended to have been the fact that there was any wilful or fraudulent failure to serve the notice in the technical manner prescribed by the statute upon every voter of the district. It must be said that the district clerk acted in good faith, and, I think, with due diligence. Moreover, the several votes taken in the district meeting were overwhelming, and it does not appear, and can not be the fact, that persons were absent from that meeting because of a lack of notice of the same in sufficient number, by any possibility, to have changed the result.

The action of the district meeting appears to have been entirely regular and in strict conformity with the requirements of the statutes concerning such action.

The resolution to purchase a new site and erect a new schoolhouse was evidently drawn with care, as was also the other resolution authorizing the purchase of a specified site, and describing that site by metes and bounds. The ayes and noes were taken and recorded, and the vote was overwhelmingly in favor of the proposed action.

It also appears that, subsequent to the district meeting, the trustee entered into negotiations with the owner of the proposed site for the purchase thereof, but was unable to consummate the same because of the exorbitant demands of the owner; that he thereupon employed counsel and initiated proceedings in the county court for the condemnation of the proposed site, and that such proceedings resulted in the appointment of appraisers, and in the appraisal of the property and in the final order of the court condemning the property for a schoolhouse site. The proposed new site has also been approved by the school commissioner of the district.

All of these proceedings must have been known in the district, and yet they were allowed to go forward to completion without opposition, and before an appeal was taken from the action of the district meeting.

The trustee has issued his tax list, and a portion of the same has been collected.

I fail to find any sufficient ground for setting aside the action of the district meeting. There certainly is no reason assigned which would be a sufficient foundation for sustaining the appeal, unless it be that the site selected is not central, and is not suitable to the majority of the people of the district.

The appellant makes a somewhat strong showing upon this point, but after somewhat full consideration of all that is said in that connection, I have come to the conclusion that I should not be justified in interfering. I find that the new site is less than seventy-five rods from the old one. It is practically admitted by all in the district that a new site should be selected and a new schoolhouse erected. If persons interested in the selection of the new site failed to exercise their prerogative at the district meeting, their negligence should not be permitted to overturn the action of the residents who did attend and participate, nor should it be permitted to involve such residents in additional expense, inasmuch as there was general notice of the proposed action given throughout the district, and inasmuch as there is no allegation that the site chosen is not well adapted to schoolhouse purposes.

For these considerations, I am obliged to dismiss the appeal.

3780

In the matter of the appeal of John R. Russell and others from the proceedings of a special school meeting, held in district no. 4, of the town of Ellery, Chautauqua county, March 4, 1889.

Appeal sustained when a resolution designating a site was not sufficiently descriptive thereof to comply with the statute.

Decided April 15, 1889

Draper, *Superintendent*

This appeal is taken from the proceedings of a special school meeting, held in district no. 4, of the town of Ellery, Chautauqua county, at which a change of schoolhouse site was proposed and voted.

Many reasons are given by the appellants for a reversal of the proceedings of the meeting. It is unnecessary for me to examine them fully, as the representative of the respondent concedes, in a communication in relation to the appeal, that the resolution designating the site was not sufficiently descriptive thereof to comply with the statute. This being conceded, I sustain the appeal, and authorize the trustee of the district to forthwith give notice for a special meeting to be held within fifteen days from this date, for the purpose of determining the question of the selection of a schoolhouse site.

3600

In the matter of the appeal of Emmet S. Elmer v. the action of a district meeting in school district no. 9, of the town of Monroe, Orange county.

The proceedings of a district meeting in deciding by a strong affirmative vote to change a schoolhouse site and build a new schoolhouse will not be disturbed for irregularities at the meeting which are not specified with clearness and proof.

Decided May 18, 1887

Draper, *Superintendent*

This is an appeal from the action of a special school meeting held in school district no. 9, in the town of Monroe, Orange county, N. Y., upon the 18th day of February 1887, and by which it was determined to change the site and erect a new school building. The appellant alleges several irregularities in the proceedings of the meeting. None are specified with much clearness, and no proof is offered to sustain the allegations which are set forth in the appeal papers. From the minutes of the meeting, it would appear that there were 77 qualified electors of the district present at the meeting; that the matter of changing the site and erecting a school building was discussed at length and deliberately voted upon. Forty-eight votes were cast in favor of a new school building and 29 against. Forty-two votes were cast in favor of changing the site and 31 votes against. The record book of the district shows that the names of the persons present were called and a record of their votes was made.

There may have been slight irregularities in the manner of giving notice and in some of the proceedings of the meeting, but I do not see any of sufficient gravity to justify me in overturning the will of a clear majority of the qualified voters of the district present at the meeting. No fraud is alleged. The appellant admits in his appeal that this district is almost wholly in favor of a new school building.

In view of these considerations, I feel compelled to dismiss the appeal.

3853

In the matter of the appeal of David M. Elliott and others from the proceedings of a special school meeting, held December 7, 1889, in school district no. 6, town of East Greenbush, Rensselaer county.

A site for a schoolhouse, selected by the district meeting, and satisfactory to a large majority of the district, will not be disturbed unless selection was brought about by illegal or improper means.

Decided January 17, 1890

Draper, *Superintendent*

At a special school meeting, held on December 7, 1889, in school district no. 6, of the town of East Greenbush, Rensselaer county, it was decided by a sufficient vote to enlarge the present schoolhouse site by acquiring title to adjoining land. From this action this appeal is taken. The grounds of the appeal are that the site agreed upon is unfit for schoolhouse purposes; that the spot is a bleak one and much exposed to wind; that another site has been proposed which is nearer to a village which forms a part of this district; that the last mentioned site is upon level ground and sheltered from storms and wind, and that the inhabitants of the district are nearly evenly divided in their preferences between the respective sites.

An answer has been interposed by a committee of taxpayers of the district, selected by a district meeting for that purpose. It appears that the site selected at the district meeting is located very near the center of the district, and that although it is upon high ground, it is in the immediate vicinity of farmhouses and improved real estate. It is clear to me that the site selected by the district meeting is satisfactory to a large majority of the inhabitants of the district and is believed by them to be the location which will best accommodate the children of the district. It is not claimed by the appellants that any undue advantage was taken of them at that district meeting at which the site was selected, nor that the result was brought about by illegal or any improper means.

I therefore fail to discover any reason why I should interfere with the expressed will of the inhabitants. The appeal is overruled, and the stay heretofore granted upon the application of the appellant is vacated and set aside.

3816

Charles L. Rowell v. school district no. 3 of the town of Franklin, county of Delaware

The fact that a newly selected school site is inconvenient for some patrons is not sufficient for setting aside the action selecting it.

Decided October 9, 1889

Draper, *Superintendent*

This is an appeal from the action of a special district meeting held on the 2d day of September 1889, locating a new schoolhouse site.

There is no claim that the action of the meeting was not regularly taken in conformity with the requirements of the statutes relating to the subject.

There is no claim that the new site chosen is not suitable for school purposes.

It is said that it is inconvenient for some patrons of the school. That is ordinarily the case in all districts. If some other site was chosen, someone else would be inconvenienced.

In short, no sufficient reason is shown for overruling the action of the district meeting.

The appeal is dismissed.

3887

In the matter of the appeal of Francis J. McBarron v. John Jasper, superintendent of schools of the city of New York

Students of the College of the City of New York are not eligible for State scholarships in Cornell University.

Decided July 18, 1890

Theodore Baumeister, attorney for appellant

Draper, *Superintendent*

The appellant was during the last year a student in the College of the City of New York, and attempted to enter the last annual examination of candidates for State scholarships at Cornell University, but was not permitted to do so by Superintendent Jasper, on the ground that students in the College of the City of New York are ineligible to such scholarships. This appeal is brought to determine the question.

The statute provides that "none but pupils of at least sixteen years of age and of six months' standing in the common schools or academies of the State during the year immediately preceding the examination, shall be eligible" to the State scholarships. The only question here is whether the College of the City of New York is a common school or academy within the meaning of this statute. It certainly is not a common school, and I am confident that it is not an academy. It is not classified as such by the Board of Regents of the University. It does not participate in the distribution of the income of the "literature fund." Section 1058 of the New York City consolidation act provides that it shall be entitled to do so, but as a matter of fact, it does not. It has the authority to confer degrees. Indeed, it seems to have the plan of organization, the extended course and the general authority of a college. I can not believe that it was the purpose or intent of the Legislature to open the State scholarships at Cornell University to the students of such an institution as the one under consideration, and am of the opinion that the superintendent of schools in the city of New York, who was charged with the duty of conducting the Cornell examination, acted within the meaning of the statute in declining to permit the appellant to enter the same.

The appeal is dismissed.

3879

In the matter of the appeal of Frank G. Snyder, Walter W. Hyde, by his father and guardian, Orange P. Hyde, and Walter W. Edwards, by his father and guardian, David Edwards v. Cornell University.

Students holding a State scholarship at Cornell University, who fail in term examinations and consequently have to leave the institution, must be deemed to have abandoned their rights to the scholarship.

Decided May 15, 1890

Draper, *Superintendent*

Frank G. Snyder, Walter W. Hyde and Walter W. Edwards, were candidates at the examination held on the first Saturday of June 1889, for State scholarships at Cornell University. Their standing in such examination was not sufficiently high to make either one of them first entitled to scholarships; but candidates who fail to gain scholarships are, under the law, entitled in the order of merit, to vacancies which may arise in the State scholarships in case students who have become entitled thereto, either abandon or vacate the same. The names of the three young men appear in the list of persons, who in the order of merit, are entitled to such vacancies. Although these young men failed to secure scholarships, they entered the freshmen class in the university in September 1889 as pay students. They now allege that, at the term examination held in December 1889, more than three State scholars forfeited their rights to scholarships, by reason of failure to pass the examination, and that, under the law, it thereupon became the duty of the president of the university to certify the fact that vacancies existed in State scholarships, and the duty of the State Superintendent to fill such vacancies from the list of persons eligible thereto.

The university in its answer admits substantially all the facts alleged by the appellants, except that it denies that students who failed to pass the term examination in December 1889, forfeited their scholarships in consequence thereof. It is said by the university that students failing to pass such an examination are not thereby permanently excluded from their scholarships, but are only temporarily suspended therefrom, and afforded an opportunity to make up their deficiencies and reenter upon their scholarships.

Section 9 of the charter of Cornell University, which relates to the State scholarships, was amended by chapter 291 of the Laws of 1887. Subdivision 5 of said section relates to the filling of vacancies in such scholarships, and reads as follows:

> In case any candidate who may become entitled to a scholarship shall fail to claim the same, or shall fail to pass the entrance examination at such university, or shall die, resign, absent himself without leave, be expelled or, for any other reason, shall abandon his right to or vacate such scholarship, either before or after entering thereupon, then the candidate certified to be next entitled in the same county shall become entitled to the same. In case any scholarship belonging to any county shall not be claimed by any candidate resident in that county the State Superintendent may fill the same by appointing thereto some candidate first entitled to a vacancy in some other county, after notice has been served on the Superintendent or commissioners of schools of said county. In any such case, the president of the university shall at once notify the Superintendent of Public Instruction, and that officer shall immediately notify the candidate next entitled to the vacant scholarship of his right to the same.

From this it appears that when a candidate "shall abandon his right to or vacate such scholarship," the candidate certified to be next entitled thereto, shall become entitled to the same. The terms *abandon* and *vacate* seem to have been used to cover either a voluntary relinquishment of the right to the scholarships, or an involuntary forfeiture of such rights. The plain meaning of this

paragraph of the statute is that, when a State scholarship shall for any reason become unoccupied, the persons who entered the annual examination in competition therefor shall, in the order of their acquired standing in such examination, become entitled to enter thereupon and receive the benefits and advantages thereof. I know of no principles of legal construction that would change this manifest intent of the law.

But the university says that the scholarship is not vacant or unoccupied when the holder fails to meet the requirements of a term examination, in consequence of which he must necessarily leave the institution, because he may make up his work and be reinstated.

It seems to me that this view is repugnant to the evident purpose of the Legislature in enacting the recent amendment to the charter of the university. (Chapter 291, Laws of 1887.) In consideration of the advantages accruing to the institution from the fact that it was given the share of the State of New York in certain public lands distributed to the States by act of Congress for specific educational purposes. The State reserved to itself the right to send to the university each year, students to the number of one for each Assembly district, who should be entitled to the privileges thereof without the payment of tuition fees. The university accepted these terms. The scholarships thus created had never been fully occupied. It had never been possible to fill a vacancy in one district by appointment from another district, no matter how many deserving candidates the other districts might have. When a scholarship had once been filled by appointment from one district and should become vacant, there was no way of filling it, even though there were deserving and willing candidates in the same district. In this way the scholarships were not more than half filled. Chapter 291 of the Laws of 1887, was intended to correct this, and provide a way for extending the privileges of these State scholarships to any students in the State who might desire them and be able to comply with the necessary requirements. In short, the State undertook, by this amendment to the charter of the university, not only to fill the scholarships, but to keep them full so long as there were students in the State who desired and deserved the privileges thereby afforded, in the evident belief that, in thus carrying the advantages of the great institution to the greater number of its brightest and most deserving children, it would be helping them and promoting its own substantial development as well.

The length of time with which the university claims that it may permit delinquents to make up deficiencies and regain position is indefinite, and if we adopt the principle for which it contends — that a student who is obliged to drop out and leave the institution because he can not sustain himself in examinations, does not vacate his scholarship because he *may* make up his work and be reinstated at any indefinite time in the future — we practically hold that a scholarship once occupied, and then vacated, can not be again filled at all. It stands to reason that the greater number of the students who fail to pass the term examination will not be disposed, or will be unable to regain their forfeited places.

It stands to reason also that the greater number of failures to maintain positions, will occur in the freshman year, thus leaving a vacancy in each case extending over a period of more than three years. This is a denial of the rights which the statute gives to waiting candidates, and overthrows and thwarts the manifest intent and purpose of the Legislature in enacting the amendment to the charter of the university, with a view to keeping the scholarships full.

The university exacts certain evidences of proficiency, either the certificates of other institutions as to work previously performed by the candidate, or that he shall show his scholarship in an entrance examination, before the holder of a scholarship can be admitted to the course at all. After being thus scrutinized upon admission, it would seem quite possible for the authorities to determine whether a student is so deficient as to make it impossible for him to sustain himself and complete the work of the course, before actually depriving him of the privileges of the institution and barring the door against him.

It must be admitted I think, that the student who can not sustain himself beyond a reasonable question, should give way to one who can, but that after admission, one should not be obliged to go out until it is clear that he can not go on with fair prospect of creditable graduation, and when that time has arrived, another who is waiting should be allowed to come in. And when a State student has for any reason been debarred the privileges of the university and prevented from attending upon its instruction, he must be deemed to vacate his scholarship within the meaning of that term as used in subdivision 5, section 9 of the charter.

From these considerations, it follows that the appeal must be sustained. It would seem reasonable, however, that a little time should be afforded for the correction of any misunderstanding which may have arisen through conflicting interpretations of the meaning of the statute. The authorities of the university will at once notify all holders of State scholarships who have been debarred the privileges of the institution, that they may at once return, and must do so or forfeit their scholarship rights, except in cases where such authorities determine that students are so deficient that their scholarship privileges should be taken away. All who are thus allowed to return and do not do so within twenty days, will be deemed to have abandoned or vacated their scholarships. And the president of the university will at the end of that time notify the Superintendent of Public Instruction of all State students who have voluntarily abandoned their scholarships, or have vacated them, as the term is herein construed.

3531

Summit Mountain House Company v. Samuel Decker, sole trustee of school district no. 21 of the town of Middletown, Delaware county.

Chapter 59, Laws of 1886, authorizing certain taxpayers to elect and give notice in which of two towns they will pay taxes held to apply to school taxes.

Held, further, that the act applies to cases which arise subsequent to the passage of the act as well as to the then existing cases.

Decided November 12, 1886

Draper, *Superintendent*

This is an appeal from the action of Samuel Decker, sole trustee of school district no. 21 of the town of Middletown, Delaware county, N. Y., in levying a tax for the sum of $198.87 by a tax bill dated July 5, 1886, and renewed August 5, 1886. The appellant insists that such tax list is incorrect and invalid as to it, and that it should not be taxed in district no. 21 at all. The property of the appellant consists of a hotel and accompanying buildings, and about one hundred acres of land. The line between Delaware and Ulster counties, and between the towns of Middletown and Shandaken, runs through said property and through said hotel building, leaving a portion in each town.

The appellant claims that school district no. 3 of the town of Shandaken includes the entire property, and the description of said district as recorded in the town clerk's office of said town seems to support this view. The respondent insists, upon the other hand, that the boundary line between district no. 21, Middletown, Delaware county, and district no. 3 of the town of Shandaken, Ulster county, is identical with the boundary line between the two counties, so far as the same runs through this property, and supports its claim by numerous affidavits of former trustees and other residents who profess to have been familiar with all the circumstances for more than thirty years. It is impossible for me to determine the disputed question and the location of the district line from the papers in the case. It probably can only be determined by a survey, which should be made. If I could feel justified in sustaining the appellant's claim in this regard, that would settle the controversy; but I can not. The appellant says, however, that even if the respondent's claim as to the location of the boundary line be assumed to be correct, even then it ought to succeed in this appeal, for the reason that it has elected to pay taxes in the town of Shandaken pursuant to the provisions of chapter 59 of the Laws of 1886. Proof is made that the appellant, in the month of March 1886, caused to be served upon the assessors of each of the towns of Middletown and Shandaken, a notice signed by the appellant, together with a copy of the act (chapter 59 of the Laws of 1886), and stated that, pursuant to such chapter, the appellant

would elect to pay taxes thereafter in the town of Shandaken. It is insisted by the respondent that chapter 59 of the Laws of 1886 applies only to taxes levied and unpaid at the time of the passage of the act, and in any event it does not apply to taxes for school purposes. The language of this act is, perhaps, unfortunate and difficult of construction; it must be read in its entirety, and its different provisions must be construed in line with its general purpose, and, so far as possible, held to carry out that purpose. Its general purpose is to relieve the owners of dwelling houses, or other buildings through which town boundary lines run, from the embarrassment and annoyance of being subjected to taxation in the two towns, and to avoid controversies between the same in relation to their respective claims. It does speak of "taxes levied thereon, which shall remain unpaid by the owner . . . at the time of the passage of this act"; but section 2 provides that "the occupant shall cause to be served upon the assessors, or one of them in both said town and city, or in both of said towns in the same or different counties, at least thirty days prior to the date fixed by law for the date of assessment, a written notice of his said election, together with a copy of this act," etc. This provision that the notice of election shall be served at least thirty days prior to the date of assessment would be meaningless, if we were to hold that the act applied only to taxes levied at the time of its passage. On the contrary, it plainly indicates the intent of the Legislature to make a general provision not only for the benefit of existing cases, but of such as might arise after the passage of the act. Furthermore, the act refers to taxes in general, and I think must be held to include school taxes.

For the foregoing considerations, the appeal must be sustained, and the tax levied against the appellant in the town of Middletown must be held to be null and void, and the trustee of school district no. 21 of said town is hereby directed to withdraw the tax list in question from the hands of the collector, and to correct the same by striking therefrom the name of the Summit Mountain House Company.

3625

In the matter of the appeal of E. M. Davis and James H. Riker v. John H. Albright, as trustee of school district no. 3, town of Ontario, county of Wayne.

The acceptance and adoption of a trustee's report containing reference to an item of expense does not authorize its insertion in a tax list. A tax must be specifically voted.

Teachers' wages already earned and due may be included in a tax list without a vote of a district meeting, but not so as to wages not yet due.

There is no law to authorize a tax for "incidentals."

Decided July 21, 1887

Draper, *Superintendent*

This appeal is taken by residents of school district no. 3, town of Ontario, county of Wayne, from the action of the trustee of said district in including

in a certain tax list certain items for which, it is claimed by the appellant, he had no authority to do. The items objected to are as follows:

Remainder of teachers' wages, $14.48; teachers' wages for fall term (8 weeks), $40; wood for ensuing year, $20; costs incurred by former trustee in bringing and defending suits, $47.53; cleaning up and improving school yard, $5; incidentals for ensuing year, $10.

The appellants allege that none of these items were authorized to be raised by tax at a district meeting, and that the item of costs has not been allowed by the county judge, as provided by law.

The respondent answers the appeal, and alleges:

1 That the appeal was not taken within the time allowed by law; that property had been advertised for sale before the date of the service of the appeal.

2 That the item of $5 for cleaning up and improving the school yard was a necessary and reasonable charge.

3 That the sum of $10 for incidentals was reasonable.

4 The items for costs ($47.53) was reported to a district meeting, and the report accepted and adopted.

There is no serious dispute about the facts, and in deciding this appeal I must look only for the trustee's authority to include these items in a tax list.

1 Was he authorized to do so by a vote of the district meeting? The trustee's claim that he was so authorized to include the item of $47.53 for costs, can not be sustained on the ground that a report of a former trustee, containing the item was accepted and adopted. It does not appear that the meeting voted to direct the trustee to levy a tax for this item. It has been held by a former superintendent "that the acceptance and adoption of a report containing an item of expense, does not authorize the levy of a tax agreeable to the recommendations contained therein. A tax must be specifically voted before it can be lawfully levied."

This item of tax, therefore, can not be sustained.

2 The item for the balance due the teacher for wages is sustained. A trustee is expressly authorized by statute to levy a tax for this purpose, when no provision therefor has been made by the district meeting.

3 The item for teachers' wages, fall term, being in anticipation of wages to be earned, and not authorized by a vote of a district meeting, can not be sustained.

4 The item for incidentals is not sustained. There is no authority for its collection.

5 I sustain the item for fuel and for cleaning up the school yard, it appearing to my satisfaction that the amounts proposed are not exorbitant. A trustee is authorized to provide fuel and remove nuisances and clean up the schoolhouse and yard.

The appeal is therefore sustained as to the items mentioned above, and the trustee is hereby authorized and directed to withdraw his tax list and warrant, dated October 12, 1886, from the collector, and amend the same accordingly, striking out the items for any anticipated teachers' wages, the items for costs and for incidentals, and then deliver the same to the collector as amended.

3787

In the matter of the appeal of Fred Mussen v. official acts of James Mussen, trustee of school district no. 13, town of Chesterfield, Essex county.

Collector. A collector who refuses to furnish a bond within ten days after proper notice from the trustee, vacates his office and the trustee may fill such vacancy.

The fact that a warrant is not attached to a tax list but is handed to a collector folded within the tax list and the collector is instructed to attach the warrant to the tax list with some adhesive substance, is held to be a substantial compliance with the statutes.

Decided April 17, 1889

Draper, *Superintendent*

This appeal is taken by the appellant, who alleges that he is a taxpayer and voter in school district no. 13 in the town of Chesterfield, county of Essex, from official acts of the trustee of said district, enumerated as follows:

1 In appointing a district collector in place of the appellant, who was duly elected collector of said district at the annual meeting held in August last.

2 In preparing and issuing a tax list which contained items which were not voted at a district meeting, and which were not authorized by law to be raised without the vote of a district meeting.

3 In withdrawing a tax list and amending the same without the consent of this Department.

4 In including in the tax list property which was not assessed on the previous assessment roll of the town, and in reducing the valuation of a certain piece therein from its previously assessed value, and in increasing the valuation of another piece.

The appellant alleges that after his election as district collector, and on or about the 7th day of December 1888, the trustees delivered to him a tax list to which no warrant was attached, but that the warrant was delivered to him at the same time; that the tax list was detached therefrom; that the appellant returned the said tax list, informing the respondent that the same was illegal, and that he could not collect the same; that on the 17th day of December last, said respondent delivered to the appellant a new tax list, which the appellant alleges was defective in several minor particulars, one of which was that an item for repairs was stated at $115 instead of $114.50; that an item for blinds, windows and paint was included at the sum of $19.50 instead of $18.98; that an item for other expenses was stated at $1.50 instead of $2.50, and that an item for teachers' wages was stated therein at $30 instead of $30.24. This tax list the appellant also returned to the trustee and informed him that he could not collect the same. He alleges that he has not refused at any other time to execute any tax list and to perform any lawful duty pertaining to his office; that subsequently the respondent appointed one Frank Pelkey as collector for the district and issued to him a tax list and warrant directing the collection of certain items which the appellant alleges were not legal charges against the district; that at the annual school meeting held in said district, it was proposed to repair the schoolhouse, but that no vote was taken thereon; that the meeting

was duly adjourned to September 4, 1888, to further consider the subject of repairs and to receive proposals for making the same; that no meeting was held on the 4th day of September, but that on the 1st day of September preceding, after a notice had been informally circulated that said adjourned meeting would be held on that evening, a meeting was held, at which meeting it was voted to make repairs and proposals were received and the work let to one Frank P. Mussen, for which he was to be paid the sum of $114.50. Subsequently the work was done and completed prior to November 5, 1888; that at a special meeting, held on November 5th, which was regularly called, the meeting voted to pay said Frank P. Mussen $114.50 for all repairs made by him, and directed the trustee to assess that amount upon the district; that the trustee seeks to raise the further sum of $18.98 to pay to the said Frank P. Mussen for repairs made by him; that the tax list delivered to said Frank Pelkey, as collector, was not the same as the tax list delivered to the appellant previously thereto; that the respondent reduced the valuation of the taxable property of one James McCarty from $450 to $300, without any claim being made by said McCarty for such reduction and without notice to any taxpayer in the district; that one Joseph Tromblee was assessed for $50 upon real estate, when the said Tromblee was not assessed upon the town assessment roll, and that the said assessment was made without notice to said Tromblee; that the valuation of real estate of Antoine Fortune was increased from the sum of $400 to the sum of $700, without notice to said Fortune.

The respondent, the trustee of said district, answers the appeal in detail. He denies that the appellant is in any way aggrieved, or that he has sustained any injury by any of the acts complained of; that the appeal was actuated by spite, solely because of the failure of the appellant to secure the contract to make repairs to the schoolhouse, for which he was a bidder, but not the lowest; that the appellant refused to furnish a bond as collector, and refused to collect a tax when the warrant and list were lawfully placed in his hands; that by such refusal to furnish a bond and perform his duty, he vacated his office, and that the trustee was then authorized to appoint his successor; that no change or amendment of any tax list has been made by the trustee, excepting the adding of fifty dollars to the assessment of one McCarty, and the including of an assessment against a corporation which had been omitted, the effect of which was to decrease the tax of the appellant and other taxpayers; that the tax against the property of Joseph Tromblee is as it has been for years, and that said Tromblee is in possession of the land assessed to him and claims to be the owner thereof; that the assessment of Antoine Fortune has not been changed and is the same as it appears on the town assessment roll; that the contract for repairs was in writing, and each item required of the contractor specifically stated, and the appellant, who bid upon the work, had full knowledge of the same at the time his bid was made, and at the time the contract was let (a copy of the contract appears in the respondent's papers); that the collector's notices were duly posted; that the item of $18.98, to which the appellant objects, was for repairs ordered

by the trustee, and was for work not included in the contract, but which the trustee deemed necessary to be done; that the item of $4 for cleaning the schoolhouse and building fires for the year then passed, and for cleaning work for the then coming year, were voted at the annual meeting; that the item for teachers' wages was for services actually due; that the respondent admits that the annual meeting was duly adjourned to the 4th day of September, but alleges that prior thereto, and at the request of the appellant who desired to offer a bid for the proposed repairs to the schoolhouse, and who would not be able to attend the meeting if held on the 4th day of September, the meeting was held, with the consent of all the taxpayers and voters of the district, on the 1st day of September instead of the 4th; that at a special meeting held November 5, 1888, the sum of $114.50 was voted to pay for the repairs specified in the said contract, and for no other work, and that the meeting was then and there informed that other repairs, not included in the contract, had been made, the expense of which amounted to $18.98, and that the appellant and his friends thereupon left the meeting, and no other business was transacted thereat; that at the time the tax list and warrant were first delivered to the appellant, the respondent did not have at hand the means for attaching them together, and he requested the appellant to do so, both being delivered to him at the same time; that the usual notices of the completion of the tax list were duly made and posted as the statute requires; that a large proportion of the taxes have already been collected by the said Pelkey as collector.

Many affidavits, in corroboration of the allegations of both the appellant and the respondent, are presented. I have examined them all with care, and I am forced to the conclusion that there is but little merit in the appeal, and that the appellant was, to a great degree, actuated by spite and disappointment. I can not conceive how the appellant can consider himself aggrieved except in his removal from the position of collector. By his own act in neglecting to give a proper bond and in refusing to execute the warrant delivered to him by the trustee, he vacated his office, and the trustee was authorized by statute to appoint a collector to fill the vacancy. The contract for repairs was in writing and specific, and I am satisfied the appellant knew just what the terms of the proposal were when he offered his bid to do the work, which was several dollars in excess of the amount at which the contract was let. A trustee has authority under the school law to make repairs, the expense of which in any one year shall not exceed $20, without the vote of a district meeting. The additional item, therefore, of $18.98 was not without authority of law. It appears that the items for cleaning were authorized by a vote at the annual meeting, and the item for teachers' wages the trustee was authorized to levy without the vote of a district meeting for the reason that the service had been rendered and the wages were due. If it were a fact that some person, other than the appellant, was included within the tax list, or that the valuation of some other person's land was increased, that fact would not result in any loss to the appellant. An increase in that respect would cause a reduction in the tax he would be required to pay.

Many of the allegations of the appellant as to the irregularity of the tax list, are indefinite and based upon information and belief, while the trustee positively avers that no change was made in the tax list from the time it was first presented to the appellant until its final delivery to his successor. The fact that the warrant was not attached securely to the tax list, but was handed to the collector at the same time, with instruction to attach the same with some adhesive substance, sufficiently explains that objection. This I would hold to be a substantial compliance with the statute.

The slight discrepancies in the amount included in the first tax list, and the amount which the appellant claims should have been inserted, are almost too trivial to be taken advantage of by a proceeding of this nature.

In view of these considerations, I have concluded to dismiss the appeal, and hereby vacate and set aside the stay of proceedings granted herein on the 8th day of January 1889, and direct the trustee to forthwith renew the warrant as to any delinquent taxpayers, and redeliver the same to the collector.

3761

In the matter of the appeal of Abijah J. Wellman and another v. union free school district no. 1, of the town of Friendship, in the county of Allegany.

Where, at a special school meeting, a vote to appropriate money for building a new schoolhouse, was made after a site had been selected, and subsequently thereto another site was selected, about which there was much controversy in the district, and the statement made that the money would not have been appropriated had it not been supposed that the site first selected would be built upon; and where it was further claimed that the notice of the meeting at which the second site was selected was not as clear as it should have been, owing to the importance of the matter to be considered thereat, the action of the meeting was set aside and another district meeting ordered, so that all the electors of the district might have an opportunity to be heard upon the question of the location of a site.

Although a site may have been changed since a tax for building a schoolhouse was voted; *held*, not to prevent the enforcement of the tax.

Decided February 3, 1889

D. P. Richardson, attorney for appellants
S. M. Norton, attorney for respondents

Draper, *Superintendent*

A special school meeting was held in the above-named district on the 6th day of July 1888, at which a motion was made to appropriate $15,000 for a new schoolhouse. Pending the determination of this motion, it was voted that the meeting should proceed to select a new site. Several sites were proposed. The meeting proceeded to ballot for a site, and property known as the "Old Academy" or "Miller" site was selected. It was agreed that the purchase of this property should be conditioned upon the ability of the board to secure a good and

sufficient title thereto. The meeting then proceeded to ballot upon the proposition that there be raised $15,000 to pay for new schoolhouse and site in instalments of $3000 and interest annually. The result of the ballot showed that 131 were in favor of the proposition, and 95 opposed it.

Another special meeting was held in the district on the 15th day of January 1889, at which the board reported that it was impossible to procure a good title to the site previously chosen. After discussion and the consideration of various propositions, it was voted to proceed to an informal ballot for a new site. This ballot and a subsequent formal ballot resulted in the selection of property known as the "Church" site.

This appeal is brought against the proceedings of the last special meeting, but the board of education has not yet raised the money appropriated at the July meeting, and the appellants claim that they should be enjoined from doing so, as the authority to raise the money was given upon the supposition that the "academy" site would be taken. They claim that there was no legal notice of the January meeting given by the board, and that, in consequence, the action of the meeting selecting the "Church" site can not be sustained.

I have heard argument of able counsel, carefully read the papers, considered the facts and the law, and arrived at the conclusion that the notice of the special meeting in January was not in full compliance with the provisions of the statutes, and that, consequently the proceedings of that meeting can not be sustained; I am not satisfied that there was a sufficient number of voters misled to have changed the result, but observe that there were wide differences of opinion in the matter, and also that the vote was not taken and recorded by a call of the ayes and noes, and recall also that even under the call, there was some ground for voters failing to understand that the meeting would select a new site at that meeting. In view of these facts, and the great importance of the matter, I conclude that the voters had better be given another opportunity to express their opinions concerning it. When the opportunity is afforded it is to be hoped that all will avail themselves of it, and cheerfully abide the determination of the majority.

I see no reason to stop the board from raising the money authorized by the July meeting, by selling bonds, as provided by statute. The board has agreed with the owner of the "Church" site for his property, has caused plans to be prepared, and purchased some materials for building. Whatever obligations the board has entered into on the faith of the acts of the district meetings which are not contrary to law, must be carried out by the district. The proofs seem to show that the business of the district will be embarrassed and thrown into confusion, unless some money is raised at an early day. I see nothing to invalidate the proceedings of the meeting making the appropriation. Those proceedings were not called in question until long after the expiration of the time for doing so. All agree that a new school building is a necessity. No good reason why the board should not proceed with the sale of the bonds is made to appear to me.

I therefore determine that the appeal must be sustained, so far as it concerns the proceedings of the meeting of January 15, 1889, and that the action of that meeting in selecting a school site, be declared null and void. The board will, upon due notice, convene another district meeting for the purpose of taking action in the premises.

3932

In the matter of the appeal of Aaron R. Clark v. Reuben Rose and Samuel DeGray, as trustees of school district no. 1, Highland, Orange county.

Two members of a board of three trustees, without notice to their associate trustee, accepted and approved of the district collector's bond, and issued to him a tax list and warrant. *Held,* irregular and illegal and their action void.

Tax list and warrant may be delivered to collector at any reasonable time after the lapse of thirty days after the meeting at which the tax was voted.

Decided December 3, 1890

Draper, *Superintendent*

Appeal by a resident taxpayer of school district no. 1, town of Highland, county of Orange, from the proceedings of two of the three trustees of said district. In approving of the district collector's bond and issuing a warrant and tax list about September 10, 1890, without consulting Charles H. Brooks, the other trustee, or giving him any notice of a meeting therefor; and also for placing a tax list in the collector's hands more than thirty days after the annual meeting.

No answer has been interposed. The appellant sustains his first allegation by the evidence of the third trustee, Mr Brooks.

The second allegation furnishes no ground for an appeal. A warrant and tax list may be delivered to the collector at any reasonable time after the lapse of thirty days after a meeting at which a tax is voted.

The action of two of the trustees in transacting business without giving the third notice, to which he was entitled, is irregular and their action is illegal. Two of three trustees may legally act when all three have been duly notified of a meeting.

The appeal is therefore sustained, as to the first allegation, and dismissed as to the second. The approval of the collector's bond and the issuance of a tax list and warrant about September 10, 1890, is void and ineffectual.

3948

In the matter of the appeal of Chauncey R. Cornell v. Leonard A. Denison, sole trustee of school district no. 12, town of Middleburgh, county of Schoharie.

District tax lists must contain a proper heading, enumerating the several items for which the tax is to be levied, and specify the amount of each item.

Decided December 30, 1890

Draper, *Superintendent*

This is an appeal against a tax list issued by respondent in November last.

While I have no reason for doubting the entire good faith of the trustee in the matter, I am still of the opinion that his tax list does not meet the requirements of the statute. The heading ought to enumerate the items for which the tax is laid, and the several items for which the tax is laid should be specifically set forth. The trustee has included two items in this tax list. The first is for "teachers' wages, fuel and incidental expenses." These items should have been separated. The statute authorizes the trustee to levy a tax for teachers' wages in advance, without the vote of a district meeting, but not so as to incidental expenses. The items included in this list must be separately specified, and there must be specific authority for them, either in the statute or pursuant to the vote of the district meeting.

The appeal is therefore sustained, and the trustee is directed to withdraw his tax list from the hands of the collector, and correct it as hereinbefore indicated.

4035

In the matter of the appeal of John O'Donnell v. Frank Henry, as trustee of school district no. 8, of the town of Lowville, county of Lewis.

The items included in the tax budget should be separately stated in the heading of the tax list.

A tax list is illegal if given to a collector before that officer gives the required bond.

Trustees may without vote of the district levy a tax for the wages of the teachers for a sum, which with the public and district funds on hand will be sufficient to pay the salary of teachers for a period of four months.

Decided December 18, 1891

Draper, *Superintendent*

The appellant complains of the action of the trustee of school district no. 8, town of Lowville, county of Lewis, and alleges:

1 That he has levied a tax for $100.78 for the following purposes, without the vote of a district meeting authorizing it, namely:

For teachers' wages	$86 00
For fuel and repairs	14 78

2 That the different items have not been set forth in the heading of the tax list.

3 That the trustee has delivered the tax list and warrant to the collector without requiring a bond of the collector.

The trustee admits each charge. To deliver the tax list without receiving a proper bond is clearly illegal, and the custom in the district can not excuse the neglect.

The item for fuel and for repairs should have been separately stated.

I can not, from the evidence before me, determine whether the vote of a district meeting was necessary to authorize the tax proposed or not. A trustee may, without such a vote, levy a tax for teachers' wages, for a sum which, with the public and district moneys on hand, would meet the wages of teachers for four months. He may also include an item for repairs not exceeding in amount twenty dollars, and for the cost of necessary fuel.

The appeal is sustained, and the trustee is directed to withdraw the tax list and conform it to law, and before it is redelivered to the collector, to require a satisfactory bond of the collector, which must be filed in the town clerk's office.

3950

In the matter of the appeal of Horatio Gardner v. Lyman S. White, as sole trustee of school district no. 8, towns of Big Flats and Elmira, county of Chemung.

An appeal from a district tax list which contains items not authorized by statute, and from the action of a trustee in delivering to a collector a tax list and warrant some time before a bond was given by the collector and filed. *Overruled*, for the reason that the appeal was not promptly taken, and not until after a collector's bond had been filed. A levy and sale had taken place under the warrant, and the amount of the tax had been collected and fully realized.

Decided December 30, 1890

Daily & Bentley, attorneys for respondent

Draper, *Superintendent*

The appellant, a taxable inhabitant of school district no. 8, towns of Big Flats and Elmira, county of Chemung, appeals from certain acts of the trustee of that district, and alleges that he is aggrieved thereby. He alleges that the trustee has illegally appointed a district collector; that he has prepared and delivered to such appointed collector a tax list and warrant, upon which tax list certain lands which should have been assessed as nonresident lands were assessed to certain individuals; that the items for which the tax was levied were not properly itemized, and an item for teachers' wages was for an amount in excess of the sum actually due; that the collector's bond was not approved nor filed until two days after the tax list and warrant were delivered to the collector.

Other charges are made by the appellant against the trustee by an additional pleading, which I shall not consider upon this appeal, as they were not included in the original pleading to which the trustee has made answer.

The answer of the trustee controverts some of the appellant's allegations, but not all, and I am satisfied that the tax to be collected was not properly itemized. The item for teachers' wages, $20, should have been $19.44, a difference too trivial to be considered upon an appeal, as the surplus could not legally be diverted to other than district purposes.

The item of $8 for fuel, fires and repairs, and $7.03 for miscellaneous and other expenses, are both too indefinite to comply with the statute.

The appellant places great stress upon the fact that one John Kneale was declared by the trustee to have vacated his office of district collector, and that one Seeley P. Chapman was appointed thereto; that certain real estate, not the appellant's, was not assessed to the proper owners. As the tax was paid to the collector upon such property before appellant's appeal was taken, I am at a loss to discover how he was affected thereby, or by the change in collectors, unless it be that the newly appointed collector was less susceptible to appellant's influence, and levied upon and sold appellant's property for his school tax.

The charge that the bond was not delivered and filed until after the tax list and warrant were delivered, but before the appeal was taken, or properly levied upon, is not a ground for an appeal. This the courts have repeatedly held as well as this Department.

The grounds are not sufficient to sustain the appeal. If the appellant had brought his appeal before the list was collected, the trustee would have been ordered to withdraw his tax list and correct the same, where errors were noted, but it is too late to ask the Department to interfere after levy and sale, and the amounts called for are fully realized.

But the fact that this appeal is not sustained, must not be taken to authorize any illegal expenditure of moneys raised. The trustee will be personally liable, if he gives orders upon the collector, for items which are unauthorized either by a district meeting or by statute.

He can insure a school building only by the authority of a district meeting.

For the reasons given, the appeal is dismissed.

3962

In the matter of the appeal of James B. Haynes and Edwin H. Taylor v. A. B. Davis, as trustee of school district no. 11, town of Rushford, county of Allegany.

An appeal to stay the collection of an illegal tax must be promptly taken, and before the tax has been collected and the money disbursed, or it is too late for a decision of the State Superintendent to change the condition of affairs.

Plan for a schoolhouse should be determined upon by a district meeting, and a building erected in accordance therewith.

Decided February 9, 1891

E. E. & G. W. Harding, attorneys for appellants

Draper, *Superintendent*

Appellants are electors of school district no. 11, town of Rushford, county of Allegany. The relief asked for is the setting aside of a warrant and tax list issued by the respondents, bearing date July 7, 1890, and an order enjoining its

collection pending the determination of the appeal. On July 23, 1890, the enjoining order was granted and promptly sent by mail to the appellants. The appeal was duly served upon respondent July 28th, and on August 2d, filed in this Department. It is based upon the following allegations: That on May 2, 1890, a special meeting voted not to build a new schoolhouse; that a special meeting held May 13th, voted to build a new schoolhouse, appointed a building committee of three, and authorized them to determine size, price and quality of the proposed building; that thereupon, the trustee, acting in conjunction with such committee proceeded to erect a schoolhouse, and on July 7, 1890, the trustee issued the tax list objected to, to raise moneys for the district.

On August 20, 1890, the matter was referred to School Commissioner D. D. Dickson, to take and return the evidence. From the evidence returned, I find the facts to be as follows, namely: the school commissioner had frequently called the trustee's attention to the necessity of erecting a new school building in consequence of which the first special meeting was held. When the refusal of the meeting to vote to build was communicated to the school commissioner, he informed the trustee that he would condemn the building unless the district agreed to build. The trustee thereupon called a second meeting which the commissioner attended, and a new school building was ordered.

Both special meetings were slimly attended, and the vote at each was nearly evenly divided. The building committee and trustee thereupon met, and after visiting a neighboring district and examining the schoolhouse thereof, decided to build a similar house.

On May 17th a tax of $400 was levied for the purpose of building a new schoolhouse, and paid to the collector. About June 25th, the work of erecting a new schoolhouse was begun, mainly by days' work. On July 17th, a second tax list was prepared, $144.85 of which tax was for the building and furnishing, and $74.08 for other purposes.

The trustee having failed to itemize the tax, applied for and on July 22d, obtained leave to withdraw and amend this list, which was done and on the 26th of July, all taxable inhabitants, including appellants, had paid their tax, except one taxpayer who is not a party to this appeal, and who had paid a part of his tax and is willing to pay the remainder. It seems that the appellants paid before the stay granted by me July 22d was received by them. The money raised by these two tax lists, has all been expended but $26.80 on hand at the annual meeting held August 6th, last. The schoolhouse is nearly completed, and there is some evidence that the moneys remaining on hand will complete it. This would make the cost of the house, including $50 for furniture, about $550.

It is charged by the appellants that the tax list is illegal; the building erected without authority; the old building worth repairing; the trustee has charged for his personal services, and has boarded the workmen at his residence.

It is shown that the house after which this was patterned, cost $700. Several witnesses for appellants swear that $500 would be a sufficient sum to

build the house complete. The respondent's witnesses swear that the work was well and economically done, and the price paid for labor and materials market rates.

It seems that the trustee did, at the annual meeting, present a personal bill for audit for use of horses, which was rejected and on the hearing the claim was expressly waived and withdrawn.

The trustee did board some of the workmen for 50 cents per day, because after consultation with the committee, it was decided to be the wisest arrangement for all, the trustee being in a position to board them and living conveniently near the work. I consider this explanation satisfactory, and the charge he made not at all unreasonable, if at all profitable to the trustee.

The appellants would have been entitled to relief had they been timely with their appeal. They allowed the first tax of $400 to be levied and collected, and the schoolhouse to be built without dissent. The second tax was levied and paid before the appeal was filed. The money raised has been disbursed. The district has a new schoolhouse, the cost of which I do not deem exorbitant, and paid for by the people's money.

The proceedings have been irregular. A district meeting should have been called and plans adopted, and a building erected according thereto; but a condition of affairs is presented which no decision of this Department can change.

The respondent is now out of office. There has been no misappropriation of money on his part. He seems to have given much of his time and the use of his teams to the district, for which he can receive no remuneration.

In view of these circumstances, I must dismiss the appeal, and vacate the stay heretofore granted.

3964

In the matter of the appeal of Ralph Wolford v. school district no. 7, of the town of Knox, county of Albany.

An appeal to have determined a mooted question as to the place of taxation of certain lands. No map worthy the name is submitted as the rules required.

The land in question has been taxed for school purposes in a particular district for many years.

Held, that the burden is upon the appellant to show by clear and preponderating evidence that it is not properly so taxed, and in this he fails.

Decided February 21, 1891

Krum & Grant, attorneys for appellant

Draper, *Superintendent*

The appellant owns a farm in the school district above named, consisting of 130 acres, and also a second farm in the same district consisting of 26 acres. The appellant also owns a farm of 84 acres, situated in the town of Wright in the county of Schoharie. For many years the last mentioned property has been taxed for school purposes in school district no. 7 of the town of Knox. About

the 1st of January last, the trustee in said district issued a tax list to raise money for school purposes and included therein the three farms aforesaid. The appellant insists that the farm of eighty-four acres should not be taxed in the said district, and brings this appeal to have the matter so determined.

The parties have filed several pleadings upon each side. After reading them all with as much care as I am capable of bestowing upon the matter, I find myself uncertain as to how it should be disposed of. No map worthy the name, is submitted for my assistance, as is required by the rules. The property in controversy has been taxed for school purposes in the present district for many years, and the burden is upon the appellant to show by clear and preponderating proof, that it is not properly so taxed. This he fails to do.

The appeal is dismissed, but without prejudice to the right of the appellant to bring the matter before the Department again at some time, after proper surveys and a creditable map of the territory have been made.

3986

In the matter of the appeal of Isaac W. Durfee v. George G. Rich, as trustee of school district no. 13, town of Cambridge, county of Washington.

The preparation of a district tax list from a town assessment roll which was not at the time of such preparation the last revised assessment roll of the town. *Held,* irregular. Decided July 3, 1891

Draper, *Superintendent*

Appeal from the action of the trustee of school district no. 13, town of Cambridge, county of Washington, in preparing a school tax list from a town assessment roll which was not the last corrected assessment roll of the town on file at the time of such preparation, which tax list was delivered to the district collector January 7, 1891. It is claimed that, in consequence of the trustee's action, erroneous assessments have been made.

No answer has been interposed. The action appealed from is irregular and can not be upheld.

The appeal is sustained, and the trustee is ordered to withdraw and correct the tax list so as to conform to the valuations appearing upon the last town assessment roll, if it has not already been done in accordance with an order heretofore issued to the trustee.

3553

In the matter of the appeal of John Wiegner for the removal of Theron P. King and Eugene Shaw from the offices of trustees of school district no. 11, town of Brunswick, Rensselaer county.

A majority of a board of trustees will not be required to sign a tax list and warrant for the collection of taxes when the tax list contains an item not authorized by law. But

the majority is ordered and directed to prepare a tax list and warrant for the legal items voted by a district meeting.

Decided January 5, 1887

G. H. Mallory, Esq., attorney for appellant
Hon. A. C. Comstock, attorney for respondent

Draper, *Superintendent*

This appeal is taken by John Wiegner, a trustee of school district no. 11, from the refusal of the respondents to sign the tax list and warrant for the collection of school taxes voted at the last annual meeting in said district.

The respondents, answering the complaint made by the appellant, admit that they refused to sign the list and warrant as charged, but allege as a reason that the amount of tax proposed to be raised included an item of two dollars for extra compensation to the collector of the district, which would be an illegal tax.

The respondents are not justified in the position they have taken, except as to the item of two dollars voted for additional compensation to the collector.

The law regulates the collector's fees, and only the Legislature can change it. But because of this item of two dollars a majority of the trustees can not be sustained or justified in refusing to carry out the directions of the annual meeting, as to legal items, and embarrass the school interests of the district. Why have not the respondents provided a tax list and warrant to raise the amounts provided for teachers' wages and other legitimate expenses?

I am at a loss to understand their position except upon the theory that there is an intention to break up the school in the district.

I have concluded to dispose of this appeal for the present as follows:

The respondents are hereby directed to prepare, according to law, a tax list and warrant for the items voted at the annual school district meeting, excepting the item of two dollars for extra compensation to the collector of the district, and to join with the appellant in signing the same and in delivering them to the collector of the district.

The final decision of this appeal will be suspended for ten days and if the direction above given is complied with during such period of suspension, the appeal will be dismissed.

3608

In the matter of the appeal of Adam Frederick v. Eugene Frederick, as trustee of school district no. 11, of the town of Johnstown, Fulton county.

A general allegation that a tax list is erroneous without specifying the error; that a trustee has neglected his duties, does not manage the affairs of the district for the benefit of the patrons of the school, but for his own personal gain: *held* to be too indefinite for intelligent determination.

Decided June 20, 1887

Draper, *Superintendent*

This is an appeal by Adam Frederick, a resident of school district no. 11, town of Johnstown, Fulton county, N. Y., against Eugene Frederick, sole trustee thereof. The appellant alleges that the tax roll caused to be collected is erroneous; that the trustee is ineligible to the office he holds; that he has neglected the duties of his office and does not manage the affairs of the district for the benefit of the patrons of the school, but for his own personal gain; that he stated to several persons that he would not hire any teacher who would not board with him, and had refused to hire several applicants for such reason; that he conducted school at a time when most of the scholars could not get there, and that he has misapplied the money of the district.

The trustee, answering said allegations, denies positively and specifically each allegation of the appellant.

This appeal is too indefinite for intelligent determination. Facts must be stated. If the roll is erroneous, it should be shown in what respect it is so. It does not appear, from appellant's papers, what tax list is referred to. It is not shown in what respect he has neglected his duties as trustee. It is alleged generally that he has misapplied money, but when and how does not appear.

No specific act of the trustee seems to be appealed from. The appellant seems to desire to remove the trustee from office, and seems to think that the way to accomplish it is to appeal from his acts. In this he is mistaken. If the trustee is disqualified or unqualified for the office, or is abusing his trust, charges should be preferred against him, and the facts which are cause for removal should be clearly set forth and proved.

The appeal is dismissed.

3634

In the matter of the appeal of Edward T. Lovatt, James O. Jones and John Webber v. Patrick Quinn, George Sinnott and John Massett.

Certain trustees in a union free school district refused to sign a tax list and warrant to raise moneys lawfully voted by the district meeting more than thirty days since, upon the ground that the office of collector was vacant.

Held, no sufficient reason. Trustees directed to sign, or show cause why they should not be removed from their offices.

Decided September 17, 1887

Draper, *Superintendent*

The board of education of union free school district no. 1, of the town of Mount Pleasant, Westchester county, consists of six members, of which number the appellants above named constitute three of the members and the respondents the other three.

The appellants allege that the taxes for school purposes for the year 1887 were heretofore estimated by the board of education and afterward granted and

voted at a district meeting more than thirty days since, and that the appellants have prepared the tax list and warrant for the collection of the said taxes, and have signed the same, but that the respondents refuse to sign said tax list and warrant, although requested so to do. It is shown that the district is in need of moneys for current expenses. The appellants say that the reason given by the respondents for such refusal is that the office of collector is vacant. It is shown that Morgan Purdy was appointed collector upon the 23d day of February 1886, and that he subsequently gave the required bond, which was approved by the board, and that he entered upon the office and has since continued to occupy the same. The respondents question his right to do so.

Proof is made of the service of the petition setting up this state of facts upon Trustees Quinn and Sinnott on the 1st day of June 1887, and on Trustee Massett on the 7th day of June 1887. No answer has been made and affidavits are presented showing that Trustee Quinn has repeatedly stated that no answer would be made, and that the facts are correctly stated in the petition of the appellants.

Upon this state of facts, the appellants ask for an order directing the respondents to join them in making the tax list necessary to collect the said taxes.

Title 7, article 7, section 65 of the Consolidated School Act provides "that within thirty days after a tax shall have been voted by a district meeting the trustee shall assess it and make out a tax list therefor and annex thereto the warrant for its collection."

This provision of the statute is imperative. It imposes upon the members of the board a duty with which enough of the members to prevent any action have failed to comply. The direction to "assess it and make out a tax list," of course imposes the duty of preparing, signing and executing such tax list.

The reason which is given for the refusal to execute the tax list is not sufficient. Title 9, section 7 of the Consolidated School Act contains this provision, namely: "In districts other than those whose limits correspond with those of any city or incorporated village, said board shall have power to appoint one of the taxable inhabitants treasurer and another collector of the moneys to be raised within the same for school purposes, who shall severally hold such appointments during the pleasure of the board." Under this provision a collector once appointed and qualified would continue to hold the office until removed by the action of a majority of the members of the board. Mr Purdy is, therefore, still the collector of the district in question.

In view of the foregoing, the respondents are hereby ordered to forthwith join with their associates in signing and executing the tax list and warrant referred to, or to show cause before me at the Department of Public Instruction in the city of Albany, on Monday, the 26th day of September 1887, at three o'clock in the afternoon of said day, why they should not severally be removed from their offices as trustees of said district because of their refusal to do so.

Let service of this order be made upon the several respondents by delivering a copy to each of them, and by exhibiting to them the original thereof, on or before Wednesday, September 21, 1887.

4163½

In the matter of the appeal of Deville W. Corbin, Chester W. Corbin and Ralph Corbin v. George W. Vanderworker, trustee school district no. 3, town of Bainbridge, Chenango county.

It is the policy of the school laws to require trustees of school districts, in making out a tax list to follow the last revised town assessment roll. The law gives trustees no power to revise the work of the town assessors. It is only in special cases that trustees have authority to make original assessments, that is, where there is change in the value of property since the completion and revision of the last assessment roll of the town. When the town's assessors have settled the question of valuation it must not be reopened by trustees, because such officers are of the opinion that it is wrongly determined.

Decided February 25, 1893

Crooker, *Superintendent*

This is an appeal from the action of the respondent, as trustee of school district no. 3, town of Bainbridge, Chenango county, in making, or attempting to make, an original assessment of the William Corbin estate.

The material facts established are as follows:

The appellants are the owners, under the will of William Corbin, deceased, of a certain tract of land, lying in one body, known as the William Corbin estate. That the buildings on said land are situate in the town of Afton. That said lands were assessed by the assessors of said town of Afton, on the last revised assessment roll of said town in one body, as follows: The William Corbin estate, 321 acres, valuation $7200. No buildings have been erected on said lands or improvements made thereon since such assessment by said town assessors. That the appellants have not purchased or in any manner acquired title to or control of any lands since such assessment; and all the lands owned, occupied or in any wise controlled by said appellants were included in such assessment by said town assessors. That said lands are partly wild lands and the quantity of land can not be definitely ascertained; that the boundaries thereof are uncertain, and in some parts unknown, and that it would require a competent civil engineer and surveyor, with proper instruments, aided by records, to correctly ascertain such boundaries and monuments and the precise acreage of the land comprising said estate. That the assessors of said town of Afton at different times have been required to review the assessment of said estate and increase the valuation thereof, but after examination and review, have declined to change such assessed valuation. That the respondent, as such trustee, as aforesaid, made, in November 1892, a tax list and assessment for said district, in which he made or attempted to make relative to the William Corbin estate, an original assessment, placing upon said tax list and assessment as the same was assessed upon the last assessment roll of the town of Afton, after revision by the assessors, the following: "Corbin estate, 321 acres, $7200 valuation, nine dollars and forty-three cents," and as an original assessment the following: "Corbin estate, 144 acres, $1000 valuation, one dollar and thirty-one cents." He also placed upon said tax list and assessment, as an original assessment, the following: "Ralph Corbin, ten acres,

valuation $350." That on November 28 or 29, 1892, said respondent served upon the appellants a notice that he had completed the assessment and tax roll of said district, and a copy thereof was at his shop, where the same might be seen and examined by any person interested until the 20th of December 1892, and that on that day he would review the said roll. That no other notice, public or otherwise, of the completion of the said assessment and the appointment of a day for the hearing of grievances was given by said respondent as such trustee, either by posting the same or in any other manner. That on said December 20, 1892, the appellant appeared before said respondent as such trustee, and objected to the aforesaid original assessments made relative to the Corbin estate and Ralph Corbin; that testimony was presented before said respondent, and afterwards, and on December 23, 1892, the respondent delivered said tax list and assessment, containing said original assessment, with his warrant, to the collector of said district.

By section 68 of title 7 of the Consolidated School Laws of 1864 it is provided that, when such reductions shall be duly claimed, and where the valuation of taxable property can not be ascertained from the last assessment roll of the town, the trustees shall ascertain the true value of the property to be taxed from the best evidence in their power, giving notice to the persons interested, and proceeding in the same manner as the town assessors are required by law to proceed in the valuation of taxable property.

By the laws of this State, town assessors are required to put up, at three or more public places in their town, notices that they have completed their assessment roll, and that a copy thereof is left with one of their number where the same may be seen and examined by any person interested, and that said assessors will meet at a time and place specified in said notice to review their assessments.

Section 68 relates to cases where the trustee does not follow the town assessment. Where the valuations are increased or new property is added, in such cases the section requires the trustee to give notice to the parties interested, and to proceed in the same manner as town assessors are required by law to proceed in the valuation of taxable property. The courts have held an omission to give such notice is a jurisdictional defect, invalidating the tax.

In the appeal of Bryant and others, no. 3342, where the trustee had made an original assessment and served a personal notification upon the person assessed, but failed to give the notice required by law for town assessors, Superintendent Ruggles decided that the trustee, having failed to give the notice prescribed by the statute, the original assessment is void for want of jurisdiction. I concur in the decision of Superintendent Ruggles, and decide and determine that the original assessment made by the respondent herein is void for want of jurisdiction, and that the said tax list and warrant issued by the respondent, as such trustee, to the collector of said school district, on December 23, 1892, must be therefore set aside as invalid and void.

Assuming, however, for the purposes of the argument, that the respondent has given all the notices required by law, his original assessments were without authority of law.

By section 66 of title 7 of the school laws, it is provided that land lying in one body and occupied by the same person, either as owner or agent for the same principal, or as tenant under the same landlord, if assessed as one lot on the last assessment roll of the town, after revision by the assessors, shall, though situate partly in two or more school districts, be taxable in that one of them in which the occupant resides. Chapter 315 of the Laws of 1886 provides that when the line between two towns, wards or counties divides a farm or lot, the same shall be taxed, if occupied, in the town, ward or county where the occupant resides. By section 67 of title 7 of the school laws, the valuations of tax able property shall be ascertained, so far as possible, from the last assessment roll of the town after revision by the assessors.

It is affirmatively established that the land known as the "Corbin estate" lies in one body and owned by the appellants as devisees under the will of William Corbin, who reside in the town of Afton, and was assessed as one lot on the last assessment roll of the town, after revision by the assessors, and valued at $7200. It is also affirmatively established that all the land owned by the appellant, Ralph Corbin, in said school district no. 3, of Bainbridge, is included in the land lying in one body, known as the Corbin estate, as aforesaid. If the ten acres attempted to be assessed to Ralph Corbin by the respondent, is divided from the rest of the land of the Corbin estate by the town line between the towns of Afton and Bainbridge, it is properly assessed, under said chapter 315, of the Laws of 1886, as part of said estate in the town of Afton, where said Ralph Corbin resides, and the assessors of the town of Bainbridge, when requested, very properly declined to assess said ten acres to said Ralph Corbin in the town of Bainbridge. It is also affirmatively established that there has been no change in the value of the property known as the "Corbin estate," nor any increase in the quantity of land of said estate, since the last assessment roll of the town of Afton, after revision by the assessors. It is not shown by competent proof that the said assessors have unquestionably made an error in assessing said estate at 321 acres, nor that they erred in judgment in their valuation of said land at the sum of $7200; but on the contrary it is shown that the acreage of said estate has been examined, investigated and considered by said assessors, and that the valuation put thereon is higher than that of other farm lands in the vicinity.

It is the policy of the school laws to require trustees, in making out a tax list, to follow the last revised town assessment rolls. The law gives trustees no power to revise the work of the town assessors. It is always to be borne in mind that town assessment rolls are prepared by officers who are chosen with special reference to such service, and who must be presumed to be better informed as to subjects of taxation than school trustees are likely to be. It is only in special cases that trustees have authority to make original assessments, that is, where there is a change in the value of property since the completion and revision of the last assessment roll of the town; as for example, where improvements have been made by the erection of buildings not completed

when the town assessment was made or where buildings have been destroyed, or where the property of a party is clearly known or acknowledged to have been increased, as by a bequest or otherwise, or where the town assessors have unquestionably made an error, as in assessing one for 100 acres of land when he is known to own but fifty acres, or vice versa. These cases, however, are not frequent, and, upon the facts presented, none of them are shown to exist in the matter under review. Trustees must not assume to pass upon the judgment of the town assessors. When the town assessors have settled the question of valuation it must not be reopened by trustees because these officers are of the opinion that it is wrongly determined.

The appeal herein is sustained.

It is ordered, that the tax list and warrant issued by the trustee of school district no. 3, town of Bainbridge, Chenango county, to the collector of said district, on December 23, 1892, be, and the same hereby is, declared invalid and void; that all sums collected upon or by virtue of said tax list and warrant be refunded to the person or persons respectively, from whom the same were so collected. That said trustee forthwith made a new tax list and assessment for said district in which the said "Corbin estate" shall be taxed and assessed as the same is taxed and assessed in the last assessment roll of the town of Afton, after revision by the assessors; and said tax list shall not contain any tax or assessment against Ralph Corbin for ten acres of land forming a part of and included within the assessment of said Corbin estate on said assessment roll of the town of Afton.

4408

In the matter of the appeal of T. W. Mannigan v. Edwin Wicks, trustee, school district no. 15, town of Diana, Lewis county.

Trustees under the school law are required to prefix to their tax list a heading, showing for what purpose the different items of the tax are levied. Such heading is necessary to give validity to such tax list, and a tax list which does not show such items will be set aside upon appeal. Every taxpayer is entitled to see the tax list, which would show him the purposes for which the tax is levied, the items on the tax list which are ordered or authorized by a district meeting should be so designated, giving the date of the meeting which authorized the levy. Items which the trustees are authorized by law to insert without any vote of the district can be included in the same heading and inserted in the same tax list.

A trustee of a school district can not legally receive pay for services done and performed by him as trustee and required to be performed by him under the school law.

When a tax list and warrant has been delivered by the trustees of a school district to the collector, such trustees have no legal authority to recall such tax list and warrant from the collector, and make any alterations or changes therein without the permission of the State Superintendent of Public Instruction.

Decided December 3, 1895

Skinner, *Superintendent*

This appeal is taken from a tax list and assessment made by Edwin Wicks as trustee of school district no. 15, town of Diana, Lewis county, and delivered, with the warrant of the trustee, to the collector of the district on or about September 30, 1895; and from certain acts done by said trustee.

A copy of the appeal was personally served upon said trustee on October 24, 1895. No answer has been made by said trustee to said appeal. A copy of said tax list and assessment as it was on October 14, 1895, is annexed to said appeal.

The appellant alleges that the annual meeting in said district voted that but one tax list be made for the present school year and that the expenses for school purposes for said school year to be raised by tax be included in said tax list; that on or about September 30, 1895, the said trustee, Edwin Wicks, delivered to the collector of the district, a tax list and warrant, and that in the heading prefixed to said tax list it was stated that the aggregate sum of $148.87 was to be raised, whereas the aggregate amount assessed in the tax list was the sum of $131.57; that said heading contained the following items: "Copying assessment roll and making teacher's wages, $127," and "rate bill, $1.50"; that on or about October 16, 1895, the said trustee, without permission from the State Superintendent of Public Instruction, recalled said tax list and warrant from the collector and altered the items in said heading, namely, "Copying assessment roll and making teacher's wages, $127," by altering said amount to $109.70; that the land owned by nonresidents of the district, and which is not occupied by an agent, servant or tenant residing in the district, is not described in said tax list and assessed as required by law; that on or about October 2, 1895, Miss Foley, the teacher in said district, received from the supervisor of the town of Diana, the sum of $14 or more, upon an order drawn by said trustee for wages due Miss Foley, at which time Miss Foley had not verified the entries made by her in the school register, and that on October 18, 1895, such entries still remained unverified.

No answer having been made by said Trustee Wicks to the appeal herein, the allegations contained in the appeal are deemed admitted by him.

Section 62, article 7, title 7, of the Consolidated School Law of 1894 requires the trustees of school districts to prefix to their tax list a heading showing for what purpose the different items of the tax are levied. Such heading is necessary to give validity to such tax list, and a tax list which does not show such items will be set aside upon appeal to the State Superintendent. Every taxpayer is entitled to see the tax list, which should show him for what purposes the tax is levied. The items on the tax list which are ordered or authorized by a district meeting should be so designated, giving the date of the meeting which authorized the levy. Items which the trustees are authorized by law to insert without any vote of the district can be included in the same heading and assessed in the same tax list.

In the copy of the tax list and heading annexed to the appeal is as follows:

"Copying assessment and making teacher's wages, $127." This item is not properly stated. There should be an item showing the amount assessed for teacher's wages, and the trustee has no legal authority to assess any sum for copying the assessment.

A trustee of a school district can not legally receive pay or be paid for services done and performed by him as trustee, required to be performed by him under the school law. The office of trustee of a school district is an honorary one. It is clear that some part of the item of $127 is for copying the assessment roll and he can not legally receive pay for making such copy. The heading also contains the following item: "Rate bill, $1.50." Rate bills in common school districts were abolished by law many years ago. If the trustee by this item intends the item for his services relating to said tax list it can not legally be assessed against the district.

It appears that after said Trustee Wicks made out the tax list and warrant and delivered the same to the collector, he recalled the same from the collector and made alterations in the heading to the tax list. This he had no legal authority to do without permission from the State Superintendent of Public Instruction, under the provisions of section 84, article 7, title 7, of the Consolidated School Law. When a tax list and warrant has been delivered by a trustee or trustees, of a school district to the collector, such trustee or trustees has or have no legal authority to recall such tax list and warrant from such collector, or make any alteration or changes in such tax list without the permission of the State Superintendent of Public Instruction.

Land situate in a school district, owned by nonresidents of the district, and which shall not be occupied by an agent, servant or tenant residing in said district, shall be assessed as nonresident, unoccupied and unimproved land in like manner as by law town assessors assess nonresident land, and a description of said land shall be entered in the tax list, but in a part separate from other assessments. It is clear that said Trustee Wicks has failed to legally assess the nonresident lands situated in said school district no. 15, town of Diana.

Section 53, article 6, title 7, of the Consolidated School Law of 1894, requires the teachers in each school district to enter upon the school register the attendance of pupils at the school taught by them respectively as stated in said section, and to verify such entries by his or her oath or affirmation. Said section forbids a trustee to draw any order upon the supervisor, collector or trustee in favor of any such teacher for any portion of his or her wages until such teacher shall so make and verify such entries in such school register.

It appears that said Trustee Wicks has been guilty of a violation of the said provisions contained in said section 53, above cited.

The appeal herein is sustained.

It is ordered, That the tax list and assessment made by said Edwin Wicks as trustee of school district no. 15, town of Diana, Lewis county, and delivered by him on or about September 30, 1895, with his warrant, to the collector of said district, and on or about October 16, 1895, recalled by said trustee from the

hands of said collector, and said tax list or the heading prefixed thereto, altered and changed by said trustee without the permission of the State Superintendent of Public Instruction, be, and the same is, hereby vacated and set aside as illegal and void.

It is further ordered, That the said Edwin Wicks, without delay, make out a new tax list with a proper heading prefixed thereto, in accordance with the provisions of law and the foregoing decision; that in making such tax list he omit therefrom any sum or sums for his services in copying such tax list or for rate bill.

3786

In the matter of the appeal of Charles Chandler v. Thomas Quinn, trustee of school district no. 8, of the town of Sempronius, county of Cayuga.

An appeal from the action of a trustee in preparing a tax list, without specifying in the heading thereof each item of tax dismissed when the appellant and all other taxpayers have paid their tax and the money has been disbursed without an appeal having been promptly taken.

Decided April 16, 1889

Draper, *Superintendent*

This appeal is taken by a taxpayer, of school district no. 8, of the town of Sempronius, county of Cayuga, from the action of the trustee of said district in preparing a tax list for the purpose of raising money for teachers' wages, wood, and other school expenditures, without, in the heading of such tax list, specifying in detail each item of tax.

From the answer of the respondent, it appears that each taxpayer has paid the tax, and that the amount raised thereby has been disbursed. The appellant himself admits he has paid his tax. In view of these facts, I am at loss to know how a decision in favor of the appellant would remedy the matter. The trustee was clearly wrong in not specifying each particular item of the tax in the heading of the tax list, but the money having been raised and disbursed without the appeal having been promptly taken, I must dismiss the same.

3826

In the matter of the appeal of Sherman P. Tracy, as collector of school district no. 12, of the town of Triangle, in the county of Broome v. Josephine Adams, sole trustee of said district.

A trustee refused to further renew a warrant to collect district taxes, the warrant having already been once renewed by a former trustee; *held,* that the law is not mandatory upon trustees to extend an unexecuted warrant. The trustee is authorized to extend the warrant, but the law contemplates that the authority shall be exercised only in

exceptional cases. When the district collector is unable to enforce a warrant, the statute provides the course of procedure which he is to follow and which will relieve him from further responsibility.

Decided November 13, 1889

Lewis & Paige, attorneys for appellant
John P. Wheeler, attorney for respondent

Draper, *Superintendent*

It appears that, on the 11th day of July 1889, Mr G. H. Greaves, then sole trustee of the above-named district, issued and placed in the hands of the appellant, as collector, a tax list and warrant for the collection of the sum of $34.04. In executing the warrant the collector was able to collect from all persons on the tax list except two, who refused to pay. He thereupon levied upon the personal property of such persons and sold the same. The result of this proceeding was a litigation in each case, which is yet pending. The collector applied to and received from the then trustee a renewal and extension of the life of the warrant for thirty days from the 5th day of August 1889. At the annual school meeting held upon the 6th day of August 1889, the respondent, Josephine Adams, was elected trustee, and one Mary Smith was elected collector. On the 23d day of September 1889, the appellant presented to the respondent the tax list and warrant, and asked for the renewal thereof, which was refused. From such refusal this appeal is brought, and the Superintendent is asked to direct the present trustee to renew the warrant.

There are many other matters set up in the papers of the respective parties, but the foregoing are all that are essential to the determination of the issue here. I am of the opinion that the appellant is not entitled to the relief he seeks. It is unnecessary to consider all the minute and technical considerations which are presented by ingenious counsel upon the one side, or all the innumerable technical objections which are interposed by no less ingenious counsel upon the other. The statute does not contemplate that tax warrants shall be indefinitely extended. The law is by no means mandatory upon the trustee to extend an unexecuted warrant. It only authorizes the trustee to extend a warrant, and contemplates that the authority shall be exercised only in exceptional cases. It provides the course which the collector is to follow in case he is unable to execute the warrant in any particular instance. Section 75 of title 7 of the Consolidated School Act, provides "if any tax upon real estate placed upon the tax list and duly delivered to the collector . . . shall be unpaid at the time the collector is required by law to return his warrant, he shall deliver to the trustees of the district, an account of the taxes remaining due, containing a description of the lands upon which such taxes were unpaid as the same were placed upon the tax list, together with the amount of the tax so assessed, and upon making oath before any justice of the peace or judge of court of record that the taxes mentioned in any such account remain unpaid, and that, after diligent efforts, he has been unable to collect the same, he shall be credited by said trustees with the

amount thereof." The statute then provides that the trustee shall certify the facts and transmit the matter to the county treasurer, and it makes it the duty of the county treasurer to pay the taxes and lay the matter before the board of supervisors; and it then becomes the duty of the board of supervisors to cause the amount of such unpaid taxes to be levied upon the lands upon which they were imposed. It appears in this case that the unpaid taxes were upon real estate. The law provides all the facilities for enforcing the collection of the taxes remaining unpaid. It therefore seems clear to me that the present trustee was under no statutory direction or obligation to renew the warrant; and the fact that the warrant had expired nineteen days before application for renewal was made, together with the fact, which seems to be undisputed, that there had never been any written appointment of the collector to whom such warrant was issued, made by the trustee then in office, coupled with the farther fact there was litigation pending touching the validity of the proceedings to enforce the tax list, and that the district was abundantly protected in another and better way, was sufficient to justify the present trustee in declining to renew the warrant.

The appeal is dismissed.

3818

In the matter of the application of John Halstead and others for an order setting aside a tax list and warrant issued by L. R. Needham, sole trustee of district no. 3, towns of Johnstown and Caroga, county of Fulton.

A tax list, based upon the last town assessment rolls, issued in good faith by trustees of a school district composed of parts of more than one town, prior to the action of supervisors of the towns determining a basis of equalization for levying taxes, upheld.

Decided October 21, 1889

Philip Keck, attorney for petitioners
R. P. Anibal, attorney for respondents

Draper, *Superintendent*

District no. 3, of the towns of Johnstown and Caroga, county of Fulton, lies partly in each of the towns named. It is alleged that the valuations fixed by the assessors in the towns are not equitable as related to each other; and the supervisors of the respective towns have met and undertaken to equalize the same. Being unable to agree, they have called in a third supervisor, and two of the three have agreed upon a basis of equalization. It is alleged that there are irregularities in the proceedings of the supervisors sufficient to invalidate the same, but that is not material to the determination of the question here presented. Prior to the action of the supervisors, the trustees of the district issued a tax list, using as the basis thereof the revised assessment rolls of the respective towns. The appellants claim that such tax list ought not to be upheld, being unjust to the residents of one of the towns.

In decision no. 3451, rendered November 13, 1885, Superintendent Ruggles held that trustees were justified in following the revised assessment rolls of the town up to the time when the order of the supervisors equalizing assessments was actually made, unless they were guilty of fraud or bad faith after knowledge that an application had been made to the supervisors for equalization. I think we must follow that decision. There is no evidence of fraud or bad faith on the part of the trustees. Indeed, it appears in the evidence that they were being pressed by creditors of the district, and needed the avails of the tax list.

The appeal is dismissed.

3737

In the matter of the appeal of Henry H. Holden and others v. Albert H. Palmer and James S. Carpenter, two of the trustees of school district no. 3, town of Marlborough, Ulster county.

A tax list prepared by one of three trustees without consultation with the others, signed by two of three trustees, the third trustee not having been in any manner consulted in reference thereto. *Held*, void.

Decided November 28, 1888.

Draper, *Superintendent*

This appeal is taken by residents and taxpayers of district no. 3 of the town of Marlborough, Ulster county, from the action of two of three trustees, composing the board of trustees of said district, in preparing a tax list to raise money for school purposes for the year 1888, from which a large amount of personal property was omitted, besides some real estate, and upon the ground that the tax list was prepared by one trustee without consultation with the others, and the list signed by two of the trustees, the third not having been consulted in relation thereto.

No answer has been interposed by the respondents, but the third trustee, who was not consulted, has made an affidavit of the facts above stated.

The statute expressly requires trustees to meet and act together in determining the assessment, and as this has not been done, I have no alternative but to sustain the appeal and declare the tax list appealed from invalid, and to order the trustees to meet as a board for the purpose of making out a new one.

3702

In the matter of the appeal of Phœbe A. Rider v. school district no. 11, town of Hempstead.

In preparing a tax list, trustees are required to follow the statutory provisions strictly, otherwise the warrant can not be enforced, and, upon appeal, will be set aside.

Decided July 26, 1888

John Lyon, attorney for the appellant

George Wallace, attorney for the respondent

Draper, *Superintendent*

This is an appeal by Phœbe A. Rider, brought against school district no. 11 of the town of Hempstead, in the county of Queens, for the purpose of setting aside a tax levied by the trustees of said district between the 1st day of February and the 1st day of May 1888, for the sum of $536.40. It is alleged by the appellant that the levying of this tax was never authorized by a district meeting; that the trustees did not follow the last revised assessment roll of the town, having omitted from their tax list certain property to be found upon said assessment roll; that the tax list was altered by the trustees after being delivered to the collector; that the tax rate was not arrived at by the trustees in the proper manner, and that their proceedings were otherwise irregular.

The trustees answer that they did follow the assessment roll to the best of their knowledge. They admit that there were some errors in copying it, caused principally, as they allege, by reason of the fact that it was impossible for them to determine from the roll what property of the town was within school district no. 11, in consequence of the indefiniteness of district boundaries. They insist also that a portion of the same, for which they issued the tax list appealed from, was authorized at the last annual school meeting, and that the balance is for an indebtedness incurred for repairs to the school property under the order of the school commissioner. It is stated on behalf of the appellant, however, that search has been made for such order, and that it can not be found, and the trustees fail to produce it.

I do not see how the tax list appealed from can be sustained. The collection of school taxes is a statutory proceeding, and all of the provisions of the statute must be strictly followed. It is apparent that they have not been in this case. It is not sufficient for the trustees to say that they have proceeded according to their best knowledge. They must proceed according to the statute. It is of no consequence that a portion of the tax has been paid. I see no way but to set aside the tax list and to direct the trustees to begin over again, issue a tax list for such amount as may have been authorized according to law, and proceed with greater caution.

The appeal is sustained.

3836

In the matter of the appeal of Fannie A. Karker v. George C. Knowles, trustee of school district no. 4, of the town of Westerlo, county of Albany.

Appeal from the action of a school district trustee in issuing a tax list to raise money to pay counsel fees and the expenses of the prosecution of a criminal action. It appearing that the prosecution of the action, and the employment of counsel by the trustee, was directed by a district meeting, *held*, that the tax therefor was legal.

Decided December 6, 1889

Barlow & Greene, attorney for respondent

Draper, *Superintendent*

Appellant, a resident of the county of Schoharie, but the owner of real estate in school district no. 4, of the town of Westerlo, county of Albany, appeals from the action of the trustees of said district in issuing a tax list to raise money to pay counsel fees and expenses of prosecution of a criminal action for destroying certain property of the school district.

Before the appeal was taken, the tax had been paid by nearly every person assessed, including the tax upon appellant's property, and the amount claimed for counsel fees and expenses had been paid out.

The appellant objects to the tax upon the ground that the prosecution was an individual and not a district matter.

The proofs show that a district meeting authorized the prosecution and the employment of counsel, and the compensation to be paid was agreed upon. Subsequently, a district meeting ordered the payment of the bill of counsel, and authorized the levying of the tax referred to for the purpose.

I am not called upon to pass upon the propriety of the district in engaging in the prosecution of the action in which the expenses were incurred. The evidence before me satisfies me that the district directed it, and that counsel were regularly employed and performed the duties which devolved upon them. By the provisions of section 7 of title 13, the cost and expenses became a district charge, and was properly collected by district tax and liquidated.

It is nowhere claimed by the appellant that the charge is unreasonable or excessive. It appears the district was represented by a firm consisting of two lawyers, while the defense availed themselves of the services of at least four lawyers.

It follows that the appeal must be dismissed.

3882

In the matter of the appeal of George Allen and William Smith v. Jacob Closser, trustee of school district no. 9, town of Allen, county of Allegany.

A trustee will not be required to include in a tax list a tax upon personal property against himself, although he is assessed therefor upon the town assessment roll, when it is clearly shown that he is not the owner of personal property liable to taxation.

Decided July 10, 1890

Draper, *Superintendent*

This appeal is brought by residents of school district no. 9, of the town of Allen, Allegany county, from the neglect of the trustee to include in the tax list an item of tax for personal property against himself, which it is alleged he is assessed for upon the last town assessment roll, and of which it is alleged he is the owner.

It appears from the answer of the trustee that the assessment by the town assessors was erroneous, and grew out of the fact that at one time he had the contract for the sale of some real estate, which contract was some years ago cancelled and annulled, so that the respondent became and still is the sole owner of the real estate referred to; that respondent shows clearly that all of the personal property he is possessed of, including live stock, debts due to him and a small bond and mortgage which he holds, does not exceed in value $900, and that he owes debts to a larger extent. A good portion of the indebtedness he owes grew out of a loan which is invested.

In view of the positive nature of the respondent's proofs that he has no personal property which, under the law, is subject to taxation, and the clearness with which he has stated his position, I must overrule the appeal and sustain the tax list now in the hands of the collector of said district.

3860

In the matter of the appeal of James D. Lawrence v. Abram J. Corbin, sole trustee of school district no. 1, of the town of Kortright, county of Delaware.

Appeal from the action of a trustee who, in preparing a tax list, it is alleged omitted to tax certain residents for personal property. The trustee was guided in preparing the list by the town assessment rolls, and the items omitted do not appear thereon. *Held,* not to be irregular. It is the policy of the law to require trustees to follow the assessment roll of the town, and only in special cases make original assessments.

The Department has no authority to levy taxes nor prepare tax lists. Trustees act judicially in preparing tax lists. This Department does not possess greater powers than the courts in the matter of correcting assessments.

Decided February 26, 1890

Draper, *Superintendent*

This appeal is from the neglect of the trustee of school district no. 1, of the town of Kortright, Delaware county, to include in a certain tax list assessments against several residents of the district for personal property and also one upon real estate. The answer of the respondent shows that in preparing the tax list, the trustee followed the last assessment roll after revision by the assessors; that the item of real estate referred to is included in the tax list, and that the persons whom the appellant alleges should be assessed for personal are not so assessed on the last town assessment roll. It is the policy of the school laws to require trustees, in making out a tax list, to follow the last revised assessment rolls of the town. It is only in special cases that they have authority to make original assessments. It is always to be borne in mind that town assessment rolls are prepared by officers who are chosen with special reference to such service, and who must be presumed to be better informed as to subjects of taxation than

school trustees are likely to be. This Department has no authority to levy taxes or prepare tax lists. Trustees, in assessing property, act judicially and the courts have refused to interfere to correct assessments, even where it is proven that property has been erroneously omitted. This Department does not possess greater powers in such cases than the Supreme Court. The Department will not set up its judgment in opposition to that of the trustees as to the correctness of the trustees' judgment. Under the present system of taxation, it would be a rare case indeed if some item of personal property did not escape taxation in the preparation of a tax list. In this particular case, although the appellant set out several instances in which he claims persons in the district, liable to taxation are possessed of personal property upon which no assessment has been made, it may yet be possible that an assessment in those cases would not be proper.

There may be offsets in the way of debts due by the owners of personal property, which would make an assessment upon the same unjust and ineffectual. The appellant is assessed for but a trivial amount, and his assessment at this particular time is, I believe, but fifty cents. If some item of personal property has escaped taxation, which should have been taxed, the loss occasioned thereby to the appellant, could be but little.

From the foregoing conclusions, the appeal is dismissed.

3742

In the matter of the appeal of Minard Proper and Caleb B. Fancher v. Henry W. Ploss, sole trustee of district no. 18, towns of Summit, Blenheim, Jefferson and Fulton, Schoharie county.

An appeal from the manner of election of a trustee will not be sustained unless promptly taken.

The action of a trustee, who has in good faith followed the town assessment roll, in preparing a tax list, but it seems omitted, as the town assessors did, a small piece of property of little value, the including of which would have made but a trivial reduction in the tax rate, and the appellant neglected to move promptly, will not be disturbed.

Decided December 28, 1888

P. B. Sweet, attorney for respondent

Draper, *Superintendent*

This is an appeal by legal electors of district no. 18, towns of Summit, Blenheim, Jefferson and Fulton, in Schoharie county, from a certain tax list and warrant issued by the trustee, which warrant bears date September 29, 1888. The appeal was taken on or about November 19, 1888. The grounds of the appeal are:

1 That the respondent was not legally elected as trustee.

2 That certain property, known as the "parsonage" lot, was omitted from the tax list.

3 That a certain other piece of property, known as the "Reformed Church" lot, was also omitted from said tax list, which should have been included and assessed to one Stanton P. Harder, who claims to own the property. The objection to the manner of the election of the respondent has not been taken in time, and to the other grounds of appeal, the respondent answers and alleges that he followed the town assessment roll and did not include the items of property above referred to, believing that the same were exempt from taxation.

The respondent further shows that he did not include a certain other lot which should have been assessed, and that when his attention was called to the last mentioned omission, he applied for and received permission October 27, 1888, from the Department to withdraw the tax list from the collector, in whose hands it had been placed, and by whom notice thereof had been duly given, and corrected all errors he knew of therein, and all to which the appellants had then directed his attention and redelivered the same as amended to the collector, who proceeded to enforce the collection of the same according to law; that the respondent was not aware that the appellants objected to the tax list because of the omission of the "parsonage" lot and the "Reformed Church" lot, until the appeal was taken, at which time nearly all taxed inhabitants had paid their share of the tax.

It is claimed by the appellants that the value of the "parsonage" lot is $500, but they do not deny that the same was not assessed on the town assessment roll and had not heretofore been assessed for town or district taxes.

The "parsonage" lot belongs to the Methodist society, and had been occupied by a minister of that denomination.

I am of the opinion that this lot is not exempt from taxation, but that the "Reformed Church" lot, to whomsoever it belongs, is exempt, for the reason that the same is occupied as a building used for public worship.

The facts brought before me constrain me to dismiss the appeal, for the following reasons, namely:

1 The reduction of the rate of tax which the assessment of the "parsonage" lot would cause, would be too trivial to be considered.

2 The fact that the trustee has acted in good faith and based his list upon the town assessment roll.

3 That appellants had ample opportunity to have secured an amendment including the "parsonage" lot by promptly appealing when the list was first opened for inspection, and in time to have had the property included when the original list was amended.

4 That the entire tax had been collected, and all but three have voluntarily paid the same.

4391

In the matter of the appeal of Warren H. Bacon from proceedings of annual school meeting held August 6, 1895, in union free school district no. 2, towns of Oppenheim and Manheim, counties of Fulton and Herkimer, in voting to raise by tax the sum of $8158.

Where, in a union free school district, at an annual or special meeting held therein, all propositions arising at said meeting involving the expenditure of money or authorizing the levy of a tax or taxes, either in one sum or by instalments, the vote thereon must be taken by ballot, or ascertained by taking and recording the ayes and noes of such qualified voters attending and voting at such meeting. A tax list issued by a board of education of a union free school district to collect any sum of money, where the authorization to levy the tax was by viva voce vote or taken by acclamation, will be set aside upon appeal.

Decided October 12, 1895

Jones & Townsend, attorneys for appellant
Edward A. Brown, attorney for respondent

Skinner, *Superintendent*

This appeal is brought from the proceedings had and taken at the annual school meeting held on August 6, 1895, in union free school district no. 2, towns of Oppenheim and Manheim, counties of Fulton and Herkimer, in voting to levy by tax the sum of $8158, the appellant alleging in his appeal that the vote upon the propositions involving the expenditure of said sum of $8158, or authorizing the levy of a tax or taxes for said sum, was not taken in accordance with the provisions contained in section 10, article 2, title 8 of the Consolidated School Law of 1894, chapter 556 of the Laws of 1894.

The board of education of said district has made answer to said appeal.

From the papers presented herein it appears: That at said annual school meeting held in said union free school district no. 2, Oppenheim and Manheim, after the organization of said meeting, the board of education presented to said meeting a detailed statement in writing of the amount of money that would be required for the ensuing school year for school purposes in said district (exclusive of public moneys), pursuant to the provisions contained in section 18, article 4, title 8 of chapter 556 of the Laws of 1894; that in said statement the sum required for teachers' wages was $7500, of which $850 was for a kindergarten school, $708 was for a bond of $600 becoming due, and interest $108, and that $2100 was for janitor and other contingent expenses, making a total of $10,308, from which was deducted public money estimated at $1300, and $1000 to be received from the Dolgeville School Society, a total of $2300, leaving the amount to be raised by tax $8008; that after the presentation of said statement to said meeting the appellant herein claimed and stated that said school district had no legal authority to maintain a free kindergarten school therein, and demanded that the items in said statement for the maintenance of said school, amounting to $850, should be voted upon separately from the other items con-

tained in said statement; that thereupon, with the consent of the voters attending at said meeting, said board of education withdrew said statement and amended the same by striking out said items amounting to $850 for the maintenance of said free kindergarten school, and then presented to said meeting said statement so amended, by which the gross sum of $7158 was necessary to be raised by tax, instead of said sum of $8008; that thereupon a resolution in writing was offered that said sum of $7158 be raised for the purposes mentioned in said statement and authorizing the levy of a tax for said sum and declared adopted; that the vote upon said resolution and authorizing said tax was taken by acclamation or viva voce and not by ballot, or ascertained by taking and recording the ayes and noes of the qualified voters attending and voting at said meeting; that prior to said annual school meeting, a society incorporated under the name of the Dolgeville School Society had promised to contribute the sum of $1000 to said board of education to be used toward the expenses in maintaining the school in said district, and after the sum of $850 for the support of a free kindergarten school was stricken out, the president of said society stated to said meeting that said society would not contribute said sum of $1000 for the support of said school as proposed, but would use the same in maintaining a free kindergarten school; that thereupon said board of education stated to said meeting that it would, by reason of the announcement of the president of said society, be necessary to raise by tax the sum of $1000 for teachers' wages and contingent expenses in addition to the aforesaid sum of $7158, and a resolution was offered in writing that said sum of $1000 be raised for the purposes aforesaid and authorizing the levy of a tax for said sum of $1000 and declared adopted, but the vote upon such resolution and authorizing said tax was taken by acclamation or viva voce, and not by ballot, or ascertained by taking and recording the ayes and noes of the qualified voters attending and voting at said meeting.

On September 21, 1895, upon the petition of the appellant herein showing that said board of education were preparing a tax list for the collection of said sum of $8158, I made an order staying all further proceedings on the part of said board of education, its officers, etc., in preparing or making or completing a tax list or assessment for the collection of said sum of $8158 or any part thereof and delivering any tax list and assessment and warrant to the collector of said district until the hearing and decision by me of the appeal herein.

In the answer herein, verified on September 28, 1895, it is alleged that said sums so voted at said annual meeting have been duly assessed and the tax list and warrant delivered to the collector of said school district.

The appellant and respondent herein agree that the vote upon the resolutions authorizing the levy of a tax for $7158 and $1000 respectively was by acclamation or viva voce. There is a contention as to whether or not the appellant herein, after the elimination of the sum of $850 from the statement, demanded that a vote be taken separately upon each of the items in the amended statement, and such vote be by ballot or ascertained by taking and recording the

ayes and noes of the qualified voters attending and voting at said meeting; but in my view of the disposition that should be made of the appeal herein it is not material whether or not the appellant did make such demand.

In section 10, article 2, title 8 of chapter 556 of the Laws of 1894, it is enacted: "On all propositions arising at said meetings involving the expenditure of money, or authorizing the levy of a tax or taxes in one sum or by instalments, the vote thereon shall be by ballot, or ascertained by taking and recording the ayes and noes of such qualified voters attending and voting at such meetings."

In section 11, article 2, title 8 of chapter 556 of the Laws of 1894, it is enacted, "Any moneys required to pay teachers' wages in a union free school or in the academic department thereof, after the due application of the school moneys thereto, shall be raised by tax."

Under the school law it is the duty of boards of education of union free school districts, at the annual meeting, to present a detailed statement in writing of the amount of money which will be required for the ensuing year for school purposes, exclusive of the public moneys, specifying the several purposes for which it will be required, and the amount for each; that after the presentation of such statement the question shall be taken upon voting the necessary taxes to meet the estimated expenditures, and when demanded by any voter present, the question shall be taken upon each item separately and the inhabitants may increase the amount of any estimated expenditures or reduce the same, except for teachers' wages, and the ordinary contingent expenses of the school or schools (see section 18 and section 19, article 4, title 8, chapter 556 of the Laws of 1894).

It appears the respondent herein fully complied with the school law in making to said annual school meeting the statement required by section 18, article 4, title 8 of the Consolidated School Law. It does not clearly appear whether a demand was made by the appellant or any other qualified voter at said meeting, that the question should be taken upon each item in said statement separately, or upon one or more specific items therein, and that such demand was refused by the chairman of said meeting. It is clearly established that said meeting in voting to authorize the levy of a tax for $7158 and $1000 respectively did not comply with the provisions contained in section 10, article 2, title 8 of the Consolidated School Law of 1894, above quoted, and hence such action of the meeting was illegal and void, and no authorization to levy such tax was legally made, and the respondent, said board of education, had no legal authority to assess such tax, or to deliver any such tax list and assessment to the collector of said district with its warrant for the collection of said tax, and said tax list or assessment and warrant are, and each of them is, illegal and void. As to the items in said statement of said board presented to said meeting, namely: bonds due October 1, 1895, $600; interest on $1800, $108, they were properly inserted in said statement for the information of the voters of said district; that it was necessary to raise by tax said sum of $708 for the purposes

stated. The said board could legally insert said sum in the tax list made and issued by it without authorization of said meeting. I assume that the school district had heretofore voted to levy by tax a certain sum named, and that said sum be levied by instalments; that the board had issued bonds for such sum, and that one of said bonds for $600 would become due on October 1, 1895, with interest upon that bond and the bonds outstanding. The district having voted the tax and that it be levied by instalments the board had the legal authority, and it is its duty, to include the sum necessary to pay the bonds becoming due and interest growing due, in their tax list and assessment and no vote of the district to do so is required, as such authority was given when the tax was first voted.

The appeal herein is sustained.

It is ordered, That all proceedings had and taken at the annual school meeting, held on August 6, 1895, in union free school district no. 2, towns of Oppenheim and Manheim, counties of Fulton and Herkimer, in voting to authorize the levy of a tax for $7158 and $1000 respectively, are, and each of them is, hereby vacated and set aside as illegal and void.

It is further ordered, That the tax list and assessment and warrant issued by the board of education of said union free school district no. 2, to the collector of said district, assessing said sum of $8158, and directing its collection, be, and the same are, and each of them is, vacated and set aside as illegal and void.

3719

In the matter of the appeal of Thomas L. Randall v. union free school district no. 1, towns of Sidney, Delaware county, and Unadilla, Otsego county.

A child of appellant was suspended from the privileges of the school for cause.
Appellant now resists the payment of a school tax upon that ground.
Held, not to be a valid ground of objection.
Decided October 22, 1888

Draper, *Superintendent*

It seems that, at the annual meeting held in the above-named district on the 28th day of August 1888, the sum of $2000 was voted to be raised for school purposes. Pursuant to this vote, a tax list was made out by the board of trustees, and a warrant for the collection of the same was placed in the hands of the collector. By this tax list the collector was directed to collect the sum of $5.60 from the appellant. This appeal is brought to set aside such tax list and warrant. The only ground alleged by the appellant in opposition to the tax list is that a child of his has been debarred the privileges of the school.

It is well known to me, by reason of another appeal which has been before the Department, that the board of education in the district referred to has heretofore suspended a son of the appellant from the privileges of the school. It is

unnecessary here to inquire into the merits of such action. Entirely regardless of the question whether the board was justified in the proceeding referred to, it must be held that the appellant can not, upon that ground, successfully resist the collection of this tax. Taxes for school purposes are levied without reference to the children sent to school by the persons against whom they are levied. If the appellant had no child to send to school, he would be obliged to pay his ratable portion of school taxes. If he had a dozen children to send, he would be called upon to pay no more. The board was empowered to take such action regarding the attendance of pupils as might be necessary for the good of the school under their charge, and whatever action was taken affords no grounds for setting aside a tax list duly authorized and properly executed.

The appeal must be dismissed.

33

TEACHERS

5251

In the matter of the appeal of Martin H. Walrath v. the board of education of the city of Troy.

The principal of a high school in a city of the second class can be removed only for cause, on charges, and after trial.

The cause must be substantial and the trial fair.

What is reasonable cause depends upon all the circumstances.

Causes justifying removal in vacation might not warrant it when the schools are in session.

The Commissioner of Education will not substitute his discretion for that of a board of education where there is nothing to raise doubts of the genuine purpose of the board and where the proceedings do not violate the rights of the accused, but he will set aside the determination when it appears that the members of the board had prejudged the case and were predetermined to find the accused guilty.

A teacher's tenure is not to depend on politics, or partisanship in any other form.

Decided April 9, 1906

Ransom H. Gillet & James Farrell, attorneys for appellant

George B. Wellington, corporation counsel of the city of Troy, attorney for respondent

Draper, *Commissioner*

This is an appeal from the action of the board of education of the city of Troy in removing appellant from the position of principal of the high school. The action of the board was based upon charges made by the superintendent of schools. The charges were served upon the appellant November 23, 1905, when he was notified that his trial would be held before the board November 27, 1905. At that time the investigation proceeded; the corporation counsel attended and prosecuted the charges and the appellant was attended by counsel; adjournments were had from day to day, and the testimony was taken at much length. On December 4, 1905, the board voted that the appellant had been found guilty, without specifying the particular offenses of which he was found guilty, and that he should be dismissed from his position forthwith.

Section 245 of the charter of cities of the second class, of which Troy is one, provides among other things as follows: "All principals shall hold their positions during good behavior and shall be removable only for cause, after a hearing by the affirmative votes of at least a majority of the board."

The appellant is a graduate of Syracuse University in the class of 1889, and had been principal of the Troy High School since March 1, 1897.

The charges were made by Mr Edwin S. Harris, the superintendent of the Troy schools since September 1904. They were made at the instance of the board, although the proceedings clearly show that the superintendent himself

was an active agent in preparing and proving them. They were drawn by the corporation counsel upon information supplied by the superintendent, and they were signed and verified by the superintendent. They alleged incompetency; neglect of duty; disobedience of the rules, requirements and directions of the board of education and of the superintendent of schools; maladministration and misconduct in office; conduct unbecoming a teacher and principal of a high school; and asserted that the things complained of were done or omitted intentionally, wilfully and maliciously.

The specifications set forth twelve (12) instances of alleged misdeeds or failure to perform the duties of appellant's position. Stripped of legal verbiage, these were as follows:

1 Failure to assign a teacher to the head of the modern language department, after she had been appointed thereto by the board.

2 Refusal, for some days, to assign another teacher to work in mathematics after her appointment thereto by the board.

3 Criticism of the board for the foregoing appointments.

4 Hindering the employees of the department of public works from making certain changes at the high school, directed by the board of education.

5 Failure to report a list of the students of the high school and the number of school credits granted to each, as well as the number claimed by each, notwithstanding the directions of the board.

6, 7, 8 Failure to maintain discipline of pupils on several named occasions, and to report thereupon although directed to do so.

9 Failure to keep accurate records of work and credits of students.

10 Untrue and inaccurate reports of work and credits of students.

11 Failure to make true and accurate reports of the attendance of nonresident students.

12 Unjust, improper and malicious criticism of the board and the superintendent.

The answer of the appellant denied, severally and specifically, the charges of the superintendent, adding what the principal claimed were explanations of certain facts brought out by the allegations made against him.

At the hearing before the board the main witnesses were the superintendent and the principal. Of the 429 pages of the record, their testimony fills 299 pages. The proof of the charges rests almost exclusively upon the testimony of Mr Harris, the superintendent. But one other witness was called to sustain the allegations, and he upon but one unimportant matter. The contentions of the principal are corroborated here and there by the testimony of several teachers in the high school, and by others.

The Commissioner of Education has read, and heard able counsel upon, and reflected upon this testimony. Though probably not bound to be limited by the record, he has been. There has been no desire to take over the functions of the board of education or to substitute the discretion of the Commissioner for that of the board. If the weight of evidence seemed nearly balanced, and

the judges appeared free from bias, and the judgment inflicted a penalty fairly adjusted to a real offense reasonably established, the Commissioner would sustain the board even though it might seem to him that they had fallen into some incidental errors and his conclusions upon the facts were not fully in accord with theirs. But he can come to no other conclusion than that the board was of one mind in prejudging the case and intent upon coming to but one end; was biased against the appellant; magnified the small incidents of administration beyond reason; denied him the fair opportunities of defense; inflicted a penalty wholly out of proportion to any apparent delinquency; and so violated the law which they were bound to regard.

No immoral act is charged against the appellant. No hasty or uncontrollable temper is intimated. Nothing to show that he brought dishonor upon his position is established. No doubt about his scholarship is brought forward. It nowhere appears that he did not enjoy the common respect of the community, of associate teachers, and of his pupils. He certainly carried himself with much steadiness under trying circumstances. The most that is alleged and attempted to be proved is that he failed to do something that he should have done, or talked too freely, and, under the light of all that was brought out before the board, even so much fades pretty nearly to the vanishing point.

The superintendent had a professional as well as a legal and moral obligation to the principal and whatever difficulties there were should have been settled between the superintendent and principal, and would have been if the members of the board and the superintendent had been moved by nothing but the good of the schools and regard for a teacher in a responsible place. Indeed, the proceedings unmistakably declare the fact that the difficulties which have set the schools and the people of a city in most regrettable turmoil have arisen out of the solicitude of this principal for the character and the quality of the faculty over which he was to preside, and out of the integrity that could not always bend to even official authority which had some other aims than the exclusive good of the schools.

The teachers who were appointed to the high school faculty without conference with the principal were assigned to work by him with little delay and no more than was inevitably incident to his surprise and to their lack of adaptation to new and responsible duties. The criticisms against the members of the board sound very differently when repeated by one side from what they do when explained by the other, and, in any event, were not to the public and not beyond what any public officer must expect, without exercising his official power to turn people out of permanent positions. The allegation about interfering with changes in the building grew out of an insignificant and passing episode. Those concerning reports upon the standings of pupils and the number of failures are clearly the result of measuring things by different standards, and of differing estimates of personal and official prerogatives. That in relation to the discipline of pupils is not serious in school administration and is no graver than may be frequently made against principals who have live boys to manage. The one about not re-

porting nonresident pupils which looks bad upon its face because it would seem to indicate that the principal permitted the city to be defrauded, is shown to refer to a student whose father was a resident and a taxpayer at the time referred to, and who was therefore in the school of right. No wrongful intent or malicious purpose appears anywhere.

But this is not all: The trial was not judicially fair. If any inquiry is unfair it is one in which the tribunal pretends to be governed by legal rules and yet has no real knowledge of them, and so exercises the power to use them, either wilfully or ignorantly, in favor of one side and against the other. It can not be expected that a board of education will be familiar with the legal rules governing the taking of evidence, but it is not too much to insist that a board of education shall either show such disposition, even anxiety, to protect the rights of the accused as will lead it to receive and exclude the testimony offered by both sides according to true rules of evidence, or else make no such pretense and get at the facts through whatever both sides can offer. There need be no hesitation in saying that the record plainly discloses that testimony material to the accused was excluded repeatedly when it tended to show that members had prejudged the case or when it would weigh against the preconceived plans of the board. An able young lawyer, favorable to the attitude of the superintendent and the board, was allowed to determine what evidence should be taken, and to badger the principal to counsel's content, while another was kept from analyzing the contents of the superintendent's mind beyond what seemed to the board to be safely consistent with its point of view. It is not said, as the superintendent and board allege of the principal, that the board was intentionally, wilfully and maliciously wrong about this. It was wrong, but it may have become infatuated with theories which impelled its course, and it may have been under political pressure which really forced it to think that the exigencies of the situation demanded it. The matter is given place here for the enlightenment and guidance of other boards in similar or analogous situations, and in eager anticipation of the time when partisanship shall not dare to obtrude upon the management of the schools.

It must be understood that a teacher is entitled to a fair chance for his life, and that a teacher's place is not to be the football of politics, or partisanship in other form. If a teacher to whom the law gives a permanent tenure through good behavior, and declares that he can only be removed for cause, is to be removed, the cause must be a reasonable one and the proceedings leading up to the determination must be so conducted as to establish the cause and yet protect the teacher's rights.

The Commissioner of Education takes no flabby or indifferent view of the need of organization, of respect for official directions, of obedience to constituted authority. But the organization must rest upon sound fundamental principles, the directions must square with reason and right, and the authority must be exclusively actuated by the high aims of the educational system and be safely within the law which regulates the schools. When it is so, authority is entitled

to honor for any aggressiveness it may show; and when it is not, he who resists it is also entitled to honor.

It is hard for anyone to lose employment. It is still harder for one to lose employment as a teacher at a time of the year which practically makes reemployment impossible for nine or ten months. It comes pretty close to annihilation when a teacher is peremptorily dismissed in the presence of all the people of a considerable city, and with the full knowledge of all teachers in the State and country, from so conspicuous a position as the principalship of the Troy High School, when it is proclaimed that it is done for incompetence, neglect of duty, intentional maladministration, wilful misconduct in office, malicious conduct unbecoming a teacher, and all the other things that come to the mind of a keen young corporation counsel assigned the duty of drawing charges and making a case.

The teacher in this case was in a conspicuous and responsible position. He was bound to endeavor to work quietly and harmoniously with all others who had the good of the schools in view, and particularly with those in official authority over him. He was bound to be patient, to carry himself with steadiness and dignity, and even to suffer much in the interest of the common good. But he was a man of character and education. He had had considerable experience in the place he held. He was not an old man, incapable of further progress and yet better accomplishments. The school over which he presided was upon his heart. He was entitled to be treated like a man, to be regarded for the public service he had rendered. He was not a mere hired man; he was entitled to be conferred with about the interests of his school. When the board was honest and sane and deliberate he was bound to act upon their conclusions without cavil, or vacate his place for one who could. If he could not do that, then he was incompetent for such a trust, and if under such circumstances he would not vacate his place, then the board could remove him at a time and in a way which would inflict no more upon him than the circumstances made reasonable and the needs of the school made imperative. An offense against good judgment or disagreements with the board which need not force an open rupture if managed by men of sense, which might be sufficient to warrant a request for his resignation or even a removal from position in the vacation time, might come short of supporting such decisive action at a time when the schools were open and the situation called for toleration and no unnecessary commotion. When the board became possessed of a purpose to oust him in the middle of the school year without substantial cause, he was not bound to acquiesce; the law is against that and it protected him. It was precisely for this purpose that the provisions concerning the tenure of teachers in the uniform charter of cities of the second class was inserted.

The appeal is sustained, and the action of the respondent removing the appellant from the principalship of the Troy High School is declared to be of no effect.

It is ordered, That the board of education of the city of Troy forthwith recognize said Martin H. Walrath as principal of the Troy High School, charged with all the responsibilities and authority, and entitled to all of the prerogatives and emoluments of said position the same as he would have been if the action of said board of education taken December 4, 1905, removing him from said position had not been taken.

5366

In the matter of the appeal of William E. Paterson from the action of Charles C. Morgan, trustee of school district no. 5, town of Bellmont, Franklin county.

A teacher who resigns because of ill health and upon the advice of his physician, is within his legal rights. When it appears that a teacher has resigned for such reasons and has not taught elsewhere and the district is indebted to him for salary for a portion of the time which he taught, it is the duty of the trustee to pay such salary due.

Decided December 16, 1907

Draper, *Commissioner*

The moving papers in this proceeding show that appellent contracted to teach for sixteen consecutive weeks beginning September 10, 1906, in school district no. 5, town of Bellmont, Franklin county, at a weekly compensation of $8.50. He taught ten weeks and filed his resignation with the trustee. He resigned upon the ground that his health would not permit him to complete the term for which he had contracted. He had been paid for only eight weeks and the trustee refused to pay him for the additional two weeks which he had taught. It also appears that appellant did not teach elsewhere after he resigned and he also presents the certificate of the physician who attended him to the effect that he was not in physicial condition to teach and that such physician advised him to stop teaching. His resignation was therefore based upon valid ground. The trustee should have paid him the salary due. The present trustee has not felt justified in paying the claim because the trustee serving when the controversy arose has refused to honor it.

No answer has been filed to this appeal and the allegations contained herein must be regarded as admitted.

The appeal herein is sustained.

It is ordered, That the trustee of school district no. 5, town of Bellmont, Franklin county, shall immediately pay William E. Paterson, appellant herein, the sum of $17 and interest thereon at the rate of 6 per centum from the first day of December 1906.

5335

In the matter of the appeal of Jonathan M. Barker from the action of the board of education of school district no. 7, West Turin, Lewis county.

The duty of a principal in his relations to Regents examinations is a vital one. He is the proper person under the Regents rules to conduct such examinations. It is his duty to be familiar with such rules and to enforce a strict observance thereof. A principal is not entitled to extra compensation for conducting Regents examinations as such work is part of his regular duties as principal.

Decided September 19, 1907

James E. Bixby, attorney for appellant

Draper, *Commissioner*

In May 1906, Appellant Barker contracted with the board of education of union free school district no. 7, town of West Turin, Lewis county, to teach in said district for a period of thirty-eight weeks. This district includes the village of Constableville and appellant was to be the principal of the school. A written contract was executed in duplicate and one copy is submitted in the pleadings of appellant. This written contract provides that appellant should begin to teach October 10, 1906. Appellant claims that while the contract did specify that he should begin to teach October 10th, the insertion of such date was a clerical error and that the date specified in the contract for the commencement of his term of service should have been September 10, 1906. It appears that appellant did begin to teach September 10th.

It appears that appellant prepared the annual catalog of the school and in this catalog he inserted a calendar of the principal school dates for the year including the dates for Regents examinations. The principal inserted June 10 to 14, 1907, as the dates for the June 1907 Regents examinations. This was an error. The dates set for such examinations by the Education Department were June 17 to 21, or one week later than the dates given by the appellant in the calendar which he prepared.

The date of this examination is an important element to be considered by a board of education in setting a date for opening schools and in determining the term for which school shall be maintained. The school in this district contains an academic department and holds Regents examinations. The term of school maintained in such district always includes the week of the June Regents examinations. It is also the general custom in such districts to hold the commencement exercises the week after the Regents examinations. By opening school on September 10th the thirty-eight weeks called for under appellant's contract would not expire until June 14th or after the erroneous date set for Regents examinations.

The principal of a school bears a very intimate relation to the Regents examinations. He is the proper person under the Regents rules to conduct such examinations. He is expected to be familiar with such rules and to enforce a strict observance thereof. He must determine the proficiency of students to

take such examinations and bar those therefrom who have not pursued the study of a subject an adequate period of time. The duty of a principal therefore in his relation to Regents examinations is a vital one.

It is only reasonable to assume that this board of education intended that its contract with appellant should cover the week of the June examinations. It is also reasonable to assume that appellant believed his contract did cover the week in question.

It appears that the board of education decided during the school year to change its principal and so far as shown by these pleadings in a proper manner contracted with another principal for the ensuing school year. This action of the board displeased appellant. He then discovered that his term of thirty-eight weeks would expire the week previous to the dates set for Regents examinations reckoned from September 10th. Appellant decided not to remain to conduct these examinations. He swears that he made arrangements for other affairs for that week. It does not appear that he notified any member of the board of education that he had made an error in this calendar in giving the dates of these examinations and that his term would expire the week previous to the proper dates set for such examinations. He knew that failure to hold these examinations in strict accordance with the rules might result in serious embarrassment to the board of education and might operate as a great hardship and loss of time in school work to the pupils he had instructed during the year. He gave no word of warning to the board of education of this situation. He took no action whatever to see that arrangements should be made to protect the rights and interests of his pupils in this respect.

It appears that information reached the president of the board of education on June 12th that there was some misunderstanding in relation to the date of closing schools and that an error had been made in publishing the dates of the June examinations. It also appears that on June 13th one of the teachers in the school communicated to the president of the board the attitude of the principal in relation to the termination of his services. The president of the board at once consulted the school commissioner and on the following morning served a written request upon each teacher to remain the following week, advising them that compensation at the regular weekly salary would be paid them. This letter requesting the principal to remain the following week is submitted in appellant's moving papers. It is dated June 14th, the date on which appellant claims his contract terminated. No answer was received from the principal until the following Monday morning. He then informed the board that he would not remain that week and conduct the examinations unless the board gave him a written contract agreeing to pay him $10 in addition to the regular weekly salary of $20. An informal meeting of the members of the board of education who were in town was held on Monday morning and it appears that School Commissioner O'Brien was authorized to state to the principal that his demands would be accepted if he would remain and conduct the examinations. Thereupon appellant remained and conducted such examinations.

Appellant's conduct in this matter by his failure to give notice to the board of the error he had made in publishing the date of the examinations and of his intention not to conduct such examination and by failure to reply until Monday morning to the request of the president of the board that he remain the following week clearly indicates that he desired to keep such information from the board and to delay any action which the board might take in such premises until it was too late to make proper arrangements for such emergency and thereby be coerced into accepting his demands.

As a matter of just dealing the principal was not entitled to extra compensation for his services in conducting the June examinations. It was his duty to conduct this examination by virtue of being the principal of the school. He expected to do this work at his regular weekly salary when he made the contract. His claim that he was not legally obligated to do such work is based upon a technical construction as to when his contract terminated and in the final analyses of the whole question rests upon the error which he made in setting the dates for the June examination.

His claim that he made other arrangements for the week of the examinations can not be accepted as being made in good faith. He remained in the district after the date when he claimed his contract terminated and held himself in readiness to do this work if the board agreed to pay him $10 extra. He offers no proof to show that he made such arrangements or that he suffered any loss by remaining another week.

It should be clearly stated that appellant has not shown a proper appreciation of the professional relation which should exist between a principal and his school and his official board.

The rights of appellant in this proceeding must be determined under a literal construction of his contract. This instrument is written and leaves no doubt as to what the agreement was. Appellant was to teach thirty-eight weeks from *October 10, 1906*. There is no evidence to show that any action, official or otherwise, was ever taken by appellant or by the board of education to amend the contract. It was undoubtedly intended that the school should open September 10th instead of October 10th. Appellant opened it on the former date. He rendered service for one month previous to the time agreed upon in this contract when he should begin such service. For this service he was entitled to compensation. Such compensation was agreed upon. The board issued him an order upon the treasurer in payment of such service. He accepted the order and received payment therefor. That transaction was therefore terminated. Had appellant desired he could have insisted upon teaching for thirty-eight weeks from October 10th as his contract provided. The board would have been compelled to employ him for that period. If such contract was binding upon the board it was binding upon appellant. It must be held therefore that the week for which appellant claims $30 compensation was within the thirty-eight weeks covered by his contract and he was therefore only entitled to $20, the regular weekly salary provided by his contract.

It should be stated that the appellant has not established that the meeting of the board of education on the morning of June 17th was a regular meeting. It appears to have been only an informal meeting. Due notice of such meeting does not appear to have been given. All members were not present. The agreement reached by a majority of the members of the board at a meeting not regularly called was not the action of the board and not legally binding upon the board. At a regular meeting of the board duly convened the agreement reached by a majority of the members of such board at an informal meeting was not confirmed and therefore failed to become the action of the board.

The board of education should immediately pay appellant the $20 due him for one week's service if he has not already been paid for such service.

The appeal herein is dismissed.

4003

In the matter of the appeal of Louise V. DeBevoise v. the board of trustees of school district no. 9, of the town of Newtown, county of Queens.

In the case of a teacher's inability to discharge her duties for several days of a term of school, the district trustees, not the teacher, possess the power to select a substitute teacher.

The compensation paid to a substitute teacher so selected, would have no legal bearing upon the compensation to which the teacher would be entitled for the remainder of the term so taught.

Decided September 15, 1891

H. A. Montfort, attorney for appellant

Draper, *Superintendent*

Appeal by a duly licensed teacher employed by the board of trustees of school district no. 9 of the town of Newtown, county of Queens, from the refusal of the board to allow the sum of $32.15 for her services as teacher for the month of January 1891.

The facts as alleged by appellant, are that she was in the employ of the board for the term of one year, at a salary of $41.65 per month; that during January 1891, she was taken ill, and was unable to teach from January 5th to January 26th, upon which latter date she resumed her duties. During the time of the appellant's illness, a teachers institute was held in the commissioner's district and the board closed the school, but the appellant was excused from attendance at the institute. The appellant contends that conformably to a custom in the district, teachers, in cases of illness, are entitled to provide a substitute at a rate of wages of one dollar per day, and on January 5th, the first day of appellant's indisposition, her sister taught in her place the forenoon session. In the afternoon the board provided another to teach in appellant's stead, and such substitute continued to teach until appellant resumed her position.

Appellant claims that but one dollar per day should have been allowed the substitute from her salary, and that the remainder should have been paid her.

No answer has been received, and the appeal will, therefore, be decided upon appellant's proofs.

The board has allowed the appellant and offered to pay her for twelve days' time — five days actually taught and for the week of the institute — a sum prorated upon her monthly salary.

I know of no rule of law which deprives trustees of the power to select their own teachers, either regular or as substitutes. Nor does the question of the wages allowed by the board to the substitute teacher, have any legal bearing upon the determination of appellant's claim.

As I view this case from the evidence before me, the board has acted generously toward the appellant. She is clearly entitled to no greater sum than that allowed by the trustees.

The appeal is overruled, but without prejudice to the right of the appellant to receive the sum tendered by the trustees, to wit: $21.53.

Application of the inspectors of common schools of the town of Monroe for instruction relative to certain rights

A teacher should not be questioned by the inspectors as to his religious opinions: but a person who openly derides all religion should not be employed as a teacher.

Decided February 1, 1830

Flagg, *Superintendent*

This was an application to the Superintendent from the inspectors of common schools, of the town of Monroe, for instructions as to their right to question a teacher with respect to his religious opinions, in order to determine whether his moral character was such as to entitle him to a certificate of qualification.

In relation to the moral character of the teacher, much is left to the discretion of the inspectors. They must be satisfied that it is good, because they have to certify to its correctness. On this point, what would be satisfactory to one man might be unsatisfactory to another. Every person has a right to the enjoyment of his own religious belief without molestation; and the inspectors should content themselves with inquiries as to the moral character of the teacher; leaving him to the same liberal enjoyment of his religious belief that they ask for themselves.

If a person openly derides all religion, he ought not to be a teacher of youth. The employment of such a person would be considered a grievance by a great portion of the inhabitants of all the districts.

The inhabitants of school district no. 1 in the town of Hunter v. the trustees of said district.

Colored persons ought not to be employed to teach white children.
Decided November 25, 1833

Dix, *Superintendent*

This was an appeal by some of the inhabitants of school district no. 1 in the town of Hunter, from the proceedings of the trustees of said district, in employing a colored man to teach the district school, which was attended almost exclusively by white children.

The law is silent as to the description of persons to be employed as teachers, and it is, therefore, a matter wholly in the discretion of the trustees. At the same time I consider the employment of a colored person to teach a school of white children as an unjustifiable exercise of authority, unless the parties concerned waive their objections to it. It is unnecessary to inquire whether public opinion, with regard to the admission of these persons to the enjoyment of all the social privileges of the whites, is well grounded or not. It is enough that a distinction exists; that they are disqualified by the laws of the United States for the performance of services in the militia, and by the Constitution of this State for the exercise of the right of suffrage, without a qualification of property.

Under these circumstances the trustees of school districts, whose duty it is to cultivate a spirit of harmony and good feeling, by carrying into effect as far as is proper the wishes of the inhabitants, should abstain from employing them in the capacity of teachers. If the trustees persist, however, notwithstanding the objections on the part of the inhabitants, I see no remedy for it, until the annual election of district officers occurs, when others may be elected in their place. They may pay the teacher the public money for his wages as far as it goes, and the residue must be collected from those who send to school. No inhabitant can of course be compelled to send his children.

The trustees of school district no. 10 in the town of Shawangunk, *ex parte*.

If a teacher inflicts unnecessarily severe punishment on a pupil he is answerable in damages. His government should be mild and parental; but he is responsible for the maintenance of discipline in his school.

Quere.— Whether inspectors can annul a certificate except on the grounds on which their authority to examine teachers is given?

Corporal punishment has no sanction but usage.

Teachers can not demand payment of their wages until the collector has had thirty days to collect them.

Decided March 1, 1833

Dix, *Superintendent*

This was an application for the opinion of the Superintendent on several questions submitted to him, the nature of which is explained by his answer.

Teachers are responsible to their employers for any abuse of their authority over the children committed to their charge. Their government should be mild and parental, but at the same time steady and firm. If a teacher inflicts unnecessarily severe punishment upon a scholar, he is answerable in damages to the party injured. It has been doubted by some whether the inspectors have a right to annul a certificate, except upon the ground on which their authority to examine is given to them, namely, to ascertain the qualifications of teachers in respect to moral character, learning and ability. The section of the law which gives them authority to annul a certificate, is general in its terms, but the question has been raised, whether that power is not to be construed as limited by the provisions of the other sections defining their powers. Whether inspectors may annul a certificate because a teacher has punished a scholar with too much severity, depends on the manner in which this question is settled. The question has never been presented distinctly to the Superintendent in such a manner as to obtain his decision upon it, and I merely suggest it as a matter which has given rise to doubt. With regard to the right to punish, no general rules have been laid down, and it would be difficult, if not impossible, to make any which would be applicable to every case. The practice of inflicting corporal punishment upon scholars in any case whatever, has no sanction but usage. The teacher is responsible for maintaining good order, and he must be the judge of the degree and nature of the punishment required, where his authority is set at defiance; at the same time he is liable to the party injured for any abuse of a prerogative which is wholly derived from custom.

The trustees must pay to the teacher the wages which they have contracted to give him; he can not be put, against his consent, to the inconvenience of collecting his dues himself, and if the trustees, who made the contract with him, do not pay him any portion of his wages, he can prosecute them or their successors in office for the whole amount. But unless they have made some specific agreement with him to the contrary, he can not demand payment until after the expiration of the time allowed the collector for making his return to the warrant annexed to the rate bill. He must be presumed to have made his contract with full knowledge of the requirements of the law. The trustees are to be regarded as acting in a public capacity, and they can not be required to do more than the law enjoins upon them, unless they have made themselves responsible individually by a specific agreement to do more. The statute gives the collector thirty days to execute the warrant, and the money by which the teacher is to be paid will not be presumed to be in their hands until that time has expired. He can not before the expiration of that time demand his wages, without showing moneys in their hands for the purpose of paying him.

4048 and 4049

In the matter of the appeal of E. A. Frink v. Oscar Haswell, as trustee of school district no. 8 of the town of Bethlehem, Albany county.

In the matter of the appeal of David Van Allen v. Oscar Haswell, as trustee of school district no. 8 of the town of Bethlehem, Albany county.

School discipline. The Department can not interfere in small matters of school discipline where no charges are made against the character or competency of teachers and where children have not been punished or deprived of the privileges of the school.

When a child has always used his left hand and has come to be 12 or 14 years of age, it seems very doubtful whether it is practicable to change the habit and therefore whether the teacher should insist upon it.

Decided January 11, 1892

Draper, *Superintendent*

These are two appeals arising in the same school, and involving the right of the teacher to require left-handed children to write with their right hand.

It is not possible for me to lay down any general rule upon this subject, and I do not feel bound to determine the matter. There is no allegation of cruelty on the part of the teacher. The teacher simply seems to have desired to do her duty by the children referred to. It may be that she has misconceived what her duty is in the particular cases which are presented. If a left-handed child can be taught to use its right hand in writing, that should be done. If the habit can be acquired, it ought to be acquired, and the teacher ought to insist upon it. At the same time, when a child has always used his left hand, and has come to be 12 or 14 years of age, it seems very doubtful whether it is practicable to change the habit, and therefore doubtful whether the teacher should insist upon it.

The Department can not interfere in all small matters of school discipline, particularly where no charges are made against the character or competency of teachers, and where children have not been punished or deprived the privileges of the school.

The appeals are dismissed, but with the injunction that the teacher shall attempt to carry out her laudable purpose only in cases where circumstances are such as to make it practicable.

TEACHERS CERTIFICATES

5406

In the matter of the application of Truman Daniels for the annulment of the certificate of Percy C. Lance.

Revocation of teacher's certificate on ground of cruelty. A teacher's certificate will not be revoked on the ground of brutal punishment of a pupil unless it clearly appears by a preponderance of evidence that the teacher has been brutal in his treatment of pupils. A single case of undue severity in the treatment of a pupil who was disobedient and resisting the teacher in the exercise of his proper authority is not sufficient to justify revocation.

Decided May 6, 1909

Herbert C. Teepell, attorney for the petitioner
Floyd L. Carlisle, attorney for the respondent

Draper, *Commissioner*

The petitioner, Truman Daniels, presents charges against Percy C. Lance a teacher in the public school at Glen Park, county of Jefferson, and asks that the certificate of the said Lance be annulled. He alleges that Lance was guilty of brutally treating his son Pearl Daniels; that the said Lance choked, kicked and struck his son without just cause. It appears that the son had been operated upon for appendicitis some time before, and that the punishment he received at the hands of the respondent aggravated this difficulty. It does not appear anywhere that the respondent knew of the pupil's condition when he punished him. The respondent denies specifically the alleged brutality and explains how it became necessary to use force in disciplining the petitioner's son. It is apparently agreed that the pupil resisted the respondent when he attempted to take him from his seat. The evidence adduced clearly shows that the pupil hung to his seat and that the force used by the respondent was for the purpose of compelling the pupil to leave his seat as directed by the respondent.

It does not clearly appear that the respondent has been guilty of unreasonable force in punishing other pupils. One of the pupils makes two affidavits in one of which he states that he was punished by the respondent very severely, while in another he states that he never saw any brutal treatment by the respondent. These affidavits are not worthy of consideration. The respondent's associates in the school say that in their belief the respondent has not been brutal in his treatment of the pupils under him. The president of the board of education expresses his satisfaction with the work of the respondent as principal of the school; the matter was evidently brought before the board but no indication of any adverse criticism of the respondent for his treatment of the petitioner's son is shown.

There is nothing in this case to show that the respondent has been habitually brutal in his treatment of pupils. The petitioner has not been able to establish by a preponderance of evidence, the fact that the respondent has been brutal

in his treatment of pupils in the Glen Park school. The respondent may have been unduly severe in his treatment of the petitioner's son. But the son was disobedient and resisting the teacher in the exercise of his proper authority. The discipline of the school would have suffered had such resistance been successful. The respondent may have unnecessarily injured the respondent's son in overcoming such resistance; but it can not properly be said that such conduct was so brutal as to justify the annulment of the respondent's certificate to teach.

Undue force in the punishment of a pupil will not be upheld by me. But it is not every case of such force by a teacher which will result in an annulment of his certificate. It has not been shown to my satisfaction that the power conferred upon me by section 336 of the Education Law, to annul a teacher's certificate, should be exercised in this case, and I therefore dismiss the petition.

Petition dismissed.

5451

In the matter of the application for the revocation of the teacher's certificate of Aida A. Austin.

Revocation of teacher's license; excessive punishment of pupils. Where a petitioner seeks the revocation of a teacher's license on the ground of excessive punishment alleged to have been inflicted upon a pupil, the charge must be proven by a preponderance of evidence.

Decided May 28, 1910

George Smith, attorney for appellant
J. M. Maybee, attorney for respondent

Draper, *Commissioner*

This proceeding is brought by the petitioner, Herbert L. Eldred, to secure the revocation of the certificate of qualification to teach granted to Aida A. Austin, a teacher in school district no. 4, town of Highland, county of Sullivan. The petitioner submits affidavits tending to show that the respondent was excessively violent in punishing the petitioner's daughter and another girl attending the school. It is alleged that the respondent "seized Bertha F. Eldred by the collar, and shook her and choked her and threw her on the floor, bruising her and making her stiff and sore from the effects of such fall. . . . That said teacher seized Ethel Daley by the throat and shook her and choked her, tearing her waist." The respondent denies that she so treated these pupils and states that she "did take both girls by the dress at the back, when they refused to obey her, and put them in the cloakroom"; and also that she "did not strike or choke either of said girls, or inflict any personal injury upon them whatever." It is also alleged by the respondent in her answer, and the petitioner does not deny, that both of the girls are over 16 and are large, well grown girls, and that one of them is larger than the respondent. Supporting affidavits are submitted by both parties. The two girls have sworn that they were punished as described in the petition, and three of the pupils who witnessed the affair

partly corroborate the petitioner's statement. On the other hand, nine pupils have sworn that the respondent's statement of the affair is true. Some question has arisen as to whether these pupils fully understood the nature and contents of their affidavits. The notary who took their oaths has submitted an affidavit in which he states that the whole matter was carefully explained to them, and that Miss Austin's description of the affair was read to each of them and after the nature and effect of an oath were explained to them, they were asked to swear to their affidavits. It thus appears that the essential facts to establish the charge of brutality on the part of the respondent are in dispute. It is impossible to arrive at a conclusion as to the truth of the charge from the affidavits of the several parties. The burden is upon the petitioner to prove the charge which he has made. He has failed in this respect, and it must be held that respondent has not been proven guilty of such brutality as to justify the annulment of her certificate.

Reference was made in the papers to the respondent's refusal to excuse the two pupils for the purpose of attending a drawing class conducted as a part of the work of a free library and reading room. It is apparent that the punishment was inflicted because the pupils insisted that they be permitted to attend such class. The petitioner contends that the teacher erred in not permitting these and other pupils to attend such class. It is not necessary to decide on this appeal whether it is proper to excuse pupils to attend drawing lessons elsewhere. In any event, the teacher was not bound to excuse for such purpose, unless the trustees, acting as a board, had formally resolved that pupils be so excused. There is nothing in the papers to indicate that such action was taken by the trustees of the district.

The petition is dismissed.

The infliction upon a pupil of unnecessary and cruel punishment is good cause for annulling a teacher's certificate.

Decided March 29, 1843

Young, *Superintendent*

A teacher, for an act of disobedience, ordered a boy, 15 years of age to hold out a book, of the ordinary size used in schools, at arm's length, level with his shoulder. The boy, after holding it in that position from five to eight or ten minutes, let it fall and said he could not hold it any longer. On being ordered to hold it out again, he peremptorily refused. The teacher, then, with a curled maple rule, over twenty inches long, one and three-quarters wide, and half an inch thick, struck him from fifteen to twenty blows on his back and thighs, and in so severe a manner as to disable him from leaving school without assistance. A physician was called and found his back and limbs badly bruised and swollen. The teacher on the succeeding day sent to him a physician, who pronounced him "very badly bruised." It was ten or twelve days before he so far recovered as to be able to attend school.

The Superintendent expresses his unqualified disapprobation of a punishment so severe and unreasonable. If the disobedience of the boy had been the

result of sheer obstinancy and wilfulness, it could not justify the infliction of fifteen or twenty blows with such a bludgeon, upon the back and limbs of the boy disabling him for a fortnight. Such a measure of punishment for such an offense would be sufficient ground for annulling a certificate.

A teacher's certificate should not be annulled for moral delinquencies known to the commissioner at the time of issuing the same, and where no departure from moral rectitude is shown to have occurred since.

Decided January 28, 1876

Gilmour, *Superintendent*

A certificate of qualification was granted to one Parks by the school commissioner, notwithstanding it had been charged, and admitted by the teacher, that twice prior to the time of his examination for said license, he had played cards for money. The commissioner, in view of this moral delinquency, required Parks to bring testimonials as to character, which he did, signed by reputable citizens, and in view of which the previous lapse of the teacher from morality in the respect noted, was condoned and the certificate issued.

Subsequently, formal complaint was made to the commissioner against the teacher upon the ground of this previous delinquency, and the commissioner went through the formality of a hearing, upon which, however, nothing, not previously known to the commissioner, was elicited. The certificate, however, was annulled.

It does not appear that Parks had violated the dignity of his profession, by gambling, subsequent to holding said certificate, or that he had the reputation of being a gambler, which would of course unfit him for the business of teacher, but that his reputation for morality is good, and he produces strong testimony to that effect.

Under these circumstances, I think the commissioner should have overlooked these two acts of indulgence prior to the granting of the certificate.

The Superintendent would not for a moment countenance the licensing as teachers, of persons of immoral character; on the other hand, it is very hard to annul the certificate of a successful teacher, and one whose moral character is shown to be now good, for acts committed some time ago. In all such cases there should be charity, and a disposition to help rather than hinder anyone who is trying to reform and lead a better life, especially in a case of this kind, where the commissioner, with full knowledge of all the facts, issued the certificate. Order of commissioner annulling certificate vacated.

3496

The cause assigned for the annulment of the teacher's certificate is "incompetency." This is a very grave and serious finding, and should not be reached, as it embraces not merely the ability to teach, but may also look to the moral character of the teacher and his learning, without a full and fair investigation on the part of the commissioner,

after notice to the teacher that such investigation would be had, giving him an opportunity in the presence of the commissioner to show his ability to teach, if that is called in question, and to refute any charges made by others and upon which the commissioner proposes to act.

Decided April 2, 1886

Morrison, *Acting Superintendent*

The school commissioner annulled the teacher's certificate on the ground of incompetency on the 14th day of December 1885. This annulment was made by the commissioner after a brief visit to the school on the 9th day of December, just before the close of the schoolhouse, and without previous notice to, or opportunity for a hearing on the part of the appellant. The commissioner admits that his action was taken under the provisions of subdivision 6, section 13, title 2 of the Code of Public Instruction, which provides that every commissioner shall have power, and it shall be his duty "to reexamine any teacher holding his or his predecessor's certificate, and, if he find him deficient in learning or ability, to annul his certificate." In his answer the commissioner sets up the inability of the teacher to conduct the school; but it would not seem that the commissioner had sufficient opportunity, from his observation, to determine the ability or inability of the teacher, to whom he had previously granted a certificate of qualification. If the commissioner depended upon his advice and information derived from others, it is only fair that the teacher should have an opportunity to be heard in his own behalf in writing, and if possible, refuting the charges touching his ability to conduct the school. The commissioner, after disclaiming any desire or intention to entertain or pass upon any charge affecting the moral character of the teacher, introduces a series of affidavits, directed to the proof of bad temper and inability to rule his own passions, want of self-control and partiality in the conduct of the school on the part of the teacher, and I must assume that it was upon testimony of this character that the commissioner proceeded to annul the teacher's certificate *for incompetency*. It has been frequently held by this Department that where complaints against a teacher of this kind are made, the teacher should have an opportunity to refute or answer the charges. The cause assigned for the annulment of the certificate is "incompetency." This is a very grave and serious finding, and should not be reached, as it embraces not merely the ability to teach, but may also look to the moral character of the teacher and his learning, without a full and fair investigation on the part of the commissioner's order revoking the teacher's certificate vacated and set aside. had, giving him an opportunity in the presence of the commissioner to show his ability to teach, if that is called in question, and to refute any charges made by others and upon which the commissioner proposes to act. I look upon the action of the commissioner as a violation of subdivision 6, section 13, title 2, under which he assumed to act, as he can not be said, within the language and spirit of the statute, to have afforded a reexamination to the teacher. Appeal sustained and the commissioner, after notice to the teacher that such investigation would be

3510

No general charge of immoral character will be sufficient to put a person upon the defensive. The charges should state the immoral *acts* of the teacher and should be drawn with care and distinctness.

The respondent must be given an opportunity to defend; to confront and cross-examine witnesses produced by the appellant.

The Department can not revoke a license upon charges affecting character, except upon clear and unquestioned proofs.

Trustees must not rely upon the Department to relieve them from their unwise contracts.

Decided June 11, 1886

Draper, *Superintendent*

The board of education preferred charges before the school commissioner of the district, against the teacher, and asked him to revoke her certificate on the ground of immoral character. The teacher was properly notified of such charges and given opportunity to defend. A hearing was set and three days occupied by the commissioner in receiving testimony offered by the board to sustain the charges, at the end of which time the proceedings were withdrawn by the parties instituting them. The principal reason given for such withdrawal is that the commissioner refused to receive as evidence affidavits of persons not present. The commissioner was instructed by the Department that affidavits should not be received as evidence in an oral examination. Counsel for the teacher asked the commissioner to render a decision in the matter to the effect that the charges had not been sustained. This the commissioner refused to do, and the board was allowed to discontinue without any judgment or decision being rendered by the commissioner.

On the 28th day of May 1886, the proceedings now before me were commenced. A copy of the charges and affidavits submitted in support thereof was served upon the respondent. The respondent has filed no answer and the case must be examined upon the evidence of the moving parties.

In proceedings of this kind, two rules must be complied with: (1) The charges must be definite and specific. No general charge of immoral character will be sufficient to put a person upon the defensive. The charges should state the immoral act of the teacher and should be drawn with as much care and distinctness as an indictment. (2) The respondent must be given an opportunity to defend, to confront and cross-examine the witnesses produced by the appellant.

In the examination of the charges and the affidavits filed therewith, it appears that the principal charges are those of lying, perjury and disrespect toward the board of education on the part of the respondent. The charges are, in the main, general, although some statements of the teacher are set out and characterized as false.

A large number of affidavits are filed and similar ones were upon the former appeal. The board of education entered into a written contract with the teacher without first having a personal interview with her. During her term of service as teacher, the exact time does not appear, misunderstandings and contentions arose between the respondent and the board. The papers are very voluminous, covering a mass of irrelevant matter. The controversy is a highly unfortunate

one, and it would undoubtedly have been far better if the respondent had never been employed to teach in this school, but with that the Department has nothing to do. The only question left for me is, whether the papers in the case show the respondent to be a person of such immoral character as to render it improper for her to hold a certificate to teach in the common schools of this State. It is not whether she lacks judgment; it is not whether she is a successful teacher; but whether she is of immoral character. The Department can not revoke a license upon charges affecting character, except upon clear and unquestioned proofs. The fact unquestionably is, that there has been a heated controversy, and that disagreeable things have been said on both sides. Undoubtedly some things have been said which are not altogether true, as is the case in all such controversies, but I find no evidence sufficient to justify me in holding that the respondent is a woman of immoral character. The allegations against her are, in the main, general and indefinite and such specific allegations of fact as are contained in the charges are not supported by the proofs.

If trustees will employ teachers without sufficient caution, without previous acquaintance or inquiry, they must not rely upon the Department to relieve them from their unwise contracts, and particularly so when the most that can be said against a teacher so employed is that she lacks tact and management, or talks offensively under opposition and criticism.

The charges are dismissed.

3501

A state certificate while unrevoked "shall be *conclusive evidence* that the person to whom it was granted was qualified by moral character, learning and ability to teach any common school in the State." For this reason a board of education can not discharge, upon the ground of incompetency, a teacher who was hired for a stated time and who holds a state certificate.

Decided April 5, 1886

Morrison, *Acting Superintendent*

The teacher was employed in pursuance of a certain contract dated June 16, 1885, for the school year beginning September 7, 1885, at a salary of $500 a year. The teacher continued in her engagement as principal of the school, until the 2d day of February 1886, when she was dismissed by order of the trustees. A tender of $5 was then offered to her which at first she refused to accept, but afterward did accept; she gave the board credit for that amount, but claimed that they owed her the balance of the $500, the contract price, which they had not paid, and held herself in readiness to teach the school. It appears that the amount which will be due her at the expiration of her term, and for the unexpired term, is $257. She asks that the action of the board in discharging her be set aside, or that she be paid the amount of the salary due and to become due to her on the contract. In answer, the board of education urge as reasons for the dismissal of the teacher, her deceit in misstating her age; her unjustifiable interference with, and the annoyance to which she subjected an

assistant teacher in the school; conduct on her part tending to destroy the discipline of the school; interference with the comfort and convenience of the pupils, according to whim or caprice; inability to perform or conduct the affairs of the school, and a want of moral rectitude.

I find that the appellant holds a state certificate, granted to her in 1867, at which time, as at present, the provision of section 15, title 1 of the Code of Public Instruction, was operative and controlling. This section distinctly provides that the Superintendent's certificate while unrevoked "shall be *conclusive evidence* that the person to whom it was granted was qualified by moral character, learning and ability to teach any common school in the State." The case cited by the respondents, therefore, decided by Superintendent Van Dyck in 1858, which holds that the teacher's license from the proper officer is prima facie evidence only, that the applicant possesses the requisites of moral character, learning and ability to teach, but it is not conclusive — does not apply to the holder of a certificate granted by the State Superintendent. I am debarred, therefore, by the statute from considering the allegations of the respondents touching the moral character, learning and ability of the appellant, and the respondents are concluded from offering any testimony on this point. It must be shown that there was an express violation of the terms of the contract made with the teacher, in order to justify her dismissal during the term for which she was engaged. An attempt is made to do this by showing that she was negligent in the matter of keeping the register, but this seems to have been an afterthought of the board of education, and the register, it appears, was properly completed before the time of the answer to the appeal. I am, therefore, constrained to sustain the appeal, and to set aside the action of the board of education in dismissing the appellant. The respondents are, therefore, ordered forthwith to restore the teacher to her position and to permit her to continue her contract until the expiration thereof; or, if they deem continuance in the school will not be for the best interests of the district, they are ordered, from time to time, and at such times as payments are usually made by the board, to pay her the amount of her salary, named in the contract as the same would be due, had she been permitted to continue her services as teacher, subject to the deduction of any amounts of money which the said appellant may have received for services elsewhere during said unexpired term and up to the time of any such payment as herein ordered.

Holders of state certificates are not exempted from examinations, by school commissioners or city superintendents, in the places where they seek situations as teachers. Decided April 13, 1864

Rice, *Superintendent*

A state certificate does not of course authorize the holder to demand employment of right, from any school officer, or board of officers. These have the right to demand just such evidence of qualification as they deem proper. Hence they may say to any applicant for a position who holds a state certificate, "we will employ you if you can procure a certificate from the local commissioner or from

the city superintendent." If he refuses to comply, of course they may refuse to employ him. Hence it follows that the board of education in the city of New York may prescribe such conditions of qualification as they see fit, as a precedent condition to employment. If they require examination by the city superintendent, the teacher has no alternative but to comply. The holder of a state certificate is supposed to be so thoroughly qualified in all respects, that he is ready to pass an examination at any time. He should seek, rather than avoid, the application of the several tests that can be applied to his character and scholarship.

3686

In the matter of the appeal of William W. Durfee v. Joseph B. Thyne, school commissioner of Fulton county.

The annulment of a teacher's certificate will not be upheld when the commissioner's action was based solely on the ground that the teacher was impecunious and had failed to liquidate certain debts at the time he had promised to do so.

Decided May 19, 1888

Draper, *Superintendent*

This is an appeal from an order made by the respondent upon the 3d day of February 1888, annulling a teacher's certificate issued to the appellant by the respondent on the 10th day of September 1887. The action of the commissioner was the result of an investigation into certain charges made against the teacher in which it was alleged that he was indebted to different persons for small sums of money which he had promised to pay from time to time, but had failed to keep his promises. The appellant admits the debts and the promises to pay them, but alleges that the failure to make his word good was because of his inability to do so. The annulment of a license is a step which should only be taken for the protection of the schools. It is no part of the duty of school officials to aid in the collection of debts or to punish for misconduct. The only ground upon which the act of the commissioner in the present case could be upheld would be that the teacher was shown to be so untruthful as to render it improper for him to continue as an instructor of youth.

This is not shown to my satisfaction. It appears that Durfee has been a teacher in Fulton county for nineteen years. Many of the most prominent and reputable citizens of that county, including the district attorney, the superintendent of the poor, two ex-members of the Legislature, and several ex-school commissioners, furnish affidavits in which they swear that the appellant is a man of good moral character, with good general repute as to truth and veracity.

Taking these facts in connection with the nature of the charges against him, and also remembering that the certificate which it is undertaken to annul is one which was issued less than a year ago by the present commissioner, I come to the conclusion that there is not sufficient reason to justify me in upholding the order of annulment.

The appeal is sustained and the order of the commissioner declared to be of no effect.

357[2]

In the matter of the appeal of Jessica Wells from the order of Perrin A. Strough, school commissioner of the third district of Jefferson county, annulling the appellant's certificate to teach.

A school commissioner's order annulling a teacher's license will not be sustained, unless for some cause sufficiently grave to justify a public and permanent revocation of the right to teach.

This proceeding is not to be resorted to in order to get rid of a teacher, because people in a district are dissatisfied with her.

Decided March 2, 1887

H. E. & G. E. Maise, attorneys for appellant

Draper, *Superintendent*

This is an appeal by Jessica Wells, a teacher, from the order of the school commissioner, dated December 28, 1886, annulling a certificate to teach, issued to her by said commissioner. The teacher was engaged in teaching the district school in district no. 6, town of Cape Vincent, in the third commissioner district of Jefferson county.

The order of annulment was made upon charges against the teacher after an examination by the commissioner, upon which examination the appellant and her counsel were present, and witnesses were examined.

All the proceedings had upon such examination are before me, the exhibits showing the same forming part of the papers submitted upon the appeal.

There is no charge made against the appellant, affecting her character. The charge seems to be that she neglected classes and scholars, and that her methods of teaching were faulty. I am unable to find that she was not intelligent, active, and did not give all her time during school hours to the instruction of the pupils under her charge.

As bearing upon the allegation that her methods were faulty, I find that the commissioner, as late as the 13th day of December last, just two weeks prior to the order of annulment, visited the school taught by appellant, and made the following entry upon the teacher's register:

Visited this school December 13, 1886. I am well pleased with all the school work, and believe that if the teacher had the full and hearty cooperation and support of the parents, this would be a term of school marked with more progress than any school I ever visited here.

[*Signed*] PERRIN A. STROUGH
School Commissioner

After this visit it appears that the commissioner did not visit the school, but upon the examination relied mainly upon the testimony of several pupils of the school, who had not attended school very regularly.

It may be that the teacher has not managed the school as well as some other might have done, but, assuming that to be the case, is it just to subject her to the public humiliation of an annulment of her certificate, in the middle of a

term, without any charge against her character, and within a few days of the time when the commissioner had made an official record indicating his satisfaction with her work, and his belief that the cooperation of parents was the only thing necessary to make the school a better one than any he had ever before visited there? If her school is not as well classified and arranged as it might be, why not aid her to do it better? If her methods are faulty, why not help her to improve them? There is nothing to indicate any effort to do so, either by the trustee or commissioner, and nothing to show her unwillingness to be guided by the suggestions of these officers, or to do the best she can.

The annulment of a license is a severe penalty to inflict upon a teacher. It ought not to be imposed except for a cause sufficiently grave to justify a public and permanent revocation of the right to teach. It is not to be resorted to for the purpose of removing a teacher from the school because people in the district are dissatisfied with her. Moral delinquency, or a deliberate infraction of school laws, or the wilful defiance of the proper suggestions or directions of supervisory officers, or utter inability to follow them, may be sufficient ground for annulling licenses, but nothing less grave than this is.

The case of the appellant does not come within this rule, and her appeal must, therefore, be sustained.

The order of annulment of the commissioner is vacated and set aside.

3959

In the matter of the appeal of Frank F. Gray v. Arthur P. Nichols, school commissioner of Chemung county.

Order of a school commissioner annulling a teacher's certificate in the middle of his term of employment, because of the "want of sufficient ability to teach," set aside when it appears that the teacher is a man of sufficient general ability to teach school successfully, and is able to do so, provided he receives the support of the community.

Decided February 4, 1887

Draper, *Superintendent*

The appellant is principal of the school in district no. 1 in the town of Ashland, Chemung county, having been licensed to teach by the respondent. On or about the 7th day of December 1886, the appellant received a written notice from the respondent, announcing the intention of the commissioner to annul the certificate of the appellant on or before the 18th day of December, because of the "want of sufficient ability to teach." On the 25th day of December, the teacher received, by mail, an order annulling his certificate, dated the 18th day of December, signed by the commissioner. From this action this appeal is taken.

The school commissioner resided at the time in the village of Wellsburg, where the school is located, and had previously taught in this school. There have been dissensions in this district for some time, in which the commissioner

has had some part. It is alleged by the appellant that the act of the commissioner was the outgrowth of these dissensions in the district, and because of personal prejudices on the part of the commissioner against him. This is denied by the respondent. He says that he visited Mr. Gray's school and severely criticised his methods of teaching, and insists that the discipline was very lax and inefficient. Many of the most prominent residents of the district, including the president and trustees of the village of Wellsburg, certify that they are familiar with the condition of affairs at the school, and that Mr Gray's administration of the school is in every way creditable to him and satisfactory to them. It is very possible that there may be some errors on both sides of the controversy. There usually are in heated controversies of the character of this one. But weighing all that has been said upon both sides in the voluminous papers which are presented, I have come to the conclusion that there has not been sufficient cause shown for the annulment of the teacher's license, in the middle of his term of employment, by the commissioner who granted the same. To uphold the act of the commissioner would be to inflict a humiliation upon the teacher, which, I am inclined to think, would be unjust, and it would be demoralizing to the district. The papers which Mr Gray has presented here and the assurances of prominent citizens of the locality whose credibility is undoubted, go to show that he is a man of sufficient general ability to teach school successfully, and, I have no doubt, will do so if he can have the general support and good will of the community. No one can succeed without this. There is little reason to believe that the work of a teacher who might succeed him would have more cordial or general support than his work has.

The appeal is sustained, and the order of the commissioner annulling the certificate of the appellant is hereby set aside and declared void.

3928

In the matter of the charges against W. L. Utter.

Teacher's license revoked for using scurrilous and obscene language in a letter addressed to a school commissioner.

Decided December 1890

Draper, *Superintendent*

On the 15th day of November 1890, information reached the Superintendent by letter, that W. L. Utter had addressed a letter to E. R. Harkness, school commissioner of the second district of Delaware county, which contained scurrilous and obscene language, such as no gentleman, and particularly no school teacher, should use. This letter was forwarded to the Superintendent by said School Commissioner Harkness. An inquiry addressed to said W. L. Utter, elicited an admission from him that he was the author of such language, and had addressed such letter to said School Commissioner Harkness. Further investigation showed that Utter holds a second grade certificate granted

by E. C. Douglass, school commissioner of the third commissioner district of Ulster county, and dated May 4, 1889. The language used by said Utter in his letter addressed to said School Commissioner Harkness is abundant reason why he (Utter) should not be allowed to teach in the public schools of this State, and his said certificate is hereby revoked; such revocation to take effect Saturday, December 6, 1890.

3853½

In the matter of the charges against H. L. Bundy.

Falsification by a teacher of the register of attendance at his school; *held*, sufficient ground for the annulment and cancelation of his license.

Decided December 24, 1889

Draper, *Superintendent*

The respondent holds a commissioner's uniform certificate of the first grade, issued to him by E. R. Gregory, school commissioner of the second district of Otsego county, on the 13th day of March 1889. He has taught several terms prior to the close of the last school year in district no. 14, of the town of Unadilla. It is charged that, during the spring term in said district, he falsified his school register by recording several pupils as present for many weeks when they were not in attendance at all. The register and the affidavits of these pupils are presented, and, taken together, clearly show many fraudulent entries. It is stated that during the term not more than six or eight pupils attended, although the register indicates a very regular attendance of twenty-eight. The respondent has had abundant notice of the allegations against him, and full opportunity to meet the same. He has failed to do so. I entertain no doubt of the facts being as alleged. When it is remembered that the register is sworn to by the teacher, and becomes the basis for apportioning public moneys to the district, the gravity of the offense can not be overlooked. It is at least clear that a person guilty of such an offense ought not to be continued as a teacher and commended as a suitable person to instruct children.

It follows that the certificate of the respondent must be annulled and canceled, and it is so ordered.

3750

In the matter of the appeal of Casper D. Bellows v. E. R. Harkness, school commissioner of the second commissioner district of Delaware county.

The action of a school commissioner, in refusing to indorse a certificate to teach, issued to a teacher by another commissioner, upon the ground that the holder was addicted to the use of intoxicating drinks, will be sustained, unless it is made to appear that he acted from malicious or unworthy motives. Where it appears that a commissioner

acted from proper motives, and with the purpose of discharging the duties of his office fairly and justly in refusing to grant a certificate, it is unnecessary to inquire into the reasons for his action.

Decided January 15, 1889

Draper, *Superintendent*

This is an appeal from the refusal of the school commissioner of the second commissioner district of Delaware county to indorse a certificate issued to the appellant by another commissioner. The ground alleged by the school commissioner for his refusal is that the appellant is addicted to the use of intoxicating drinks.

I do not feel bound to inquire into the truth or falsity of this allegation against the appellant. The commissioner had the right to refuse to indorse such certificate, assuming, as we are bound to assume, that he acted from proper motives and with a purpose of discharging the duties of his office fairly and justly. Unless it is claimed that he acted from malicious or unworthy motives, it is unnecessary to inquire into the reasons for his action. There is no allegation that he was influenced by any unworthy or improper motive.

The appeal is dismissed.

3863

In the matter of the charges against Irving W. Craw.

A public school teacher is shown to be intemperate, a frequenter of saloons and disreputable places and to have inflicted cruel and unnecessarily severe punishment upon pupils. *Held,* that he should be dismissed and that his certificate should be revoked.

Decided March 6, 1890

Draper, *Superintendent*

Irving W. Craw holds a certificate issued to him by C. G. Richards, school commissioner of the first school commissioner district of Niagara county, on the 26th day of November 1889, and is engaged in teaching in district no. 6, of the town of Pendleton. He is charged with visiting saloons and a house of ill-fame, with being intoxicated at different times, with drinking from a bottle in the schoolroom and with inflicting cruel punishment upon pupils. The school commissioner has assumed to investigate the charges and has come to the conclusion that the proofs are not sufficient to justify him in annulling the teacher's certificate. With this determination, residents of the district are not satisfied, and have asked the Superintendent to examine the testimony taken upon the commissioner's investigation. This has been done with considerable care.

Several persons testify to seeing Craw in and about saloons, and in a state of apparent intoxication at different times. Several pupils swear to seeing him drink from a bottle in a schoolroom. The trustee of the district and his wife swear that the teacher boards with them, and that they have seen him under the

influence of liquor. Another witness swears that on the 8th of February he followed the accused and saw him visit three different saloons and a house maintained by a woman shown by the public records to have pleaded guilty to an indictment for keeping a disorderly house.

The accused swears that some of this evidence is not true, although he does not deny being in and about saloons, or that he is addicted to the use of intoxicating drinks, or has within a comparatively recent period, been under the influence thereof. His negative statements stand alone. He makes no attempt to show previous good character. No one corroborates his testimony. Nothing is said against the credibility of the witnesses opposed to him.

There is considerable other testimony concerning the infliction of cruel punishment by the accused. It is shown that he has beaten several pupils on different occasions with a stick three or four feet long, until he has drawn blood upon and disfigured their hands and heads, raised ridges upon their bodies, and produced lameness which continued for a week or more. No denial whatever of this is made by the teacher.

In view of all this evidence, I have no hesitation in disagreeing with the conclusion of the school commissioner. It is needless to comment upon the necessity of good character and a blameless life on the part of teachers in the schools. There are enough who are anxious to teach who are not lacking in these attributes. Such a person as the accused is shown to be, should give way to another who will set an ennobling example before children. Regardless of the question of character, the proofs of cruel punishments could not be overlooked. The time has gone by when such indignities may be inflicted upon children or such scenes as this testimony depicts, may be enacted in the presence of a public school. A teacher who has not the character and self-possession, and who has not yet learned how to maintain discipline, in a better way, is no longer wanted.

The certificate of Irving W. Craw is hereby annulled

3886

Newton R. Peckham v. R. C. Francis, school commissioner of the first commissioner district of Madison county.

The action of a school commissioner revoking a teacher's license sustained, when the holder while teaching had engaged in other pursuits, and in consequence neglected his work in the school, and where it became apparent that the teacher had lost all interest in his work, had become lax in discipline and had neglected to preserve order in the school.

Decided July 16, 1890

Draper, *Superintendent*

The appellant held a certificate as a teacher issued in due form by D. D. N. Marvin, school commissioner of the first district of Onondaga county, on the 29th day of August 1888, and duly indorsed by the respondent on the 30th day

of August 1888, and was engaged in teaching in school district no. 1, of the town of Georgetown, when, on the 24th day of April 1890, the respondent revoked and canceled such certificate, against which last action the appellant brings this appeal.

The appellant alleges and shows that the school commissioner had visited his school repeatedly, and at the close of the first year of his employment had strongly commended him as a teacher. The respondent admits this, but alleges that during the second year of appellant's employment he was engaged in pursuing the study of law in Syracuse, and neglected his school to such an extent that many complaints were made by patrons of the district. The respondent states, also, that he visited the appellant in his school at four different times, and admonished him that he was neglecting his work and that complaints were frequent. He states, also, that, at such visits, it was manifest that appellant had lost all interest in the school; that discipline was lax, and that much disorder prevailed. The statements of the commissioner are corroborated by the trustee in the district, and by other reputable and substantial residents thereof.

After carefully reading all the papers in the case, I have come to the conclusion that there is no sufficient reason shown for my setting aside the order of the commissioner.

The appeal is, therefore, dismissed.

3866

In the matter of the charges against William G. Wilson.

A person holding a teacher's license engages in a dishonorable vocation. *Held,* sufficient cause for annulling his license.

Decided March 29, 1890

Draper, *Superintendent*

On the 7th of March 1890, information reached the Superintendent, by letter, to the effect that William G. Wilson, a teacher in the public school at Pike Pond, Sullivan county, was engaged in selling lewd and indecent photographs. A copy of an advertisement by said Wilson in a paper called the "*National Police Gazette,*" was forwarded as proof of the fact. A copy of said paper was procured and the advertisement found to be of the following words, namely:

[NOTE: The advertisement is of such character, that it is deemed not best to insert it here.]

The Superintendent also procured the advertisement to be answered, and the person who did so received pictures which would probably not be held to be *obscene* within the meaning of the law; but they were of such a character as to preclude any self-respecting person, and particularly a teacher, from being engaged in the business of selling them.

Aside from the questionable character of the articles sold, the business as carried on by Wilson is highly dishonorable, if not legally fraudulent. Cheap prints for which sixty cents are charged, did not cost two cents. The vender seeks to extort money from simpletons by appealing to their curiosity and baser passions. With his cheap pictures he sends advertising cards and leaflets of a still more questionable character than that above printed, with a view to extorting still more money.

Investigation showed that Wilson holds a second-grade certificate issued by William Westfall, school commissioner, on October 8, 1888.

With a knowledge of these facts in the possession of the Superintendent, Wilson was required to show cause before him at 10 o'clock this day, why his certificate should not be revoked. He has failed to appear, although he has written a letter acknowledging the receipt of the order to show cause, and admitting that he is the same person named in the advertisement. He claims that the business is not *obscene*. It is clear that he is engaged in a scandalous business, while he tries carefully not to infract the technical provisions of the penal statutes relating thereto. Whether he has been guilty of a crime is a question for the district attorney of his county, rather than the Superintendent of Public Instruction. It is not necessary to wait for a person to be sent to jail before stopping him from teaching school. There is abundant reason why this person should be stopped at once. His certificate is hereby revoked.

5262

In the matter of the appeal of Roscoe C. Parker from the action of the trustee of school district no. 9, town of Leicester, Livingston county.

A school commissioner may for valid reason refuse to indorse a training class certificate. Until such certificate is indorsed by the school commissioner having jurisdiction the holder of such certificate can not enforce a contract against a trustee within such school commissioner district. The relief in such case is an appeal to the Commissioner of Education from the action of the school commissioner in refusing to indorse such certificate.

Roscoe C. Parker, attorney in person
Charles D. Newton, attorney for respondent

Draper, *Commissioner*

The appellant herein contracted on or about October 2, 1905, to teach the school in district no. 9, town of Leicester, for a period of 32 weeks. On September 5, 1905, a special meeting of the district was held and authorized the trustee to provide for the education of their children in another district under the contract system if the expense thereof should be less than the expense of maintaining school in the district. It was after this meeting that the trustee made the contract with appellant. Appellant taught under his contract until November 8, 1905, when the trustee ordered the school closed. Another special

meeting was held December 12th and the district again authorized the trustee to provide for the education of the children of the district under the contract system. Thereafter the trustee contracted for the education of the children of the district at the school in the village of Perry. He also dismissed appellant.

The first special meeting authorizing the contract system was held September 5, 1905. The instruction to the trustee was upon the condition that it would cost less to contract than to maintain a home school. On October 2d he contracted with appellant to teach 32 weeks. He had the right to make such contract. The fact that the district again voted on December 12th that the trustee should contract if that plan should be cheaper did not release the district from its liability under the contract with appellant.

Respondent claims, however, that the appellant was not legally qualified to contract to teach on the ground that his teacher's certificate was not valid in the school commissioner district in which district no. 9, Leicester, is located. Appellant held a training class certificate issued August 1, 1900, and valid in the first school commissioner district of Wyoming county. The certificate expired July 31, 1903. It was indorsed by School Commissioner McNinch in 1902 but such indorsement expired with the expiration of the certificate. School district no. 9, Leicester, is under the jurisdiction of School Commissioner McNinch. This certificate of appellant was renewable under the regulations of this Department for a period of five years. It appears the certificate was renewed by Commissioner Lewis of the first commissioner district of Wyoming and therefore became valid in that commissioner district until July 31, 1908. The certificate was not indorsed by Commissioner McNinch after its renewal and was not therefore a valid certificate in that commissioner district at the time appellant contracted with or was teaching in district no. 9, Leicester. The fact that he held a valid training class certificate qualified him to contract in any school commissioner district in the State before his certificate was indorsed by the school commissioner having jurisdiction, but before he entered upon the performance of his contract it was necessary that his certificate should be properly indorsed. It appears that he sent his certificate to Commissioner McNinch for indorsement, but the commissioner refused to indorse it. The commissioner was required to indorse it or give good reasons for refusing to do so. On refusing to indorse it the relief of appellant was an appeal to the Commissioner of Education for an order directing the school commissioner to indorse his certificate. Appellant took no action to compel Commissioner McNinch to indorse the certificate and he was not therefore legally qualified to teach in district no. 9, Leicester. Not being legally qualified to teach in the district the trustee had no authority to continue him as teacher or to pay him from the funds of the district. It follows therefore that the appeal can not be sustained. However, the Commissioner of Education may excuse the default of a trustee in employing a teacher not legally certified if good reason is given therefor and this case appears to be one in which the school commissioner should file an application at this Department for the

excuse of the default of the trustee in employing appellant while not legally qualified and the legalization of the time thus taught. He may then receive full compensation for the time he actually taught.

The appeal herein is dismissed.

3885

In the matter of the appeal of George Steinson v. John Jasper, superintendent of schools of the city of New York.

A state certificate is ample authority to the holder to teach in the city of New York, although the board of education of that city may exact a further examination as a condition precedent to employment.

A teacher in New York City holding a state certificate can be removed from his position only by a revocation of his certificate by competent authority, or by the action of the board of education.

Decided July 15, 1890

Draper, *Superintendent*

The appellant had been a teacher in grammar school no. 29, in the city of New York for some three years when, on March 11, 1890, he received a notice from the city superintendent of schools stating that his certificate would expire on the next day, March 12, 1890. The city superintendent, in his answer, states that on the 9th day of October 1886, he issued to the appellant a license to teach as an assistant teacher of the third grade in the grammar schools of said city. This license was extended on the 12th day of September 1887, for the further term of six months, and was afterwards renewed or extended as follows: March 12, 1888, for six months from that date; September 12, 1888, for six months from that date; March 12, 1889, for six months from that date; September 12, 1889, for six months from that date. The superintendent, therefore, claims that, as his license was not further extended, the appellant had no authority to teach beyond the 12th day of March 1890, and, following this view to its conclusion, the appellant was prevented from continuing in his position.

Various questions are raised by the appellant as to the authority of the city superintendent to issue to him a certificate which is only provisional and temporary in its operations, and to keep him in suspense by repeated renewals of such certificate, and also to cut off his employment by declining to further extend the same. The appellant shows that, under the statute relating to the management of the schools in the city of New York, and the regulations of the board of education, he could be licensed only by the city superintendent with the concurrence of two inspectors, and that he was so licensed. He denies that what he claims amounts to a revocation of such license can be declared or enforced by the city superintendent alone. I find it unnecessary to consider or determine these questions, for it appears in the papers submitted, and is corroborated by the records of this Department, that the appellant received from the State

Superintendent of Public Instruction, on July 16, 1883, after having passed the regular State examination, a state certificate authorizing him to teach in any common school in the State during life, or until such certificate should be revoked. Such state certificate is still in force.

Before a person can teach in any public school in the State, he must receive from an officer authorized to grant it, a certificate that he is, by reason of moral character, intellectual qualifications and general fitness, qualified for doing so. This certificate authorizes him to teach only when he has been employed by an officer authorized to contract with him for employment. In the present case, the appellant had ample authority, regardless of the certificates issued to him by the respondent, to teach in any grade in the city of New York, provided he was duly employed by the board of education of such city. No question is raised about the regularity of his employment. Having such authority and being so employed, he could be removed from his position only pursuant to the provisions of section 1042 of the New York City consolidation act. This section provides that he might be removed by the board of education, upon the recommendation of the city superintendent, or of a majority of the trustees for the ward, or of a majority of the inspectors for the district, but only by a vote of three-fourths of the members of the board of education.

There may have been sufficient ground for removing Mr Steinson from his position. Whether there was or not, the papers in the case do not disclose, and it does not devolve on me to determine. In any event, it seems clear to me that he could be removed only in one of two ways: first, by revocation of his certificate as a teacher; and, second, by the action of the board of education. His certificate in the present case could be revoked only by the State Superintendent, as he had successfully passed the most severe examination to which teachers in the State are subjected, and held the highest grade of certificate ever issued to a teacher in New York. There was no action of the board of education in the premises.

I therefore come to the conclusion that he has been unlawfully deprived of his position as a teacher in grammar school no. 29, and that he now stands entitled to exercise the functions and receive the emoluments of such position, until such time as his certificate as a teacher shall be revoked by competent authority, or he shall be removed from his position in the manner provided by the local statute relating to the matter.

The appeal is sustained.

3775

In the matter of the appeal of Francis S. Williston v. George E. Knapp, school commissioner for the county of Rockland.

The regulations governing uniform examinations specifically empower a commissioner to withhold a certificate from any person when, in his judgment, such person lacks either

moral character or the qualities essential to success in a teacher. The only purpose of the uniform examination is to prevent the issuance of a certificate to any candidate who can not show the essential intellectual qualifications.

Decided March 29, 1889

Draper, *Superintendent*

This is an appeal from the refusal of the school commissioner to grant a first-grade certificate to the appellant.

The appellant alleges that the school commissioner refuses him a certificate of the first grade through personal feeling against him.

The respondent denies any personal antagonism to the teacher, but alleges that, in his judgment, the teacher lacks tact in the management of a school. He says he has visited a school in charge of the appellant and found the discipline very defective. He says that the teacher undoubtedly has the intellectual qualifications for passing the uniform examination, and that he has stood willing upon his doing so, to issue a certificate to him of the second grade.

The uniform examination regulations specifically empower a commissioner to withhold a certificate from any person when, in his judgment, such person lacks either moral character or the qualities essential to success in a teacher. It is not the purpose of the uniform examination system to take this prerogative from school commissioners. The only purpose of such examination is to prevent the issuance of a certificate to any candidate who can not show the essential intellectual qualifications. The question of character and tact as a teacher is to be decided by the commissioner, and the determination of the commissioner will be upheld unless it is shown that he acts from unworthy or improper motives. While this is alleged in the present case, the appellant produces no proof of it, and I see nothing in the papers to justify me in overturning the action of the commissioner.

The appeal is, therefore, dismissed.

4268

In the matter of the appeal of Lucy V. Hunter v. Julia K. West, school commissioner, Richmond county, and the board of education of union free school district no. 2, of the towns of Middletown and Southfield, Richmond county.

Since June 30, 1894, the school commissioners in the State have no power under the school law to reexamine any teacher holding his or her predecessor's certificate, and if he find him or her deficient in ability or learning, to annul the certificate. Where, in August 1894, a school commissioner revoked or annulled a teacher's certificate issued by a predecessor in office, an appeal having been taken from such action by the commissioner, the act or decision of the commissioner must be vacated and set aside.

Decided October 3, 1894

William M. Mullen, attorney for appellant
Howard R. Bayne, attorney for respondent West
John Widdecombe, attorney for board of education

Crooker, *Superintendent*

The appellant herein appeals from the act, decision or order of the respondent West, in revoking or annulling a teacher's certificate of the second grade issued to the appellant on March 14, 1894, by Hubbard R. Yetman, school commissioner of Richmond county; and from the action of the respondent, the board of education, in declining to contract with the appellant to teach in the schools under their control in consequence of such annulment of her certificate, and the refusal of said board to pay appellant for the entire month of August 1894.

The material facts established by the papers filed in this appeal are as follows:

That in the year 1893 John J. Kenney was the school commissioner of the county of Richmond, and on September 2, 1893, duly issued to the appellant herein a teacher's certificate of the third grade, which certificate licensed said appellant to teach the school in district no. 2, in the town of Middletown, for the term of six months from the date of the said certificate; that the appellant, after receiving said certificate, under a contract made by her with the trustees of said union free school district no. 2, taught in the school of said district for the term of six months; that the term of office of said Kenney as school commissioner of the county of Richmond terminated on December 31, 1893, and that on January 1, 1894, and until the latter part of March 1894, Hubbard R. Yetman was de facto school commissioner of said county of Richmond, said Yetman being succeeded in said office by the respondent Julia K. West; that on March 14, 1894, said Yetman, as such school commissioner as aforesaid, after an examination of the appellant herein, issued to her a teacher's certificate of the second grade in the form prescribed by the Superintendent of Public Instruction, whereby and wherein the said appellant was duly licensed to teach in any common school within the county of Richmond for the term of two years from said March 14, 1894; that under said certificate and license and her contract with said trustees of district no. 2, of Middletown, the said appellant taught in the school in said district from March 14, 1894, until such school was closed for the school year of 1893–94, to wit, June 29, 1894; that the respondent West, under date of July 16, 1894, wrote to appellant, stating that she (respondent West), having found discrepancies in the papers of appellant, marked by Yetman, she (said West) had been advised by the Department at Albany to request appellant to come to the next examination, on August 16th and 17th, at the New Brighton schoolhouse, and be reexamined in those subjects in which the appellant failed to receive the required percentage, and also those subjects taken over six months ago; that said letter was not received by appellant until July 28, 1894, by reason of her absence from the county of Richmond from July 12 until July 28, 1894; that the appellant, relying upon her said certificate of the second grade, issued by said Yetman, did not attend said examination of August 16th and 17th for a certificate of the second grade, but did attend such examination, and took the examination and applied for a teacher's certificate of the first grade; that, on or about August 24, 1894, said

appellant received a letter from the respondent West, of which the following is a copy: "New Brighton, S. I., August 20, 1894. Miss Lucy V. Hunter: On account of discrepancies in the marking of the papers, the certificate issued to you by Mr Yetman is revoked. Julia K. West, school commissioner for the county of Richmond." That on or about said August 20, 1894, the respondent West notified the trustees of said school district no. 2, Middletown, of such revocation by her of said certificate of appellant.

The question presented for my decision by the papers in this appeal is, whether the act, decision or order of said respondent West on August 20, 1894, revoking or annulling the teacher's certificate for the second grade, issued by said Yetman to the appellant herein on March 14, 1894, was legal.

Prior to June 30, 1894, under the provisions of subdivision 6 of section 13 of title 2 of the Consolidated School Act of 1864, every school commissioner of the State had the power, and it was his or her duty, to reexamine any teacher holding his or her predecessor's certificate, and if he or she find him or her deficient in learning or ability, to annul the certificate. Under the foregoing provision a school commissioner did *not* have the power to annul a certificate except upon a reexamination of the teacher, and by such reexamination finding such teacher deficient in learning or ability. A school commissioner had no authority of law to examine the marking of the papers upon examination of a person proposing to teach by his or her predecessor, and then on account of discrepancies in the marking of such papers, in his or her opinion or judgment, to annul or revoke the certificate issued by such predecessor.

On June 30, 1894, said subdivision 6 of section 13, title 2, above cited, ceased to be, and all of said title 2 ceased to be operative, or a part of the school law of the State, the Legislature of the State having passed, and the Governor having approved, chapter 556 of the Laws of 1894, entitled "An act to revise, amend and consolidate the general acts relating to public instruction," which chapter is known as the "Consolidated School Law," and which said chapter went into operation on June 30, 1894, and by which chapter the Consolidated School Law of 1864 and all amendments thereof were repealed. On and since June 30, 1894, title 5 of the Consolidated School Law relating to school commissioners, their election, powers and duties, is the law in that regard, in place of title 2 of the Consolidated School Law of 1864 and the amendments thereof. The provisions of subdivision 6 of section 13 of title 2 of the School Act of 1864, hereinbefore referred to, was not enacted in title 5 of the Consolidated School Law of 1894, but was omitted therefrom. The only power, on and since June 30, 1894, given to a school commissioner to annul a teacher's certificate is contained in subdivision 6 of section 13 of title 5 of the Consolidated School Law, to wit, to examine any charge affecting *the moral character* of any teacher within the district, first giving such teacher reasonable notice of the charge, etc., etc., and if he find the charge sustained, to annul the certificate of the teacher, etc., etc.

It is clear that School Commissioner West on August 20, 1894, had no power or authority, under the school law of the State, to revoke or annul the teacher's certificate of the second grade, issued by her predecessor in the office of school

commissioner on March 14, 1894, to the appellant herein, except where a charge affecting the moral character of the appellant had been made and sustained under the provisions of subdivision 6 of section 13, title 5 of the Consolidated School Law of 1894.

The respondent West, in her answer to the appeal, states that as she is informed and believes, she was acting strictly within and according to the instructions received by her from me under date of June 28, 1894, and the other under date of July 3, 1894. The letter of June 28, 1894, was written when subdivision 6 of section 13 of title 2 of the act of 1864, permitting reexaminations by school commissioners of teachers holding certificates, etc., was in force, and said letter in substance states that if School Commissioner West, for reasons satisfactory to her, found that Yetman had marked candidates higher than they merited, and certificates were issued to persons who had not earned them, she could reexamine such persons under the law then in force. The letter of July 3, 1894, was written when the Consolidated School Law of 1894 was in force. It states, if the certificates were issued (by Kenney and Yetman) *irregularly* you have the right to revoke them, etc., etc. The word "irregularly" was used as meaning "not conforming to a law, method or usage recognized as the general law," that is, a certificate issued without any examination, or to a person under sixteen years of age, etc., etc. It may be, however, that the person who dictated the letter had forgotten the then recent change in the school law relating to the reexamination of teachers by school commissioners.

In the view I entertain of the action of School Commissioner West, it does not appear necessary for me to decide anything relative to the action of the trustees of union free school district no. 2 of Middletown in refusing to pay the appellant for the latter part of August 1894, or to enter into a contract with her for the new school year, except to state that as I understand the contract made by her with said trustees her compensation was to be paid to her in twelve equal monthly payments, and that such payments were to be made for services rendered while she held a certificate that was valid, and not for services performed after said certificate was revoked; that even if the revocation of the certificate should be sustained said trustees were required to pay her the instalment due her for the full month of August 1894.

The appeal herein is sustained.

It is ordered, That the act, decision or order of Julia K. West, as school commissioner of Richmond county, on or about August 20, 1894, revoking or annulling the teacher's certificate of the second grade issued to the appellant herein, Lucy V. Hunter, on March 14, 1894, by Hubbard R. Yetman, then school commissioner of Richmond county, be, and the same hereby is, vacated and set aside.

3614

In the matter of the appeal of Alton H. Cowles and Charles T. Hurlbut v. Gustavus A. Crofoot, school commissioner of the second commissioner district of Cortland county.

A school commissioner examined an applicant, and issued to such applicant a teacher's license for six months, and at the end of six months reexamined the teacher, found that he passed a satisfactory examination, and then refused to issue a license, upon the ground that while teaching, the teacher had used immoral language in the school under his charge.

Held, That there was not sufficient reason for refusing the license under the circumstances. The teacher was at least entitled to a hearing upon the allegations against him.

Decided July 1, 1887

Draper, *Superintendent*

This is an appeal by Alton H. Cowles, an applicant for a license to teach, and Charles T. Hurlbut, trustee of school district no. 8, of the town of Homer, Cortland county, from the refusal or neglect of the respondent herein to issue to said appellant Cowles a license to teach in school district no. 8, town of Homer, aforesaid.

The appellants allege that after an examination of applicants for teachers' licenses, held September 30, 1886, by the respondent, the appellant was duly licensed to teach in any district school in the school commissioner district for the term of six months, and that at the time such license was granted, the respondent stated he would renew said license upon application at the expiration of six months if the same was applied for. The appellant Cowles alleges that at the end of said term he desired to continue teaching, and was offered further employment in the school then taught by him, and that he made several applications to the respondent by mail and otherwise, for a further license, and finally did so personally, and was examined; yet the respondent failed or neglected to issue the same.

The respondent, in justification of his refusal to further license appellant Cowles to teach, alleges that he became advised that the appellant Cowles had used rash and immoral language before the pupils in the school under his charge; that at one time having made the remarks: "If you do not stop monkeying, I will heat a poker red hot and put it down your back," and "I will nail you to the cross."

No allegation is made that the appellant Cowles did not pass a creditable examination, and the refusal to grant a license was based upon the charges above stated. The appellant replies that at one time he did make the remarks attributed to him by the respondent, but as the remarks of another, and that at the most they were only imprudent and thoughtless. He submits the evidence of good citizens of the district, and officers of an academy and college he has attended, to his uniform good character and ability to teach; also the entry of the respondent in the school register to the effect that the pupils were all doing well. From the evidence presented, touching the general workings of the school taught by

the appellant Cowles, it appears clear to me that a successful school has been conducted. The certificate issued by the respondent to the teacher after his first examination is evidence of his possession of sufficient learning and practical ability to teach. His reexamination is further evidence, and the entry of the commissioner in his register, upon the officer's last visit to the school, is a strong circumstance in his favor.

The respondent would break the force of this indorsement by the statement that he made it supposing the teacher was about to give up the school. This I can not hold without finding the commissioner guilty of making misleading entry upon the record — certainly not justified by the excuse offered therefor.

I hold the charges of *immoral* remarks not sustained, although possibly they were thoughtless and had better have been omitted. I do not consider them of so serious a character as to deprive a teacher, otherwise qualified, of a license to teach, at least without a hearing and an opportunity to explain them and present his defense thereto.

I sustain the appeal. The respondent is hereby ordered and directed to issue a license to the appellant Cowles, which his qualifications, as shown upon the examination held by the respondent, entitle him to, within ten days after service of a copy of this decision upon him.

3597

In the matter of the appeal of Florence Snath v. R. A. Kneeland, school commissioner of the first commissioner district of Livingston county.

School commissioner refusing to grant a certificate to teach a large school to an applicant whom he considers competent to teach and govern a smaller school, will be sustained unless it clearly appears that he so decided from improper motives.

Decided May 9, 1887

Draper, *Superintendent*

This is an appeal against the action of the school commissioner of the first commissioner district of Livingston county, in refusing to grant a teacher's certificate to the appellant, which would authorize her to accept employment as a teacher in the first school district of the town of Groveland.

It is alleged by the appellant that the school commissioner refused to grant a certificate which would permit her to teach in this particular district and that such refusal was caused by political influences and was unjust to the appellant. The school commissioner, on the other hand, says that the school in the first district of the town of Groveland, is a large one, with an average attendance much in excess of any school which the appellant has ever taught, and that he does not deem her a suitable teacher for a school of that size. He denies that his decision in the premises has been influenced by anyone, or that he entertained any prejudices against the appellant, and he submits the examination papers furnished by Miss Snath upon a written examination held by him in which she was one of the candidates examined.

The school commissioner had a right to issue a third grade certificate to the appellant which would authorize her to teach in any particular locality, but would prevent her from doing so in any other, and he had abundant authority of law for withholding a certificate which would confer upon her authority to teach in the first district of Groveland, while at the same time offering one which would authorize her to take a school in a smaller district. No competent proof is offered to sustain the allegation that the commissioner acted otherwise than conscientiously. I have examined all the papers in the case with care, and have no hesitancy in coming to the conclusion that the respondent took the course he did in this case through a desire to discharge his duty properly, and should be sustained in so doing.

The appeal must, therefore, be dismissed.

4728

In the matter of the appeal of Nina L. Barr v. George A. Cooper as school commissioner, first commissioner district, Cayuga county.

The appellant, being a resident within the first commissioner district of Cayuga county, attended the uniform examination for teacher's certificate in the first commissioner district of Wayne county, without having first obtained the permission of the school commissioner of the commissioner district in which she resided, to attend such examination in the first district of Wayne county, and having obtained a second grade certificate from such commissioner in Wayne county, and the commissioner of the first commissioner district of Cayuga county having refused to indorse such certificate; ***held,*** that sufficient reason existed for the refusal of the commissioner of the first commissioner district of Cayuga county to make such indorsement.

Decided December 30, 1898

Skinner, *Superintendent*

This is an appeal from the refusal of George A. Cooper as school commissioner of the first commissioner district of Cayuga county, to indorse a second grade certificate to teach, issued to Nina L. Barr in August 1898, by Samuel Cosad, school commissioner of the first commissioner district of Wayne county.

The appellant states in her appeal that she is a resident of the town of Victory, Cayuga county, and in January and May 1898, she attended the uniform examination for a teacher's certificate at Wolcott, Wayne county; that at the time she attended such examination she was attending school in the village of Red Creek, Wayne county; that at the time she attended such examination she was ignorant of rule 26 of the regulations governing uniform examinations that candidates must attend such examinations in the school commissioner district in which they reside or in which they are teaching, unless they first obtain permission of the school commissioner of the commissioner district in which they reside or have been teaching.

The appellant also claims that to attend such examinations in Cato, Cayuga county, she would have been compelled to travel a greater distance from Red Creek, where she was attending school, than to go to Wolcott.

School Commissioner Cooper has answered the appeal and alleges, in substance, that it was more convenient for the appellant to attend the examinations in Cayuga county than in Wayne county; that at each examination a copy of the regulations governing such examinations is placed upon the desk of each applicant and each applicant is urged to read them; that upon his information and belief he alleges that the appellant received special privileges by attending the examinations in Wayne county.

The appellant herein is presumed to have had knowledge of rule 26 of the regulations governing uniform examinations and she should have obtained the permission of Commissioner Cooper to take the examinations in Wayne county. Sufficient reason existed for the refusal of Commissioner Cooper to indorse the second grade certificate received by her.

The appeal herein should be dismissed.

The appellant in her appeal asks that if I do not direct Commissioner Cooper to indorse her certificate, a temporary license be issued to her permitting her to teach in the first commissioner district of Cayuga county until she be able to take examinations in such district.

A proper application to me, on the part of the appellant herein, for a temporary license, permitting her to teach in the first commissioner district of Cayuga county, will receive consideration.

The appeal herein is dismissed.

4743

In the matter of the appeal of Angelo O. Tucker v. Orin Q. Flint as school commissioner, first commissioner district, Greene county.

A school commissioner, in determining whether or not he or she will indorse the certificate of a teacher, issued by the school commissioner of another district, must be guided by the best information attainable. Before indorsing a certificate issued by another commissioner, the commissioner must be satisfied that the employment of that teacher in his district is for the best interests of the schools under his charge, The decision in this appeal must not be construed as a precedent to guide the action of other commissioners under like circumstances. Each commissioner must determine each case from the facts before him or her.

Decided February 17, 1899

Skinner, *Superintendent*

This is an appeal from the refusal of Orin Q. Flint as school commissioner of the first commissioner district of Greene county, to indorse the first grade certificate to teach, dated April 1, 1889, issued to the appellant Angelo O. Tucker by A. W. Fenton as school commissioner of the first commissioner district of Steuben county; that on June 27, 1898, he entered into a contract with the board of trustees of school district 1, Athens, Greene county, to teach the public school therein for the term of 40 consecutive weeks commencing September 6, 1898, at a weekly compensation of $18.75, payable at the end of each 30 days during the term of such employment; that said board of trustees contracted to employ said

appellant as such teacher for the aforesaid period and at the aforesaid compensation, such compensation to be paid as hereinbefore stated; that on August 27, 1898, the appellant at Athens, Greene county, showed his said certificate to teach to Commissioner Flint and requested him to indorse the same, and said Flint, after examining such certificate returned it to the appellant, saying, "I will have to refuse to indorse your license, from an official standpoint;" that appellant asked said Flint the reason why he so refused, but Flint refused to give any; that again, on August 30, 1898, the appellant appealed to Commissioner Flint to indorse said certificate, exhibiting to said Flint a large number of testimonials, signed by reliable and creditable men, but that said Flint refused to indorse said certificate of the appellant. September 1, 1898, the appellant verified his appeal herein from the refusal of Commissioner Flint to indorse said certificate, and on the same day a copy of such appeal was served personally upon said Flint, and on September 15, 1898, said appeal was filed in this Department.

Commissioner Flint has answered the appeal.

He alleges in his answer that on or about July 1, 1898, having previously learned that the appellant had contracted to teach the school in district 1, Athens, Greene county, in the village in which he, Flint, resides, he made inquiries of the teachers present attending the Regents Convocation, held in the city of Albany, on or about July 1, 1898, who were personally acquainted with appellant, relative to the appellant, and as a result of such inquiries he deemed it his duty to investigate the character and history of the appellant as a teacher in the public schools of the State; that he visited Alexandria Bay, where the appellant had last taught school, and made inquiries of a large number of persons in all conditions of life, relative to the manner in which the appellant had performed his duties as a teacher, and his standing in that community as a man; that from the information so obtained by him, on July 23, 1898, he became convinced that the appellant was not a proper person to teach school and he so advised the president and clerk of the board of education of union school district 1, Athens; that he (Flint) continued his investigations relative to the appellant, the result of which was to confirm him in the conclusions arrived at as announced to said president and clerk, as aforesaid, and on August 9, 1898, he met the said board of education and reaffirmed his decision not to indorse the certificate of the appellant; that on August 27, 1898, the appellant had a personal interview with him (Flint) and presented his certificate to teach, held by him, and required said Flint to indorse the same, and that Flint informed the appellant that from information he had received from sources that he considered reliable, he could not conscientiously indorse such certificate without an order from the State Superintendent of Public Instruction; that on August 30, 1898, and at other times, the appellant requested said Flint to indorse such certificate, but said Flint for reasons he considered valid, based upon information he had received and which he believed, has refused to indorse such certificate.

The respondent Flint alleges, as his conclusions, upon the information received by him regarding the appellant as a teacher in the public schools in which he has taught, that the character of instruction as imparted by the appellant is superficial; that his conduct to teachers employed with him has been improper and unjust; that he has not that regard for truth which a teacher should have, and is untruthful; that he is lax in discipline and government; that his conduct before his scholars is not exemplary, and in certain instances has been demoralizing.

The pleadings herein, in addition to the appeal and answer, consist of a reply, rejoinder, surrejoinder, rebutter and surrebutter. Such pleadings contain a mass of letters, copies of letters, affidavits, certificates, questions and answers, covering a period from 1870 down to November 1898, favorable and unfavorable to the appellant as such teacher. All the papers filed herein by the appellant and respondent have been carefully examined and considered.

The statements upon which the respondent Flint relied in refusing to indorse such certificate, were those made by persons residing in the school districts in which the appellant has been employed as teacher within the last two or three years, and not of those residing in districts in which the appellant was employed prior to 1890.

It appears from the papers filed herein that in almost every school district in which the appellant has been so employed there is a difference of opinion among the residents as to his qualifications as a teacher, and as to the manner in which his duties as such teacher have been performed.

Number 9 of the general regulations of this Department governing uniform examination for teachers certificates and the issuing of such certificates by school commissioners, and the indorsement of such certificates, provides that a school commissioner shall indorse for the full period for which they are valid when presented for indorsement, first and second grade certificates, training class certificates, and drawing, music and kindergarten certificates issued by any other school commissioner in the State, or issued by the authorities of any city which has adopted and is working under the uniform system of examinations, *unless a valid reason exists for withholding such indorsement etc. etc.*

A "valid reason" means a "good reason," "sound reason," existing in the mind of the school commissioner, based upon information obtained by him from trustworthy sources and which he believes to be true, relative to the abilities of the holder of the certificate to properly impart instruction to, and govern, the pupils attending the school which he is employed to teach, and that his moral character has not been questioned; as distinguished from mere caprice, prejudice, bias, or absence of good faith, or proper inquiry on the part of such commissioner. This proceeding is not one to *annul* the certificate to teach held by the appellant, but is for a review by me, upon the proofs presented, whether on August 27, 1898, Commissioner Flint had a valid reason, upon the information obtained by him, which he believed to be true, relative to the manner the appellant had performed his duties as teacher in the schools in which he had been

recently employed, and his standing as a man in the estimation of the inhabitants of such districts, for refusing to indorse such certificate, and thereby authorize the appellant to teach in the public schools in the first commissioner district of Greene county. I am convinced that Commissioner Flint, in such refusal on his part, acted in good faith, and upon information given him which he believed to be true; that he believed he had a valid reason for refusing to indorse such certificate and that I ought not to reverse his action in thus refusing.

In determining whether, or not, he will indorse the certificate of a teacher issued by the commissioner of another district, a school commissioner must be guided by the best information attainable. His refusal in this case, and my approval of his act in so refusing, must not be construed as a criticism upon the ability or character of the appellant. I am not called upon, in this appeal, to pass upon either. I decide only that Commissioner Flint in refusing to indorse the certificate of the appellant acted in a reasonable manner in view of the information presented to, and then before him. That such information was sufficient to put a reasonable and prudent man upon his guard, and that his action was not vindictive but was in accord with his line of duty as he then understood it. Nor must this decision be construed as a precedent to guide the action of other commissioners under like circumstances. Before indorsing a certificate issued by another commissioner, the commissioner so indorsing must be satisfied that the employment of that teacher in his district is for the best interests of the schools under his charge. Each commissioner must determine each case from the facts before him.

The appeal herein is dismissed.

4202

In the matter of the appeal of Jerry L. Gardner v. Howard B. Harrison, school commissioner, second commissioner district of Steuben county.

The basis of every certificate issued by a school commissioner to persons applying to him for examination and proposing to teach common schools is his satisfaction concerning the qualifications of the applicant in respect to moral fitness and capacity. A commissioner is justified in withholding a certificate from an applicant where he is satisfied in his mind and judgment that upon the proofs presented to him evidence of the good moral character of the applicant does not affirmatively appear.

Decided November 18, 1893

Crooker, *Superintendent*

The appellant appeals from the decision of Howard B. Harrison, school commissioner, second commissioner district of Steuben county, in refusing to grant to the appellant a certificate of the second grade of teachers. An answer has been interposed.

The decision of the respondent was based upon the ground that he did not find the appellant qualified as to moral fitness, and, therefore, refused to grant the appellant a certificate.

The papers submitted upon this appeal are quite voluminous and consist mainly of affidavits upon the question of the moral fitness of the appellant, presented to the respondent at or before the application of the appellant for examination and certificate, and those furnished by the appellant to the respondent in rebuttal; and additional affidavits furnished by appellant in support of his appeal; and said papers have been carefully read and considered.

Under the provisions of subdivision 5 of section 2 of the Consolidated School Law of 1864, and the amendments thereof, every school commissioner shall have power, and it shall be his duty, to examine persons proposing to teach common schools within his district, and not possessing the Superintendent's certficate of qualifications, or diploma of the State normal school, and to inquire into their moral fitness and capacity, and, if he finds them qualified, to grant them certificates of qualifications, in the forms which are or may be prescribed by the Superintendent. The basis of every certificate issued by a commissioner is his satisfaction concerning the qualifications of the appellant in respect to moral fitness and capacity. A commissioner is justified in withholding a certificate from an applicant where he is satisfied, in his mind and judgment, that upon the proofs presented to him, evidence of the good moral character of the applicant does not affirmatively appear. Deputy Superintendent Keyes, in a decision made by him on May 20, 1859, said: "It must be borne in mind that the commissioner is the servant of the people, pledged to protect their interests and rights in matters relating to the education of their children, and he has no right to imperil those interests by legalizing the presence and labors among them of a person concerning whose moral reputation there is a doubt."

It does not appear, from the papers presented in this appeal that the respondent was actuated by any malice, prejudice or ill feeling against the appellant in his decision. I can not say that the respondent has exercised unwisely the power and duty intrusted to him by the school laws, or that, upon the proofs before him, he was not justified in refusing a certificate to the appellant.

The appeal herein is dismissed.

3952

In the matter of the appeal of D. Eugene Smith v. Ebenezer R. Harkness, school commissioner of the second commissioner district of Delaware county.

The action of a school commissioner in withdrawing his indorsement from a teacher's certificate granted by another commissioner, for the reason that the teacher, who was quite a young person teaching his first school, failed in government, and was unable to control his pupils, *sustained.*

The annulment of the original license by the same commissioner for the cause assigned, *overruled.*

Decided January 3, 1891

O. F. Lane, attorney for appellant

Draper, *Superintendent*

This appeal is brought from the action of the school commissioner of the second commissioner district of Delaware county, in annulling a teacher's certificate which had been granted by Commissioner Theodore L. Grout, of the first commissioner district of Otsego county, on the 4th day of March 1890, to appellant, and which had been indorsed by the respondent on the 29th day of August 1890, making it a valid license to teach in his commissioner district.

The evidence submitted, which is given in detail, reveals the fact that the appellant is quite a young man but still in his minority, and that his present engagement was his first attempt at teaching. It is clear to me that in this his first attempt, the teacher failed somewhat in government, and that during the time he taught the school, there was disorder and confusion therein to an unusual degree. It is probable that with more mature years and greater experience, he will overcome this ground of objection to his work as a teacher. It is my opinion that the commissioner was justified, for the cause assigned, in withdrawing his indorsement of the teacher's certificate, issued by another commissioner. The cause assigned is not a ground which would authorize a commissioner to revoke the certificate issued by a commissioner of another district.

The appeal is sustained, so far as the commissioner acted in revoking the original certificate, but is overruled so far as it relates to the commissioner's action in withdrawing his indorsement upon the certificate, in which respect the commissioner's action is sustained.

3817

Noah Leonard v. Henry D. Nottingham, school commissioner of the third district of Onondaga county.

A school commissioner who, acting with good purpose and intent, refuses to grant a teacher's certificate to an applicant, will be sustained.

The commissioner was under no obligations to give any reason for his refusal.

Decided October 9, 1889

Draper, *Superintendent*

This is an appeal from the action of the respondent in refusing to indorse a teacher's certificate held by appellant and issued to him by another commissioner, and in refusing to issue a certificate to appellant.

The commissioner has the right, assuming that he acted with good purpose and intent, to do precisely what the appellant complains of. Moreover, he was not obliged to give any reasons for such action. There is scarcely a pretense that he acted with other than the best of motives. Facts which appear in the case clearly indicate that he only intended to do his duty, and that action complained of was proper.

The appeal is dismissed.

3510

W. L. Rutherford and others, as the board of education of union free school district no. 1, Waddington, St Lawrence county, v. Emma A. Fish.

To annul a state certificate, charges must be definite and specific.
A general charge of immoral character not sufficient to put the accused upon the defensive.
Decided June 11, 1886

Draper, *Superintendent*

This is a proceeding by the board of education of union free school district no. 1, Waddington, St Lawrence county, N. Y., preferring charges against Emma A. Fish, a teacher in the public school of said district, and asking that the state certificate held by Miss Fish be annulled, on the ground of immoral character.

I think the circumstances surrounding this case demand a brief review of the proceedings that have been taken by the board of education.

It appears from the records of this Department that an appeal was brought on or about the 24th day of February 1886, by Emma A. Fish from the action of the Waddington board of education in discharging her from her position as principal of the union school. The appeal was decided on the 5th day of April 1886, in favor of the appellant, and the action of the board set aside. It appeared therein that the board had entered into a contract, in writing, with Miss Fish, to teach in the school for one year, at a salary of $500. The reason urged for her discharge was, that she was incompetent to teach the school. The Superintendent (James E. Morrison), in his decision, says: "I find that the appellant holds a state certificate granted to her in 1867, at which time, as at present, the provisions of section 15, title 1, Code of Public Instruction, was operative and controlling. This section distinctly provides that the Superintendent's certificate, while unrevoked, shall be *conclusive evidence* that the person to whom it was granted was qualified by moral character, learning and ability to teach any common school in the State." The Superintendent felt himself, by this statute, debarred from considering the allegations against the moral character, learning and ability of the teacher, upon an attempt to discharge her from the employment of the board, and held that the proceeding should have been one to revoke her state certificate.

Shortly after the decision of this appeal, the board preferred charges before the school commissioner of the district, against Miss Fish and asked him to revoke her certificate on the ground of immoral character. Miss Fish was properly notified of such charges and given opportunity to defend. A hearing was set, and three days occupied by the commissioner in reviewing testimony offered by the board to sustain the charges, at the end of which time the proceedings were withdrawn by the parties instituting them. The principal reason given for such withdrawal is that the commissioner refused to receive as evidence affidavits of persons not present. The commissioner was instructed by the Department that affidavits should not be received as evidence in an oral examina-

tion. Counsel for Miss Fish asked the commissioner to render a decision in the matter to the effect that the charges had not been sustained. This the commissioner refused to do, and the board was allowed to discontinue without any judgment or decision being rendered by the commissioner.

On the 28th day of May 1886, the proceedings now before me were commenced. A copy of the charges and affidavits submitted in support thereof was served upon the respondent. The respondent has filed no answer, and the case must be examined upon the evidence of the moving parties.

In proceedings of this kind, two rules must be complied with:

1 The charges must be definite and specific. No general charge of immoral character will be sufficient to put a person upon the defensive. The charges should specify immoral acts of the teacher and should be drawn with as much care and distinctness as an indictment, so that she may know just what she must meet.

2 The respondent must be given an opportunity to defend, to confront and cross-examine the witnesses produced by the appellant.

In the examination of the charges and the affidavits filed therewith, it appears that the principal charges are those of lying, perjury and disrespect toward the board of education on the part of the respondent. The charges are, in the main, general, although some statements of Miss Fish are set out and characterized as false. A large number of affidavits are filed and similar ones were upon the former appeal. The board of education entered into a written contract with Miss Fish without first having a personal interview with her. During her term of service as teacher, the exact time does not appear, misunderstandings and contentions arose between the respondent and the board. The papers are very voluminous, covering a mass of irrelevant matter. The controversy is a highly unfortunate one, and it would undoubtedly have been far better if the respondent had never been employed to teach in this school, but with that the Department has nothing to do. The only question left before me is, whether the papers in the case show Miss Fish to be a person of such immoral character as to render it improper for her to hold a certificate to teach in the common schools of the State. It is not whether she lacks judgment; it is not whether she is an unsuccessful teacher, but whether she is of immoral character. The Department can not revoke a license upon charges affecting character, except upon clear and unquestioned proofs. The fact unquestionably is, that there has been a heated controversy, and that disagreeable things have been said on both sides. Undoubtedy some things have been said which are not altogether true, as is the case in all such controversies, but I find no evidence sufficient to justify me in holding that Miss Fish is a woman of immoral character. The allegations against her are, in the main, general and indefinite, and such specific allegations of fact as are contained in the charges are not supported by the proofs.

If trustees will employ teachers without sufficient caution, without previous acquaintance or inquiry, they must not rely upon the Department to relieve them from their unwise contracts, and particularly so when the most that can be said against a teacher so employed is, that she lacks tact and management, or talks offensively under opposition and criticism.

The charges are dismissed.

5011

In the matter of the appeal of William F. Masten from the action of the board of trustees in and for union free school district no. 3, Orangetown, Rockland county.

The trustees of common school districts, and boards of education of union free school districts in the absence of some special act of the Legislature, do not possess the power to establish requirements of persons employed as teachers, other than, and in addition to, those prescribed by the Consolidated School Law.

Decided June 11, 1902

Scherer & Downs, attorneys for appellant
Blatchford & Sherman, attorneys for respondents

Skinner, *Superintendent*

This is an appeal by the above-named appellant, one of the members of the board of education of union free school district 3, Orangetown, Rockland county, from the action of the board of education of said district in the adoption of a resolution relating to the employment of teachers in the school in said district.

The issue has been joined by service of the usual pleadings.

There is some conflict as to the precise wording of the resolution complained of herein, the appellant alleging that at a meeting held on April 3, 1902, said board of education adopted the following resolution:

That no teacher shall be employed in the high school department, in and for union free school district, who is not a college graduate, unless the school system committee reports to the board that it is impossible to secure a college graduate for such work or position.

The respondents contend that the exact wording of such resolution was as follows:

That in future only teachers having college certificates be employed in the high school department, unless the school system committee reports to the board that such teachers can not be obtained.

In the disposal of this appeal I shall accept the contention of the respondents as to the precise wording of such resolution. In view of the provisions of the Consolidated School Law there can be no question but that the resolution, in the form contended for by the appellant, would be illegal, inasmuch as it would seem to imply that a college graduate, whether the holder of a "college gradu-

ate certificate" or not, would be eligible to appointment; while the resolution, in the form contended for by the respondents, only raises the question as to the right of a local board, in the absence of some special statute, to establish qualifications differing from those contained in the general law of the State.

The Consolidated School Law, chapter 556 of the Laws of 1894, has prescribed the qualification of teachers in the common schools of this State. Section 38 of title 7 of said chapter provides as follows:

No teacher is qualified within the meaning of this act, who does not possess an unannulled diploma granted by a State normal school, or an unrevoked and unannulled certificate of qualification given by the Superintendent of Public Instruction, or an unexpired certificate of qualification given by the school commissioner within whose district such teacher is employed.

In addition to the qualifications enumerated in this section, the State Superintendent of Public Instruction is authorized by section 10 of title 1 of the Consolidated School Law to "issue temporary licenses to teach, limited to any school commissioner district or school district, and for a period not exceeding six months whenever, in his judgment, it may be necessary or expedient for him to do so."

The holder of such temporary license is a qualified teacher and is qualified to teach in any common school named therein, unless restricted by some statute.

In addition to the qualifications thus enumerated the State Superintendent is allowed by said section 10 of title 1 of the Consolidated School Law, in his discretion, "to indorse a diploma issued by a State normal school or a certificate issued by the state superintendent or state board of education in any other state, which indorsement shall confer upon the holder thereof the same privileges conferred by law upon the holders of diplomas or certificates issued by State normal schools or by the State Superintendent of the State." The holder of such indorsed diploma or other state certificate is also qualified to teach in any common school in this State, unless restricted by some statute.

Title 11 of the Consolidated School Law also provides for the establishment, maintenance and government of teachers training classes and section 7 of said title provides that:

It shall be the duty of school commissioners . . . under the direction of the Superintendent, to examine the students in such classes and to issue teachers certificate to such as show moral character, fitness and scholastic and professional qualifications worthy thereof.

The powers of the commissioner, in the issuing of such certificates, however, as restricted by subdivision 5 of section 13 of title 5 of the Consolidated School Law, which provides that:

Commissioners, in all cases where certificates are issued by them, shall be governed by the "rules and regulations" that have been or may be prescribed by the Superintendent of Public Instruction . . . and to grant them certificates of qualification in the forms which are, or may be, prescribed by the Superintendent.

In accordance with the provisions of this subdivision of section 13 of title 5 of the Consolidated School Law, a form of certificate has been prescribed by the State Superintendent of Public Instruction, which certificate, in accordance with rules and regulations established by him, qualifies the holder to teach in any common school in this State, unless restricted by some statute.

The Consolidated School Law and chapter 1031 of the Laws of 1895 make provisions for special forms of licenses to be issued to teachers in kindergarten schools, teachers of music and teachers in the primary and grammar grades of any city or village authorized by law to employ a superintendent of schools. And the holders of these certificates are thereby qualified to teach in any schools enumerated in such special forms of certificates, unless prevented by some statutory enactment.

Thus the law-making power of the State has solemnly declared that the holders of these various certificates are qualified, and may legally be employed in any common school in this State, except as it has limited and restricted the right of the holders thereof to be employed in certain specified schools by the provisions of chapter 1031 of the Laws of 1895, applying to every city and village authorized by law to employ a superintendent of schools, which limitation and restriction it is not necessary to consider in the decision of this appeal.

Therefore, the question presented by this appeal is, whether local authorities, in the absence of special powers conferred upon them by the Legislature, have a right to exclude from employment in the schools under their charge any class of persons whom the State in its sovereign power has declared eligible to employment therein.

Primarily the duty imposed upon every board of education, in the employment of a teacher, is to exercise their best judgment and employ the best teacher available with the funds at their disposal. They have the right to make individual selections, always bearing in mind this supreme duty and obligation, from among those whom the law has declared eligible to appointment and employment. They can not, however, erect artificial barriers to exclude any particular class or classes from employment; neither can they by resolution confine their selection to any class or division of those eligible to appointment.

Local school authorities have the right to employ, as a teacher, any person of the requisite age and possessed of the qualifications recognized by the statute; but they have no right to limit the class of persons who have reached the required standing of learning and ability to teach from whom the teachers for the school may be selected. (See decision, James E. Morrison, Acting State Superintendent; decision 3493, April 1, 1886.)

If it be conceded that a local board of education may restrict their selection, by resolution, to any particular class or division of those whom the State has declared eligible to appointment, then it must be conceded that they have the right to limit, by resolution, the selection of teachers to be employed by them to the graduates of any particular college or school or institution. And if the

respondents herein have the power to declare no one eligible to employment as a teacher in the schools under their charge unless he holds a college graduate certificate, it must be conceded that they have a right, by resolution, to declare that no one shall be eligible to employment, as a teacher in their schools who has graduated from Columbia University, or Union University, or, by way of illustration, they may say, by resolution, that no one shall be eligible to appointment as a teacher in their schools who has not graduated from some institution in which they are financially interested, or from some denominated school in whose success they have a vital interest.

They may, with equal propriety, if allowed to disregard the broad obligations resting upon them to obtain the very best teacher with the means available to them, prescribe, by resolution, that no one who is not the holder of a third grade certificate shall be employed in the schools under their charge, substituting for this broad duty to employ the very best teacher available the economic idea of selecting the cheapest teacher available.

Conceding for the purpose of the argument that this board is actuated by a desire to secure the best teacher available, and therefore have limited the power of selection to teachers holding that class of certification which, in their judgment, represents the best scholarship, it can be clearly demonstrated that the result of the broad resolution adopted by them would have directly the contrary effect under certain conditions.

Their resolution, in substance, is that no teacher shall be employed who does not hold a college graduate certificate. A college graduate certificate, under the rules and regulations governing the issuing of such certificates, can be issued only to the graduate of a college who, subsequent to such graduation, has had three years' successful experience in teaching.

No examination is required to ascertain scholarship; no particular college from which he must have graduated is specified; no limit of time within which he should have graduated from such institution is specified; no grade of school is specified in which such experience in teaching must have been obtained. All these are in the simple discretion of the licensing power.

A college graduate may have had ten years' experience in teaching prior to graduating from a college ; subsequent to such graduation he may take a supplementary course in the New York State Normal College at Albany, making a special study of the principals of education and methods founded thereon, and at the close of this experience and preparation along the special line of work he desires to follow he will find himself barred by this resolution, and be ineligible to appointment as a teacher in the schools under the charge of this board; and that too, notwithstanding the fact that his experience, training in college and special training in the State Normal College especially fit him for the work of a teacher. In other words, this resolution would exclude the men with special training and large experience, and make possible the selection of a candidate without professional training, and with but three years' experience in *any* school of *any* grade in the State. This resolution would, therefore, effectually preclude this board's selecting the better equipped man of the two.

It is universally conceded by educational experts that professional training in the science of teaching is essential to the best type of teachers. Early in the history of the State this was recognized. Since 1834 the State has made annual appropriations for the maintenance of teachers training classes devoted exclusively to the professional training of teachers; since 1843 the State has maintained teachers institutes for the professional training of teachers; since 1844 it has maintained State normal and training schools for a like purpose; since 1895 it has maintained training schools for the professional training of teachers for schools in the cities and villages of the State.

Last year the State expended $497,500 exclusively for the professional training of teachers in this State, exclusive of the amount expended in the institute work of the State. Notwithstanding this munificent expenditure annually for the professional training of teachers, not a single teacher thus trained would be eligible as a teacher in this school, unless he happened, which is rarely the case, in addition to this to have been a graduate of some college or university.

It must be remembered that if this board of education can adopt this resolution, thus nullifying the work of the State in the training of its teaching force, every other school board in the State may adopt a like resolution.

This question, namely, the right of the holder of a certificate issued by competent authority to be employed in any common school of this State was before the Court of Appeals in the case of Steinson against the board of education of New York, reported in 165 N. Y., page 434. The court there held that a state certificate was conclusive evidence of the qualifications of a teacher to teach, and hence his employment, without the provisional certificate required by local authorities, was authorized.

The adoption of this resolution would make the holder of a state certificate ineligible to appointment in this school, notwithstanding the provisions of section 10 of title 1 of the Consolidated School Law which provides as follows:

Every such certificate so granted shall be deemed and considered a legal license and authority to teach *in any of the public schools of this State,* without further examination of the person to whom the same was granted, *any provision of law in conflict with this provision to the contrary notwithstanding.*

Should the holder of such a certificate present himself as a candidate for appointment to this board of education, he would be met by the statement that in accordance with the resolution adopted by this board the holder of such a certificate was not eligible and could not be considered as a candidate. This resolution was adopted by a vote of four in favor to two opposed. The two members of this board not voting for such resolution are prevented from exercising their judgment as to the qualification of any candidate presenting himself, not holding the particular certificate required by this resolution, notwithstanding they may be of the opinion that such candidate is the most available and the best teacher available. Many of the graduates of the State normal and training schools receive their preliminary education in the public district

schools. They are acquainted with the characteristics of the children attending such schools, and having been born and reared in the country, thoroughly understand their environment. They know the best method of teaching and controlling them. After receiving their preliminary education at these different schools and the union free schools, and after attending a State normal and training school, obtaining therein the careful training and technical professional knowledge essential to their calling, and the diploma of such institution certifying that they are qualified teachers, it can not be contended that a local board of trustees, acting upon their own peculiar notions, have the right to disregard all these facts and the certificate of qualification permitting them to teach, nor can it be held that, no matter how high the standing and character and ability of the candidate, no matter what may have been his professional training, he is not eligible to employment in the common schools of this State unless he holds the diploma of some college.

As I have already said, it is the duty of the board of education to exercise their best judgment, and from all of the qualified teachers presenting themselves as candidates they must make the very best selection, considering the means at their disposal, and they can not, by any arbitrary standard, such as the adoption of the resolution under discussion, deprive themselves of the power to exercise this judgment.

The charters of some cities in this State contain special provisions authorizing local boards of education to establish requirements other than, and in addition to, those prescribed by the Consolidated School Law. The existence of such legislation would seem to imply that without it boards did not possess this power, and I am clearly of the opinion that in the absence of some special act of the Legislature, clothing a local board with the power to declare who shall be eligible to appointment in the schools under their charge, all certificates issued in accordance with the provisions of the Consolidated School Law entitle the holders thereof to appointment in any of the common schools of this State.

The appeal herein is sustained.

I decide that the resolution adopted by the board of education of union free school district 3, Orangetown, Rockland county, N. Y., at its meeting held on April 3, 1902, restricting the right of employment in the schools under their charge to the holders of college graduate certificates, is illegal and void, and said resolution is hereby vacated.

TEACHERS' CONTRACTS

5369

In the matter of the petition of the board of education of union free school district no. 4, of the town of Salamanca, for the revocation of the teachers certificate held by W. M. Clark.

A contract between a teacher and the board of trustees expresses reciprocal relations. If teachers are to hold trustees bound by the terms of such contracts they in turn must expect trustees to hold such contracts equally binding upon teachers.

A board of education that seeks to avoid the provisions of the statute through an illegal contract will not be sustained in its efforts to inflict severe punishment upon the other party to such contract for a breach thereof. A board of education seeking to impose the severe punishment of a revocation of a teachers certificate must present its petition therefor with clean hands.

Decided January 14, 1908

Ansley & Ansley, attorneys for appellants
Charles A. Machenry, attorney for respondent

Draper, *Commissioner*

The respondent is a graduate of the Cortland State Normal school and therefore legally qualified to teach in the public schools of the State for life. On October 2, 1907, he contracted with the board of education of union free school district no. 4, Salamanca, to teach in the schools of that district from October 15th for the remainder of the current school year. About November 1st Mr Clark entered into negotiations with the board of education at Harrison, N. Y., for the principalship of the school in that district for the remainder of the current school year. About November 1st Mr Clark placed his resignation in the possession of the board of education at Salamanca. A meeting of the board was held on that evening and the board voted to increase the salary of respondent after January 1, 1908, if he would remain in their employ or if such proposition was not satisfactory that the board would release him when Mr Clark or when the board were able to obtain a permanent teacher to take Mr Clark's place. The action therefore taken by the board was that if Mr Clark was not willing to remain at Salamanca and would furnish a substitute the board would release him. Mr Clark left Salamanca on Thursday evening of November 7th and swears that he devoted Friday and Saturday in search of a suitable substitute and that he applied to three different teachers agencies for such substitute. While it appears that Mr Clark made an honest effort to obtain a substitute he did not succeed in getting one and he was not therefore released from the obligation of completing his contract at Salamanca.

A contract between a teacher and a board of trustees expresses reciprocal relations and if teachers are to hold trustees bound by the terms of such contracts they in turn must expect trustees to hold such contracts equally binding upon teachers. A teacher should not, therefore, except for cause, vacate a position or refuse to complete a term covered by the contract unless released from that obligation by the board of trustees. The law specifically provides that failure to complete a term covered by contract shall be sufficient ground for revocation of the certificate of the offending teacher. It is fortunate for respondent that this proceeding is not to be determined upon his conduct in vacating the position in question. There is another element which must be regarded as the controlling factor in the determination of this proceeding.

The moving papers of appellant establish one point which seems to me to estop the board of education from invoking the power of this Department to impose the drastic punishment upon respondent of revoking his diploma and disqualifying him from teaching in the public schools of the State. The board of education inserted in its written contract with respondent Clark the following provision: "It is also agreed for value received that it shall always be at the option of the board of education to remove with or without cause stated, the said teacher . . ." The Consolidated School Law specifically provides that no teacher shall be employed for a shorter time than ten weeks except to complete an unexpired term and that no teacher shall be removed during a term of employment except for neglect of duty, incapacity to teach, immoral conduct, or other sufficient cause. The statutes provide that the removal of a teacher by a board of education *for cause* is always reviewable by the Commissioner of Education.

It is not possible for a board of education to override the specific provisions of the statutes by special contract. The board seeks by inserting this provision in its written contracts to nullify not only that provision of law providing that contracts shall not be made for a shorter time than ten weeks but also that provision of law providing that a teacher shall be dismissed for cause only. This feature of the contract in question is therefore clearly illegal.

This case presents the unusual situation of a party who, seeking to avoid the provisions of the statutes through an illegal contract, is now petitioning for the infliction of severe punishment upon the other party to such contract for a breach thereof. The idea is repugnant to all principles of equity and to common fairness. A board of education seeking to impose the severe punishment of revocation of a teachers certificate must present its petition therefor with clean hands.

The petition herein is dismissed.

5150

In the matter of the appeal of Thomas A. Killips v. Patrick Hendrick as sole trustee of school district no. 9, town of Lima, county of Livingston.

The law requires teachers' contracts to be in writing and gives its favor to such as are. Evidence to change this construction of the written contract might be considered but the burden of proof is upon the party offering such evidence. For valid reasons trustees may relieve a teacher from the work he contracted to perform but in extending such relief the right to reduce his salary does not follow. Continuing a teacher in the school without his consent to a modification of the contract, renders the district liable for the full compensation provided in such contract. Trustees will not be permitted to resort to technicalities for the purpose of withholding from a teacher any portion of the salary to which he is honestly entitled.

Decided November 17, 1904

Albert H. Stearns, attorney for appellant
George W. Atwell, attorney for respondent

Draper, *Commissioner*

This is an appeal brought to recover $183.66 with interest thereon from June 1, 1904, for balance of salary due appellant for teaching in school district no. 9, town of Lima, county of Livingston, during the school year 1903–4.

The appellant alleges that in August 1903 he made a contract with Patrick Hendrick, sole trustee of school district no. 9, town of Lima, county of Livingston, to teach in the school of said district for a period of thirty-six weeks. The respondent acknowledges that such contract was made for the said thirty-six weeks. There is no dispute, therefore, as to the period of time for which said appellant is entitled to receive compensation.

It is alleged by the appellant that under the terms of his contract he was to receive a weekly salary of $14. The respondent claims that the appellant was to receive but $11 per week for his services. The respondent admits, however, that the contract for 1903–4 provided for the same salary which was paid the appellant for *teaching* in such district during the school year 1902–3. The respondent claims that under the provisions of the contract for the school year 1902–3 the appellant was to receive a salary of $11 per week for *teaching* and a compensation of $3 per week for taking care of the furnace. The appellant makes the contract for the school year 1902–3 a part of his pleadings in this appeal. Such contract provides that Thomas A. Killips, who is the appellant in this appeal, is

"To teach the public school of said district for the term of 36 consecutive weeks, commencing September 8, 1902, at a weekly compensation of 14 dollars and.....cents payable at the end of each thirty days during the term of such employment. And the board of trustees of said district hereby contract to employ said teacher for said period at the said rate of compensation, payable at the time herein stated."

The following indorsement was made upon such contract: "This contract shall call for $15 per week if said teacher teaches in the South Street school building. It also provides for care of furnace by said teacher."

The said Killips taught during the school year 1902–3 in the building in said district described in such contract as the "South Street school building" and was paid by order of said Hendrick as the contract provided $15 per week. There is nothing in this contract which could possibly be construed to mean that the services of said Killips for *teaching* and for taking care of the furnace were to be measured separately and to be paid for accordingly. The fair, honest interpretation of the written contract is that Killips was hired to teach the school at $14 per week and if employed in the South Street building, at $15 per week, and that he was also to take care of the furnace.

The law requires teachers' contracts to be in writing and gives its favor to such as are. Evidence to change this construction of the written contract might be considered, but the burden of proof in such case is upon the respondent herein. The respondent has failed to present such proof and the above interpretation of such contract must be accepted.

The respondent admits that he "engaged" the appellant Killips to teach the school in said district no. 9, town of Lima, but claims that he agreed to pay him only $11 per week and that he positively refused to make any contract with him in relation to the care of the furnace. The said respondent acknowledges that he refused to give to said Killips a written contract as section 17, article 5, title 15 of the Consolidated School Law provides. The provisions of this law are mandatory and it was the duty of Trustee Hendrick to have complied with it. His refusal to perform this duty is the cause for this misunderstanding and this appeal.

The said Trustee Hendrick directed the appellant Killips to report at the schoolhouse to open school on the morning of September 8, 1903, but stated that school would probably not open. Killips reported but the school was not opened. Trustee Hendrick persistently refused to open school and on October 13, 1903, the State Superintendent of Public Instruction opened such school and placed said Killips in charge as the principal teacher. On October 15, 1903, the State Department of Public Instruction issued an order directing said Killips to open and maintain the school in said district no. 9, Lima, and fixed his compensation at $14 per week. This order of the State Department also provided that said Killips should take care of the furnace. A copy of such order was served on Trustee Hendrick. For two months Hendrick as trustee paid Killips $14 per week. He thus recognized the contract of Killips as calling for a compensation of $14 per week. If he had not contracted with Killips at that salary, why did he pay it for two months? Taking into consideration these facts: The contract of Killips for the year 1902–3 which was unquestionably at $14 per week; the general understanding between Hendrick and Killips that the latter should teach during 1903–4 at the same compensation which he received during the previous year; the fact that Killips was placed in such school by an order of the State Superintendent at a salary of $14 per week; and the further fact that Hendrick accepted the services of Killips for two months,

from October 13, 1903, to December 13, 1903, at $14 per week, the conclusion is irresistible that Killips was employed at, and is entitled to receive, a salary of $14 per week.

If valid reasons existed for relieving Killips of any of the work which he had contracted to perform, the trustee or district could undoubtedly have so relieved him; but in extending such relief the right to reduce his salary does not follow.

It was not until January 13, 1904, or three months from the date on which Killips began to teach that it occurred to Hendrick that under the terms of the contract Killips was entitled to only $11 per week. It was not within the power of Hendrick to modify the contract at that time without the consent of Killips. Killips might have been dismissed by the trustee for sufficient cause, but his continuance in the school without his consent to a modification of the contract, renders the district liable for the full compensation provided in such contract.

The appellant states in his appeal that he has received from the district payment on the contract in question to the amount of $390. But in his reply to the respondent's answer he claims an error was made in stating such amount and asks the privilege of correcting such error. He states in his reply that the amount he did receive was $320.34. The appellant states that he did not keep a personal written account of the payments made him but relied on the records of stubs in the school register. He also alleges that the school register was in the hands of the trustee at the time he made his appeal and that such trustee refused to permit him to examine the register to obtain information from such records. If an error was made in stating this amount, it is proper that such error should be corrected. The appellant shows the dates on which orders in his behalf were issued on the district collector and on the supervisor of the town and gives the amounts of each of such orders. The total of such amounts appears to be $320.34.

The respondent has not met this question in such a way as a public officer is bound to do. The records of his office should show what payments he has made to the appellant. The records of the office of collector of the district and of the supervisor of the town should show the amounts which each of these officers has respectively paid the appellant. The respondent could easily have shown what the facts are on this point. The conduct of trustees in dealing with teachers must be open, fair and honest. Trustees will not be permitted to resort to technicalities for the purpose of withholding from a teacher any portion of the salary to which he is honestly entitled. If the facts on this point are not completely presented, the responsibility for failure to set the matter right rests upon the respondent.

The respondent claims that he paid the appellant $10 more than was agreed upon for taking care of the library and asks that such sum be deducted from the amount of salary still due appellant. The appellant claims that he agreed to take care of the library and that Trustee Hendrick agreed to pay him $40 for

such services. The records show that respondent did pay him that amount. The respondent raises this question and the burden of proof falls upon him. He has failed to sustain his position.

It, therefore, appears quite clear that under the terms of the contract in question the appellant is entitled to salary for services for the period of 36 weeks at $14 per week or $504. It also appears that he has received in payments on such contract $320.34 and that there was due to him June 1, last, a balance of $183.66.

The appeal herein is sustained.

It is therefore ordered, That Patrick Hendrick, trustee of school district no. 9, town of Lima, county of Livingston, be, and he hereby is, ordered and directed to pay to the said Thomas A. Killips the sum of $183.66 with interest thereon at six per cent from June 1, 1904. If the said district no. 9, Lima, has not the available funds for this purpose then the said Trustee Hendrick is also hereby ordered and directed to raise the necessary funds therefor by levying a tax upon the taxable property of the district as provided by the Consolidated School Law.

5143

In the matter of the appeal of Clara Foster v. board of education of union free school district no. 1, town of Richfield, Otsego county.

While the law does not ignore a verbal contract, it does not favor one. The recorded action of the board reappointing a teacher would have bound the board, if the teacher had taken any steps which clearly indicated to the board an acceptance of the position. The teacher having applied for another position without accepting the first one, the whole question of the employment and the disposition of her services for the ensuing year was in abeyance and that question never passed out of the realm of negotiation and uncertainty into the status of established and legal rights.

Decided September 22, 1904

Draper, *Commissioner*

The appellant was a teacher in the Richfield Springs High School for the year 1903–4, and about May 1, 1904, made application for reappointment, which the board of education approved. The board followed this action by sending to the appellant an unexecuted, written contract which she was to sign and return. She had notice that if she desired the place, the contract should be signed and returned by the 15th of May. This was not done, but appellant claims that she was advised by the president of the board that it would make no difference if she took more time. In this statement the president of the board sustains her. There is, perhaps, some weight in the fact that this official ceased to be a member of the board, by reason of a different choice at the ensuing annual school meeting. The reason for the delay on the part of the appellant in signing and returning the agreement appears in the fact that she desired a different position at a

higher salary, for which she made application, which was refused, although the statement is made that she was told that she could have the position she specially desired at the same salary she had received before. In time appellant notified the board that she would prefer to take the old position rather than the new one at the same salary. While this was going on the board filled the old position. Appellant has since tendered the board the written agreement, signed by her, but the board has refused to execute it on behalf of the district. She claims the position for the present year, and the board resists the claim.

No written contract has been executed between the parties. While the law does not ignore a verbal contract, it does not favor one. The recorded action of the board, reappointing the teacher, would have bound the board, if the teacher had taken any steps which clearly indicated to the board an acceptance of the position. If it is claimed that because the teacher applied for the position and the board voted that she should have it, this constituted a contract it must be said that the subsequent course of the teacher was sufficient to overthrow the belief that she considered herself bound. If it be said that she had the right to rely upon the statement of the president of the board that she might have more time in which to accept the position, it must also be said that she clearly understood that she had not accepted and that there was no existing contract between the parties.

It can hardly be successfully maintained that she had a right to the position, that the board was bound and she was not, while she was negotiating for another place at higher pay. If she is a good teacher, as I have no reason to doubt, it is to be regretted that the negotiations were not more free and open and that the board did not extend the time for accepting the first position until she had rejected the other; but it can hardly be said that they did so or that in view of all the circumstances, they became bound to her in any way. She had applied for the other place without accepting the first one and her second application was in abeyance. This being so, the whole question of the employment and the disposition of her services for the ensuing year was in abeyance, and that question never passed out of the realm of negotiation and uncertainy into the status of established and legal rights.

It follows that the appeal must be dismissed.

4767

In the matter of the appeal of Uriah C. Gregg v. Anson S. Thompson, sole trustee, school district no. 8, Ellisburg, Jefferson county.

Trustees of school districts have the legal authority to employ a person duly qualified under the school law, to teach in their respective districts for the entire school year, or for any less term or terms of time during the school year, not less than ten weeks unless it is for the purpose of filling out an unexpired term of school. Such contracts should be reduced to writing and signed by the parties.

It is well settled that a written contract supersedes all oral negotiations or stipulations between the parties thereto which preceded or accompanied its execution, except where the contract has been procured through duress, fraud or undue influence; that parol evidence is not admissible to contradict or subsequently vary a written contract.

Decided May 26, 1899

Skinner, *Superintendent*

This is an appeal from the action of Anson S. Thompson as sole trustee of school district 8, Ellisburg, Jefferson county, in dismissing the appellant as teacher in the school in such district during the course of a term of employment without sufficient cause.

The appellant alleges, as the grounds for bringing his appeal, that he was employed by said Trustee Thompson to teach the school in said district for the term of thirty-six weeks during the school year of 1898–99 at the compensation of $10 per week, and was dismissed after teaching twenty-six weeks, without sufficient cause.

The appeal herein is quite lengthy and contains much that is not material in the consideration and disposition of the question presented for my decision, namely, whether Trustee Thompson employed the appellant to teach in the school in said district 8, Ellisburg, for thirty-six weeks during the school year of 1898–99 as claimed by the appellant. Trustee Thompson, in his answer to the appeal herein states that he entered into two contracts in writing with the appellant during the present school year, one for the period of sixteen weeks, and the other for the period of ten weeks, at a compensation of $10 per week; that on the termination of the term of employment of the appellant of the ten weeks mentioned in the second contract, he informed appellant that he did not desire to employ him any longer; that he never made any other or different agreement with the appellant to teach in the school in said district, other than the said two contracts, copies of which are annexed to his answer and marked "Exhibits A and B." Trustee Thompson specifically denies the allegations contained in the appeal herein, that April 3, 1898, or at any other time, he employed the appellant as a teacher in the school in said district for the then ensuing school year at a salary of $10 per week, for thirty-six or thirty-eight weeks as he said Thompson should determine, and which he did determine to be thirty-six weeks.

It is established by the proofs filed herein that August 3, 1898, the appellant applied to Trustee Thompson for employment as a teacher in the school in said district 8; that August 5, 1898, the said parties again met and a further conversation and negotiations were had which resulted in the execution of a contract in writing, made in duplicate, dated August 3, 1898, whereby the appellant contracted to teach the school in district 8, Ellisburg, Jefferson county, for the term of sixteen consecutive weeks, commencing September 5, 1898, at a weekly compensation of $10, payable at the end of each thirty days during the term of employment, and Trustee Thompson contracted to employ the appellant for said period at the said rate of compensation, payable at the times therein stated; that

one copy of the contract was signed by the appellant and retained by Trustee Thompson, and one copy was signed by Trustee Thompson and retained by the appellant; that said contract was performed by the parties thereto, the said term closing on or about December 23, 1898, when the school was closed for the holiday vacation; that January 10 and 14, 1899, respectively, the parties hereto met and January 14, 1899, a second contract was executed in writing and in duplicate, dated January 11, 1899, whereby the appellant contracted to teach the school in said district for the term of ten consecutive weeks, commencing January 11, 1899, at a weekly compensation of $10, payable at the end of each thirty days during the term of employment, and Trustee Thompson contracted to employ the appellant for said period at the said rate of compensation, payable at the terms therein stated; that one copy of the contract was signed by the appellant and retained by Trustee Thompson, and one copy was signed by Trustee Thompson and retained by the appellant; that said contract was performed by the parties thereto except that the appellant had two days' service to make up; that April 10, 1899, the appellant, Trustee Thompson and a Mr Littlefield being in the schoolhouse, Trustee Thompson stated to appellant that he had employed Mr Littlefield to teach the school, but he would permit the appellant to teach for that day and the day following to make up the two days; that on the morning of April 12, 1899, the appellant, Trustee Thompson and Mr Littlefield, being in the schoolhouse, said Thompson said "Mr Littlefield, I place you in charge of the school and all the teachers in the school," and to the pupils, "You are to recognize Mr Littlefield as your teacher, obey his orders and none others"; that the appellant said to Thompson that he (appellant) was there to teach the remainder of his time, and requested Thompson to remove the obstruction he had placed to prevent him (the appellant) from doing his work; that Thompson refused and said to appellant, "You fix up your register and I will pay you for the time you have taught for which I owe you," and thereupon the appellant left the schoolhouse; that said Littlefield is teaching in the school in said district, and the appellant is teaching in school district 17, Ellisburg.

The appeal was filed May 11, 1899.

Under the Consolidated School Law of 1894, the trustees of school districts are empowered to contract with and employ all teachers in the district school or schools as are qualified under the provisions of said law, and to designate the number of teachers to be employed; to determine the rate of compensation to be paid to each teacher respectively, and to determine the terms of school to be held in their respective districts during the school year. All trustees of such districts when employing any teacher to teach in any of said districts shall, at the time of such employment, make and deliver to such teacher, or cause to be made and delivered, a contract in writing, signed by said trustee or trustees, or by some person duly authorized by said trustee or trustees to represent him or them in the premises, in which the details of the agreement between the

parties, and particularly the length of the term of employment, the amount of compensation and the time or times when such compensation shall be due and payable, shall be clearly and definitely set forth.

Under the aforesaid provisions of the school law, Trustee Thompson had the legal authority to employ the appellant as a teacher in the school in district 8, for the entire school year, or for any less term or terms of time during such school year, not less than ten weeks, unless it was for the purpose of filling out an unexpired term of school; and when any such contract was entered into, it must be reduced to writing and signed by the appellant and said trustee. A contract was made in writing between the parties August 5, 1898, for a term of employment of the appellant as a teacher for 16 weeks from September 3, 1898, at a compensation of $10 per week, and January 11, 1899, a second contract was made for a like employment of appellant for a term of ten weeks from January 11, 1899, at a compensation of $10 per week.

It is well settled by the courts of this State that a written instrument supersedes all oral negotiations or stipulations which preceded or accompanied its execution, except where the instrument has been procured through duress, fraud or undue influence; that parol evidence is not admissible to contradict or substantially vary a written contract.

Admitting, for the purposes of argument only, that Trustee Thompson, in the conversation and negotiations had with the appellant, prior to the execution of the written contract August 5, 1898, said that he would employ the appellant for the present school year, such statement was merged in, and superseded by, the written contract then made, and parol evidence is not admissible to contradict or vary such written contract. The same is true relative to the written contract between the parties, dated January 11, 1899.

The contention of the appellant that he was dismissed as a teacher in the school in district 8, Ellisburg, in the course of a term of employment is not sustained.

The appeal herein is dismissed.

3768

In the matter of the appeal of Alice A. Tillson v. Isaac McNeeley, sole trustee of school district no. 4, of the town of Forestburgh, county of Sullivan.

A person claims to have been employed as a teacher by a verbal contract for a term of sixteen weeks. The school trustee, with whom the contract was alleged to have been made, denies any agreement whatever. The person averring the employment was not allowed to teach the school. On an appeal of this nature, where the parties swear to statements which are diametrically opposed to each other, the preponderance of proof must be with the appellant, or the appeal can not be sustained.

The alleged contract never having been fulfilled, the appellant's claim would be for damages upon a breach of contract.

It is not the policy of the law to require the State Superintendent of Public Instruction to measure damages for a breach of contract when the extent thereof is altogether indefinite and uncertain. The remedy is to be sought by an action in a local court.
Decided March 23, 1889

John P. Roosa, attorney for appellant
T. F. Bush, attorney for respondent

Draper, *Superintendent*

The appellant taught school in the district above named from September 1888, to the 13th of February 1889. She claims that she was employed by the trustee to teach a term of sixteen weeks, commencing on the 14th of February 1889, at $8.50 per week. She states that the agreement to this effect was made in conversations between the trustee and herself at four or five different times. She says that when she went to commence the school on the 14th of February she found the door locked against her, and that she was unable to gain admission. She asks that the trustee be directed to place her in possession of the school, and to pay her her wages as agreed.

The trustee denies any agreement of the character referred to. He says that he never had any conversations as described by the appellant, in words or substance, and that he never, at any time, agreed that she might teach the school during the spring term.

There is no proof submitted by the appellant, beyond her own statement. It is incumbent upon her to prove her allegations. The parties swear to statements which are diametrically opposed to each other. The preponderance of proof must be with the appellant in order that she may succeed. There is no preponderance on her side. Moreover, it is against the policy of the Department to interfere in a case of this kind. If there was an agreement between the parties, it was entirely unfulfilled. If we were to assume that all the appellant claims were true, it would only follow that the respondent was guilty of a breach of his contract and the appellant would be entitled to recover damages in consequence thereof. It is not the policy of the law to require the State Superintendent of Public Instruction to fix damages for the breach of a contract, when the extent thereof is altogether indefinite and uncertain.

If the appellant's statement is true, her remedy lies in an appeal to the local courts.

The appeal is dismissed.

5288

In the matter of the application of Charlotte Lamson for reinstatement as teacher in union free school district no. 6, towns of Ossining and Mount Pleasant, county of Westchester.

It is not necessary that school should be in session or that the term covered by a teacher's contract should have already been opened in order to permit the board of education

to remove such teacher. Any action of a board which prevents a teacher from entering upon her term of service and completing it is in fact a dismissal.

The contractual rights of a teacher may be enforced by the institution of any proceeding necessary to protect such right.

A teacher's contract may be vacated at any time after its execution for conduct inimical to the welfare of the school.

Decided October 22, 1906

Hon. George F. Bodine, attorney for appellant
Baldwin & Baldwin, attorneys for respondent

Draper, *Commissioner*

Miss Charlotte Lamson was employed as one of the teachers in the Briarcliff school for two years. On the 15th day of May 1906, she made a contract for the ensuing school year. Under this contract she was to teach ten months beginning in September at a monthly compensation of $65. It is conceded that during the two years she taught in this school her work was successful and satisfactory. Trouble between certain teachers and the board of education took place during the week of the closing exercises of the school. Thereafter the board of education asked Miss Lamson for an explanation of her conduct in connection with such trouble. The explanation offered by Miss Lamson was not satisfactory to the board. The president of the board advised Miss Lamson that her explanation was not satisfactory and suggested to her the propriety of resigning to avert the humiliation of being officially requested to resign. Miss Lamson refused to resign. Thereupon the board of education through its clerk advised Miss Lamson that her services would not be required during the school year beginning September 13, 1906. At the time designated for opening the school Miss Lamson appeared at the school building and tendered her services. The board refused to permit her to enter upon the performance of her contract and directed her to leave the school grounds. She formally notified the board of her readiness and desire to enter on the performance of her contract. She has not been permitted to do this.

Respondent's attorney raises the question of jurisdiction and claims the Commissioner of Education has not authority to entertain this proceeding. He claims that this is not an appeal over which the statutes confer jurisdiction to the Commissioner of Education. He also claims that the Commissioner of Education has not the power to grant the relief requested. He further contends that the proceedings are prematurely instituted as it appears from the moving papers that the petitioner had not yet entered upon the term of her alleged contract and was not therefore a teacher in said school. This contention is not sound. Title 16 of the Consolidated School Law provides for appeals to the Commissioner of Education. Section 1 of such title names various bodies and officers whose official acts and decisions are appealable. Subdivision 7 of section 1 specifically provides that any person conceiving himself aggrieved in consequence of any decision made "by any other official act or decision concerning any other matter under this act, or any other act pertaining to common schools

may appeal, etc." The appellant had a contract to teach in this district. The board of trustees officially notified her that her services would not be accepted under such contract. This action on the part of the board of education is an official act and an official decision and it pertains to the common schools and the petitioner herein is aggrieved thereby. Clearly under this provision of law she has the right to bring an appeal to the Commissioner of Education for such relief as shall be found upon the facts in the case to be just and equitable.

Among other things subdivision 11 of section 15 of title 8 of the Consolidated School Law provides that " No teacher shall be removed during a term of employment unless for neglect of duty, incapacity to teach, immoral conduct, or other sufficient cause." Subdivision 9 of section 47, title 7 also provides " nor shall any teacher be dismissed in the course of a term of employment except for reasons which if appealed to the Superintendent of Public Instruction [Commissioner of Education] shall be held to be sufficient cause for such dismissal."

Section 16 of title 8 makes this provision binding upon boards of education.

Was the action of this board of education in notifying petitioner on August 12, 1906, that her services would not be required in fact a removal or dismissal? It was not necessary that school should be in session or that the term covered by the contract should have already been opened in order to permit the board of education to remove her. Any action of the board which prevented her from entering upon her term of service and completing it was in fact a dismissal. But whether it was or not she had a contractual right which she could enforce and might begin any proceeding necessary to protect such right. The action of the board was a breach of contract unless good reason existed therefor. The contention of respondent that action for relief could not be brought under the circumstances of this case previous to the date when school was to open is not well founded. It is a well settled principle of law that where one party to a contract is guilty of a breach the other party is under no obligation to delay action until a tender of performance under the terms of such contract but may begin action for such breach of contract at once (Windmuller v. Pope, 107 N. Y. 674). Under the decisions of this Department a teacher in such case may bring action for reinstatement or for the payment of salary for the time the teacher was deprived of teaching. I must therefore hold that this case is properly before me and that I have full jurisdiction to determine the issues presented. There appears to be only one question for determination and that is whether or not the action of the board of education in notifying Miss Lamson that her services would not be required was based upon valid reasons.

It appears from the pleadings that at the time the trouble in question occurred George A. Todd jr was the principal of the school; that Asa Howard Geeding was musical instructor of said school; that Charlotte Lamson the petitioner was a teacher in the academic department and had charge of physical culture; and that Gertrude Selter (now Guthrie) was a teacher in the grades and by special agreement acted as pianist for the school. It was customary in the closing week of the school to hold public exercises of a literary character.

About one month previous to the time when such exercises were to be held the principal of the school wrote Mr Geeding, the musical instructor, requesting him to get up something for the public entertainment and to take full charge of it. It also appears that these annual entertainments were under the direction of the board of education and that the musical instructor after deciding upon the exercises to be given submitted his selection to the board of education and the principal. He was directed by the board to proceed with his arrangements as explained to them and the plan had the approval of the principal. Whatever the plans of the musical director were they had the indorsement of the proper school authorities.

The musical director desired to have one Miss Schlier play the accompaniment. By direction of the board he obtained her services. This appears to be the beginning of the trouble. It appears that Miss Selter (now Mrs Guthrie) believed that she should perform such services since she was the pianist of the school. The musical instructor claims that when he first decided on the selection to be given he consulted Miss Selter about playing and that she wanted two weeks to practise to prepare for such service which was a longer period than time would permit. Miss Selter positively denies this and asserts that she was prepared to play without practice, was anxious to do so and wrote Mr Geeding a note to that effect. The evidence given on this point by Miss Selter is directly the reverse of that given by Mr Geeding. From this the trouble spread. Miss Lamson and apparently other teachers began to think that they were being slighted because of the outsiders who were brought in to aid the musical director.

The whole trouble originated over a trivial affair. Its importance was unnecessarily and unduly magnified. It was within the province of the board of education to direct the employment of such assistance outside of the school faculty as it should deem proper. It appears that Miss Schlier was a resident of the village who possessed musical talent and who rendered similar assistance in many public functions given in the community and particularly by the public schools. She gave such service gratuitously. Obtaining Miss Schlier for this service was no reflection upon Miss Selter. It did not indicate that Miss Selter was incompetent to perform her regularly assigned work in the school. In view of the fact that Miss Schlier had rendered similar assistance at previous school entertainments and upon other public occasions it is doubtful if anyone would ever have construed her employment as a reflection upon Miss Selter if the latter and her friends had not raised that issue. It may be suggested however that it would be well to have all public school exercises of this character performed by those directly connected with the school. These exercises are given in the name of the school and stand for it and should be representative of its working forces, both pupils and teachers. If confined to these forces the authorities will avert such unpleasant and disagreeable community and school disturbances as occurred in this instance.

The pleadings clearly show that Miss Lamson the petitioner felt seriously aggrieved over the employment of Miss Schlier and because she was not herself given a more prominent part in such exercises. In her moving papers petitioner alleges that she was "shunned in every way" during the preparations and rehearsals for the entertainment and was "led to believe that she was not wanted to do anything." It also appears that she believed her position was "usurped by strangers." Miss Lamson also appears to have been the aggressor in resenting what she believed to be the slight and reflections upon Miss Selter, herself and others. It appears that she had a public discussion of their alleged grievance at the school building in the presence of one of the pupils with Mr Geeding and with Miss Schlier. It also appears that Principal Todd was present during most of the discussion between Miss Lamson and Mr Geeding and that Miss Selter was present when the interview between Miss Lamson and Miss Schlier took place. Many statements which Mr Geeding and Miss Schlier swear were made by Miss Lamson are positively denied in the affidavit of Miss Lamson and Mr Todd and Miss Selter also swear that she did not make them. It may be held that the wisest course for a teacher to pursue when she believes that she has not received the treatment to which she is entitled is to present her grievances whatever they may be to the board of education in a full and frank manner. Usually when presented in this way they will receive just and courteous consideration. Differences between members of a faculty or between the faculty and a board should not generally be discussed in the presence of pupils as such treatment thereof may prove injurious and prejudicial to the discipline and welfare of the school.

Miss Lamson closed her term of service for last year about June 19th. About July 12th, the board of education requested an explanation of her conduct in relation to these matters. Her answer to that request was written July 16th or about one month after the trouble occurred. She replied to the letter suggesting that she resign under date of August 1, 1906. The spirit of these letters written more than one month after the event occurred and after she had had opportunity to reflect upon them furnish a fair criterion for determining to some extent the spirit she manifested in the midst of the trouble. These letters are an important element in the determination of this proceeding. These letters show that Miss Lamson felt that she had been ignored not only in the school but in the community. She points out all she did to build up the school and to be helpful in the village and all of which she believes was not appreciated. Her letters show that she was indifferent to the preparation of the entertainment and because she believed the musical instructor had been unkind to one of the teachers. She says that she often went to Sunday school and no one had spoken to her but the superintendent. She also says that she was "simply ignored so far as being asked to help to prepare the entertainment and was not considered of enough importance to be introduced to the helpers." And again, "I had sufficient provocation for a discussion of personal issues before the children or where it was most convenient." She fur-

ther says, "I have a contract and if you do not wish me to teach I'll simply collect my pay and remain at home. I am quite sure that my work would be as pleasant as it ever has been, for few ever exerted themselves to make my stay in Briarcliff pleasant."

It is not charged that the board acted impulsively or with any animosity in the matter whatever. It appears that they acted very deliberately and simply with a desire to do what they regarded for the best interests of the school. It also appears that none of the other teachers identified with the trouble in question are now employed in the school and under all the circumstances I think it would be unwise to direct the board to reinstate petitioner. I think it may well be held that the question in this case is one involving the discretionary power of the board and that its judgment in the absence of any improper motive should be conclusive. It may also be said that the action taken by the board was during a vacation period and at a time when petitioner might have obtained a more congenial position without any particular hardship.

It is contended by attorney for appellant that the acts complained of took place in June and that under her contract she was not to begin to teach until September and that the contract could not be set aside for conduct which took place previous to the time when she was to enter upon her term of service. This position is untenable and it must be held that a teacher's contract may be vacated any time after its execution for conduct inimical to the welfare of the school.

The appeal herein is dismissed.

5225

In the matter of the appeal of Annie Y. Fulton Palmer from the action of Seymour Gage, trustee of school district no. 3, town of Caroga, Fulton county.

A teacher who attempts to decide whether or not nonresident pupils shall be admitted to school is usurping the powers of a trustee.

A teacher who refuses to teach nonresident pupils admitted by the trustee exceeds her authority and such conduct is good ground for her dismissal.

A teacher who dismisses school for a single day without good cause or without the consent of the trustee is guilty of a breach of contract sufficient for dismissal.

Decided November 24, 1905

Horton D. Wright, attorney for appellant
Jordan & Cassedy, attorneys for respondent

Draper, *Commissioner*

The appellant herein contracted with the trustee of school district no. 3, Caroga, Fulton county, on or about June 15, 1905, to teach the school in said district during the ensuing school year. Pursuant to the provisions of said

contract she commenced to teach in such school on the 4th day of September 1905. It appears that on or about October 3, 1905, Trustee Gage dismissed her. The only question to be determined in this appeal is the sufficiency of the grounds upon which appellant was dismissed.

The pleadings indicate that the relations between the trustee and teacher of this district have not been harmonious. A question as to which was the proper authority to determine the rights of certain pupils to attend the school seems to have arisen. The appellant refused to admit certain pupils who were nephews of respondent and permanent members of his family on the ground that they were nonresident pupils. She also refused to give them instruction when they were admitted to school. She appears to have arrogated to herself the authority to determine what pupils should be admitted to school and also what pupils she should instruct. The law imposes upon a trustee the power to determine whether or not nonresident pupils shall be admitted to school. A teacher has no authority whatever in the determination of such question. A teacher is employed to teach the pupils admitted to school and a refusal to instruct such pupils and to extend to them the school privileges to which they are entitled is good cause for dismissal. It is immaterial whether the children in question were residents of the district or nonresidents. That they were living at the home of the trustee and were sent to school by him was known to appellant. Attempting to decide that they were nonresidents and not entitled to attend school in this district was a usurpation of the powers legally imposed on the trustee. Had pupils come to the school without the knowledge of the trustee who were nonresidents it would have been the duty of the teacher to notify the trustee and then abide by whatever orders he might given in the matter. Going beyond this was exceeding her rightful powers and was good ground for dismissal.

It also appears that appellant dismissed school one day and sent all pupils home without assigning good reason therefor and without permission of the trustee. This in itself was a breach of contract and sufficient cause for dismissal.

I do not find that the trustee has exceeded his authority in any way and must decline to interfere with the action he has taken. However, the trustee should without delay pay appellant the salary due her from September 4, 1905, the day on which she opened school to the date on which he dismissed her.

The appeal herein is dismissed.

It is ordered, That appellant shall deliver to the trustee of said district no. 3, Caroga, Fulton county, the key to the schoolhouse and all school records or school property in her possession as teacher and that she shall vacate the position of teacher in said district and cease to interfere in any way with the teacher employed to continue such school or with the school maintained in said district.

5231

In the matter of the appeal of Francis J. Wilson from the refusal of Sherman Sprague as trustee to recognize him as teacher in school district no. 14, town of Liberty, Sullivan county.

A contract between a trustee and a teacher which knowingly and purposely subordinates the school interests of the entire district to the personal interests and convenience of the teacher will be set aside.

To make a contract with a teacher whereby such teacher may take six weeks' vacation whenever he desires to do so is in violation of the rights of the inhabitants of the district.

Decided December 15, 1905

Draper, *Commissioner*

At the annual meeting of school district no. 14, town of Liberty, Sullivan county, for the year 1905, Andrew Lewis was declared elected trustee. An appeal was brought to the Commissioner of Education alleging certain illegal actions and on such appeal the election was set aside and a special meeting for the election of a trustee ordered. At such special election Sherman Sprague was chosen trustee.

On August 5, 1905, Appellant Wilson contracted with Trustee Lewis to teach the school in said district no. 14, Liberty, for thirty-two consecutive weeks. From the time of the annual meeting until my decision declaring the election at such meeting illegal and void, Trustee Lewis was a de facto trustee and as such had authority to exercise the powers and perform the duties conferred by law upon trustees. He had authority to make a contract with a teacher for the school year which would be binding upon the district and upon his successor in office. A legal contract made by a de facto trustee is binding upon third parties and should be honored by a de jure trustee chosen to succeed such de facto trustee. If the contract made, therefore, between Trustee Lewis and the appellant was one which might legally have been made by a legally chosen trustee then such contract is binding upon the district, should be respected by Trustee Sprague, and the relief prayed for in the moving papers granted. The conclusion to be reached in this case, therefore, depends upon the provisions of the contract in question.

This contract was in the usual form except that it contained the following provision: "Said teacher reserves the right to provide for a vacation or vacations of not more than six weeks in the aggregate during said term to be taken when he desires it, which vacation shall not count as a part of the term of service above referred to."

The pleadings show that appellant began teaching October 2d and taught one week when he closed school for two weeks. The pleadings show that at the time this contract was made appellant was collector of the town of Liberty. They also show that at the time appellant closed school in October he was a candidate for reelection to the office of town collector. It is alleged by respondent that the two weeks' vacation taken in October and after the school

had been in session for one week only was for the purpose of enabling appellant to electioneer for votes for the said office of town collector. Appellant denies that he was engaged in canvassing for votes during the two weeks' vacation of October, but he does not show in what manner he was engaged at that time or what emergency or important matter arose sufficient to warrant his closing school for two weeks and at the most desirable period of the year for school to be in session.

It is admitted by appellant that he desired the six weeks' vacation for which provision was made in the contract, for the purpose of enabling him to perform the duties of his office as town collector. Lewis, the de facto trustee, also testifies that this was the object of inserting such provision in the contract. We have the evidence therefore of the de facto trustee and the teacher that they knowingly and purposely entered into a contract which subordinated the school interests of this entire district to the personal interests and convenience of such teacher. A trustee is the representative of the district and in his official capacity must exercise such powers as will protect the interests of the district and promote the educational facilities of the community. To make a contract with a teacher, whereby such teacher may take six weeks' vacation whenever he desires to do so, is in violation of the rights of the inhabitants of the district. Under such contract a teacher could close school the whole of October and part of November or part of October and the whole of November. He might select any other six weeks in the year and at a time when it is most desirable for a public school to be in session. Vacations should be arranged by boards of trustees to meet the needs of the district and not the convenience of a teacher. Contracts of the nature of the one in question must be regarded as inimical to sound educational policies and can not be approved by this Department. Trustee Lewis exceeded his authority in making such contract. Trustee Sprague acted within his legal rights in disregarding such contract and dismissing appellant for closing school for two weeks in October. Since appellant taught the school one week he is entitled to $10 compensation for that week. Trustee Sprague should pay appellant that amount. With such understanding the appeal will be dismissed.

The appeal herein is dismissed.

5148

In the matter of the appeal of Drucilla M. Brice v. L. L. Edsall, B. L. Drew and Robert Doty as trustees of school district no. 1, town of Warwick, Orange county.

When two members of a board of trustees sign a contract form simply as a matter of convenience but without official direction by the board and the teacher is fully and promptly advised in the matter it was held that the transaction fell short of a contract.

Decided October 25, 1904

Draper, *Commissioner*

The appellant in this appeal endeavors to show that she was employed by the trustees of district no. 1, town of Warwick, Orange county, on June 6, 1904, as teacher in said district for the ensuing school year. She alleges that on such date, at a meeting of the board of trustees, a contract in her favor was signed by two members of the board, and that she was subsequently notified by L. L. Edsall, one of the trustees, that she had been employed for the year commencing in September 1904. The appellant attaches much importance to the alleged notice received from Mr Edsall and introduces the affidavits of several persons to show that at various times and places between June 6, 1904, and September 1st following, the said Edsall had stated that two of the trustees, Mr Drew and himself, had signed a contract agreeing to employ the appellant as teacher.

The respondents, in their answer to the appeal, show that a meeting of the board of trustees was duly held on June 6, 1904, at 7.30 p. m. at the house of Trustee Drew. Trustee Edsall arrived at the meeting promptly, but was not able to remain after 7.40. Trustee Doty did not arrive at the meeting until 8 o'clock. Between 7.30 and 7.40 Mr Edsall and Mr Drew discussed the employment of a teacher and agreed to sign one blank form of contract, naming the appellant as teacher for the ensuing year, but on the explicit understanding that if the third trustee, Mr Doty, should appear at the meeting before 8.30 and object to the employment of the appellant no contract should be made with her. Mr Doty did appear at such meeting previous to 8.30 and objected to the employment of said appellant. No contract with the appellant was agreed upon at such board meeting and none of the trustees was authorized by the board to notify the appellant of her employment. The board of trustees subsequently held a meeting and agreed and voted not to employ said appellant for the ensuing year. The action of the board was conveyed to the appellant on June 9, 1904, by written notice, signed by two members of the board. Again on June 13, 1904, further notice of the action of the board was served upon appellant by delivering to her a written notice signed by all members of the board.

The appellant has replied to the answer of the respondents, but does not refute or even deny the statements set forth by the respondents in their answer to the appeal. She rests her right to a contract upon the statement of Mr Edsall that he and Mr Drew had signed one blank form of contract, naming her as the teacher for the year. It is true that they had signed such blank but only as a convenience and not upon official direction by the board. No motion appears to have been made at the board meeting, or any other action taken, authorizing a contract or directing any member of the board to notify the appellant that she had been employed.

It clearly appears from the foregoing facts that there was no action of the board authorizing a contract; that no contract was made with the appellant on June 6, 1904, or thereafter, for the ensuing year; that the transaction upon which she bases her claim fell short of a contract and was quickly explained to her, and

that she has no right or claim to act as the teacher of the district for the current school year. The board of trustees voted not to contract with her and treated her with prompt fairness by notifying her as early as June 9, 1904, of their action so that she might arrange her affairs for the ensuing year accordingly. After seventeen years' service in this district the appellant would have acted prudently had she readily acquiesced in the action of the board of trustees.

The appeal herein is dismissed.

5308

In the matter of the appeal of Clara L. Botsford from her dismissal as teacher by John Anderson, trustee of school district no. 6, town of Marlborough, Ulster county.

A teacher will not be reinstated when it appears from her own statements that she was clearly unable to maintain discipline in the school.

Decided February 15, 1907

Draper, *Commissioner*

There are many legal objections to the consideration of this appeal but it seems advisable under all the circumstances to decide it upon appellant's moving papers. She alleges that she made a written contract for thirty-six weeks' service. A copy of the contract is not in evidence and the terms of the contract are not clearly set forth. The school appears to be a difficult one to control and it appears as though the teacher had not been properly supported by the parents of pupils attending the school. It also appears from appellant's own statements that she was clearly unable to manage and discipline the school. The school had become so demoralized through lack of proper discipline that it was of little value, if any. Under the circumstances it would be unwise to reinstate appellant as teacher and it must be held that the trustee acted for the best interests of all concerned and within his legal right in dismissing her.

The appeal is dismissed.

5173

In the matter of the appeal of Thomas H. Le Roy from the action of the board of trustees of school district no. 5, town of Southampton, Suffolk county.

When a contract provides for *nine consecutive months* at a monthly compensation of $55 payable at the end of each *month,* the term *month* will be interpreted to mean *calendar* month if the conduct of both parties to the contract shows that they mutually understood these terms to mean a calendar month.

Decided February 1, 1905

Draper, *Commissioner*

On August 15, 1903, appellant entered into a contract with the trustee of district no. 5, town of Southampton, Suffolk county, under the terms of which it was agreed that said appellant should " teach the public school of said district for the term of nine consecutive months, commencing September 8, 1903, at a monthly compensation of $55, payable at the end of each month."

The only question in dispute is, what constitutes a month under the above contract? The appellant taught from September 8, 1903 until June 15, 1904, excluding a two weeks' vacation, during the holidays. At the close of school he presented a bill to the board of trustees for 38 weeks and 3 days' service, or 9 months, 2 weeks and 3 days at $55 per month, claiming that the term month in his contract meant a period of four weeks or a " school " month. The board of trustees paid him for nine months' service at $55 per month and refused to pay him for the extra time claimed of two weeks and three days. The board of trustees insist that the term "month " meant a calendar month and that appellant so understood it.

The pleadings show that appellant commenced teaching on September 8th and that November 7th, at the expiration of two months, he was paid by the district and accepted $110 in payment of his salary for such period of two months. He was again paid by the district December 7th at the expiration of the third month and accepted as salary therefor $55. On December 18th he was paid $20 and on January 7th $35 which made $55 at the expiration of the fourth month, and he accepted such payments as his salary for such fourth month. At no time when receiving such payments did he claim additional compensation or protest against receiving the amount tendered him as not being in full of all claims and demands until the close of the year. The language of the contract calls for *nine consecutive months* at a *monthly* compensation of $55 payable at the end of each *month*. The conduct of both parties to this contract shows that they mutually understood these terms to mean a calendar month. The board of trustees certainly so understood them. The conduct of the appellant shows that he placed the same interpretation upon them because he taught two calendar months and accepted $110 therefor. At the end of the third calendar month he accepted the third payment and so on. If he understood the terms of his contract to mean that he should be paid at the end of every four weeks why did he not demand his pay at the end of each of such periods or make some comment in relation to it instead of accepting part payment at the end of each calendar month and thus acquiesce in the understanding which his board had of the contract? The contention of appellant could be sustained only by a technical holding and the rights, if any, to which he may have been thus entitled were waived by his voluntary acceptance of his salary of $55 at the end of each calendar month.

The appeal herein is dismissed.

5155

In the matter of the appeal of Peter Cruikshank from the action of Harvey L. Qua, trustee of school district no. 2, town of Salem, Washington county, in employing his son Coulter Qua, to teach the public school therein.

The approval of a district meeting regularly convened is absolutely essential to a valid contract when relationship of any degree whatsoever exists between the trustee and the teacher. A written statement signed by every legal voter of the district approving a contract between related parties does not satisfy the requirements of the law.

Decided December 2, 1904

Frank C. Brown, attorney for appellant.

Draper, *Commissioner*

The appellant shows that Harvey L. Qua, sole trustee of school district no. 2, town of Salem, Washington county, employed his son, Coulter Qua, about October 1, 1904, to teach the school in said district without authorization by a district meeting, as required under subdivision 9 of section 47, article 6, title 7 of the Consolidated School Law. This provision of the law prohibits a trustee from employing any person related to him by blood or marriage, as teacher of the school of his district, except upon the approval of two thirds of the voters of the district present and voting upon the question at an annual or special meeting thereof. This approval by a district meeting is absolutely essential to a valid contract when relationship of any degree whatsoever exists between the trustee and the teacher. Such approval must be obtained at a district meeting, regularly convened. A written statement signed by every legal voter of the district approving a contract between related parties does not satisfy the requirements of the law.

The appeal herein is sustained.

It is ordered, That the said Harvey L. Qua, trustee of school district no. 2, town of Salem, Washington county, shall immediately dismiss the said Coulter Qua as teacher in the school of said district and that the said Trustee Qua shall immediately employ a duly licensed teacher as required under the provisions of the Consolidated School Law.

5295

In the matter of the appeal of Mabel Griffin from the action of John Eignor as sole trustee of district no. 6, town of Shawangunk, county of Ulster, in refusing to recognize her as teacher in said district.

A teacher having earned a certificate and received official notice thereof is legally qualified to contract to teach.

A trustee can not dismiss a teacher under legal contract for laches under a previous contract which has terminated.

Decided October, 1906

Draper, *Commissioner*

John Meredith was trustee of school district no. 6, town of Shawangunk, Ulster county, for the school year 1905–6. During that year Mabel Griffin, appellant herein, taught the school in said district. Mr Meredith's term of office expired on August 7, 1906, the date of the annual meeting. On July 25, 1906, he made a written contract with Miss Griffin to teach the school in that district for the ensuing school year. At the annual meeting of the district, held on August 7, 1906, John Eignor was elected trustee to succeed Mr Meredith. On August 9, 1906, Mr Eignor employed another teacher. He refused to permit Miss Griffin to open school and serve as teacher in accordance with the provisions of her contract. However, he did not open school in his district until October 11th, when he placed Nellie Ackerman, the teacher with whom he contracted on August 9, 1906, in charge of the school. Miss Griffin reported at the schoolhouse ready to assume work on September 10th, but no children were present and she also reported on September 24th, but the building was not open. She has reported daily since October 11th although the trustee has refused to permit her to teach.

It appears that the night of the annual meeting was stormy and the attendance was not large. Trustee Meredith was not present and did not report the contract he had made with Miss Griffin, but a copy of such contract was in the school register. Mr. Meredith did notify Trustee Eignor on August 9th, two days after the annual meeting of the contract with Miss Griffin. Eignor swears in his answer to this appeal that he made a contract with Miss Ackerman on August 8th. There appears to be some question as to the date on which this contract was executed and I directed School Commissioner Rhodes to take testimony on this point. He obtained the affidavit of Miss Ackerman and she swears that she did not sign such contract until August 9th. On August 9th, Meredith notified Eignor of the contract with Miss Griffin.

Respondent alleges that Meredith did not make a contract with Miss Griffin until after the annual meeting. He does not offer competent evidence in proof of this allegation.

Meredith swears the contract was made on July 25th. Miss Griffin also swears that the contract was made on July 25th. A daughter of Mr Meredith swears that she was present July 25th when this contract was agreed upon and saw it signed by the parties thereto. There is no evidence in proof to the contrary.

Respondent also alleges that Miss Griffin was not legally qualified to teach in the second school commissioner district of Ulster county as the school commissioner of that district had not indorsed her teachers certificate. Respondent is wrong in this contention. The records of this Department show that in the April 1906 examination Miss Griffin completed the work for a certificate of the second grade in the first commissioner district of Orange county. An official report was forwarded to Miss Griffin advising her of that fact. Having earned her certificate, she was, under the rulings of this Department, legally qualified to

contract to teach in any school district in the State. The mere formality of the issuance of such certificate did not disqualify her from making such contract. Her certificate might have been issued for first Orange or for second Ulster. Any school commissioner in the State was required to indorse it or give valid reason for not indorsing it. The right of appellant to contract to teach was not restricted to the district of the school commissioner who issued her certificate. She was legally qualified to contract to teach in any school district in the State and before the indorsement of her certificate by the school commissioner having jurisdiction. The commissioner had expressed his willingness to indorse the certificate when presented to him. [*See* decision no. 4488, October 1896]

It is claimed by respondent that he did not refuse to recognize appellant as teacher but that he dismissed her from service. A trustee has legal authority to dismiss a teacher provided good reason exists for such action. The law provides that such reason must be one which the Commissioner of Education approves. The reason assigned in this case is, in substance, the failure of appellant to keep full and regular hours and maintain proper discipline during the past year. This would have been good ground for dismissal under last year's contract but it is not good ground for dismissal under this year's contract. The present contract can not be set aside for failure to perform obligations to which appellant was bound under a previous contract.

Trustee Eignor appears to have been incensed because the retiring trustee had employed a teacher. The retiring trustee had full power under the law to hire a teacher for the ensuing year. It was the duty of the incoming trustee to honor such contract and recognize the teacher employed thereunder. His plea that he had no official knowledge of such contract is not entitled to consideration. He admits that the trustee was not at the annual meeting and his report was not received. It was the duty of the incoming trustee to obtain from the previous trustee all official books, papers and records before he proceeded to make contracts which bound the district. At least he should have made reasonable effort to obtain them. It is not claimed that he made any effort whatever to obtain such official documents. The previous trustee who was not at the meeting because of a storm appears to have made reasonable effort to notify his successor that he had contracted with a teacher as such notice was given the second day after the annual meeting. This must be regarded as a reasonable time in a rural community.

Appellant had a valid contract to teach in this district for 34 weeks from September 10, 1906, at $9.50 per week. She is entitled to full compensation from that date. Trustee Eignor is responsible for the embarrassing position in which he has placed his district.

The appeal herein is sustained.

It is ordered, That John Eignor, trustee of school district no. 6, town of Shawangunk, county of Ulster, shall immediately install and recognize Mabel Griffin, the appellant herein, as teacher of the school in said district.

It is also ordered, That the said John Eignor, trustee of said district no. 6, Shawangunk, shall, without unnecessary delay, pay the said Mabel Griffin the sum of one hundred thirty-three dollars ($133) the same being the salary due her from September 10, 1906, at $9.50 per week.

5454

In the matter of the appeal of Elizabeth Macomber from the action of the board of education of union free school district no. 12, town of Salem, Washington county, in terminating her contract.

Teacher's contract; right of board of education to transfer teacher. A contract with a teacher contained a clause that "said teacher may be transferred from one grade to another as circumstances may require, or may be deemed advisable by the principal of said school." Such teacher, after having taught French, German, ancient history, physiology and botany in the academic grades for a year or more, was notified that she must teach in grade seven in the elementary department. No ground of complaint existed against the teacher for her work in the academic grades, and no tangible reason was given for the transfer. The teacher appeals from the action of the board in transferring her to the elementary grades. *Held,* that the power of transfer reserved in the contract was not absolute; that its action in making such transfer was reviewable on appeal; that under all the circumstances the transfer was unjustifiable.

Rules as to treatment of teachers. If a board of education charges that a teacher is inefficient, that she did not teach competently or was unable to control her pupils, that she had been insolent to the board or her superior officer, or that she had done something to demoralize or discredit the school, and such charges are supported by evidence, the action of the board in respect to such teacher will be pronounced to be proper. But a board of education has no absolute power to discipline a teacher without assignable reason, especially where the teacher demands a statement of the reasons of the board's action concerning her.

Decided June 3, 1910

Abner Robertson, attorney for appellant
James Gibson, jr, attorney for respondent

Draper, *Commissioner*

The appellant, a graduate of Wellesley College in the class of 1906, was employed as teacher in Washington Academy, which is the public school of union free school district no. 12 of the town of Salem, Washington county, by resolution of the board of education, on the 3d day of June 1907. A written contract was executed between the board and the teacher. This contract was upon a form specially printed by the board of education. There were several unusual features in the terms of the contract; among others was one to the effect that "said teacher may be transferred from one grade to another as circumstances may require or may be deemed advisable by the principal of said school." The appellant was reemployed for the two succeeding school years of 1908–9 and 1909–10, and similar contracts were executed for these years. Therefore, she

has been in the school for three school years, with the exception of the few days that remain of the present year.

In the beginning of her work, the appellant taught in the elementary grades, but in the latter part of her service she has taught German, French, ancient history, physiology, and botany, in the academic grades. She was so teaching when on the 29th day of April 1910, she was served with the following notice:

Salem, N. Y., April 29, 1910

Miss Elizabeth Macomber
Salem, N. Y.

DEAR MADAM:

Pursuant to instructions of the board of education of the village of Salem, N. Y., I hereby notify you that your services are no longer required as a teacher in Washington Academy, and that you may consider your contract with said board terminated as of this date.

Very truly yours
[*Signed*] ROBERT N. WILSON
Clerk of the board of education

From this action of the board of education the appellant took an immediate appeal to the Commissioner of Education. Upon being served with this appeal the board of education convened, and on the 6th day of May 1910, the appellant was served with the following notice:

Salem, N. Y., April 29, 1910

Miss Elizabeth Macomber
Salem, N. Y.

DEAR MADAM:

I am directed by the board of education of the village of Salem, N. Y., to notify you that the action taken by the board at a meeting held on the twenty-ninth day of April 1910, in dismissing you as a teacher in the Washington Academy was reconsidered and rescinded at a meeting of said board held tonight, leaving your contract with said board in full force and effect as though the said action had not been taken.

Very truly yours
[*Signed*] ROBERT N. WILSON
Clerk of the board of education

In view of this, the appellant attempted to resume the service which had been thus briefly interrupted, and thereupon the principal of the academy called her to his office and notified her that her services in the department where she had formerly taught would no longer be needed; that another teacher had been engaged for that work, and that she must teach in grade seven of the elementary department. He read to the appellant a resolution to that effect which he said had been passed by the board of education. The appellant states that she advised the principal that she would accept said position of teacher in the

seventh grade and would obey the directions of the board of education and of the principal, but under protest and without prejudice to her rights in the premises. From this action of the board of education in transferring her from work of an academic to work of an elementary grade, this appeal is taken.

The teacher alleges and swears that she has received no explanation or information of any kind and that she does not know why she was discharged, or why (the attempt to discharge her having failed) she was removed from the academic work and given work of an elementary grade. I have read the somewhat voluminous papers with care, to ascertain what the ground of complaint was against her, if there was any. I can not assume that a board of education would so humiliate a teacher only a few days before the close of the school for the year, by severing her relations with a class that she had been teaching and which was about to be graduated, without some reason which, to the board at least, might seem sufficient; but from first to last there is no reason assigned by the board, except in the most undefined and intangible way. Notwithstanding the fact that the board is represented upon this appeal by one of its number, who is a capable attorney, there is no allegation made against the appellant beyond such a statement, for example as that "we were loath then, and are now, to prefer charges against appellant, and we felt that we could avoid such action by taking her out of the academic department." In view of the distinct admission on the part of the board that there is nothing savoring of moral delinquency on the part of the teacher, and particularly in view of the fact that she is as aggressive in securing her rights as she has proved herself to be, it is clear to me that the board should have left her in no doubt about the ground of their complaint against her, if there is any ground, and that they should have made the reason for their action entirely clear in the papers on appeal. This should certainly be so unless the clause which I have quoted from the contract, to the effect that the board or the principal might transfer the teacher from one grade to another, may be acted upon at any time and without any reason.

Such construction of a contract with a teacher will no longer stand in the State of New York. In so far as a written contract should attempt to reserve such an absolute power to a board of education, it would to such extent, at least, be in violation of law. The authority of a board of education over the affairs of a school is certainly large, but it is not absolute. The board can not deal with such a matter as many individuals transacting their personal business. The board is a public board and is transacting public business. It must transact that business in ways that are open to the public and for reasons that may, if need be, be given to the public. A teacher has rights which in the common interest of teaching must be maintained. It is no small matter to the school system that a board of education assumes to peremptorily dismiss a teacher without assigning any reason. The act is specially aggravating when it is performed only a month before the school is to be closed for the year. Attempting to do this and failing because manifestly in violation of the law, it is hardly less aggravating to restore the teacher to her right to compensation and then transfer her from one class of

pupils to another and from academic to elementary work, without giving any reason therefor. Only in February last the principal of the school gave to the appellant this certificate:

February 4, 1910

To whom it may concern:

It gives me pleasure to speak a word in behalf of Miss Elizabeth Macomber and to recommend her to any board desiring the services of an excellent teacher. Her work in the classroom is of the highest order, thorough, systematic and inspiring. Miss Macomber possesses a strong and pleasing personality so that her discipline is at all times of the best. She enjoys the respect and confidence of the entire school and community. In fact, Miss Macomber is in every sense of the word an excellent teacher, and I can not recommend her too highly. While we would greatly regret losing Miss Macomber from our faculty, yet we feel that she is deserving of a better position than we are able to offer her.

Very truly yours
SEYMOUR B. SMITH

In the face of this and of all the circumstances that appear in the case, and in the absence of all tangible allegations of immorality, misconduct and inefficiency, it is not enough to merely assert that the board is "in the unfortunate position of having to make this contest with a woman," nor is it enough to allege that the board is prejudiced because "of the constant personal solicitations of the appellant and her various counsel at the door of the Department," when the element of time is an important factor in her case, and when her counsel and the officers of the Department have for a considerable time urged the board to come to the Department and present whatever they thought well, orally or in writing. The Commissioner of Education never saw the appellant, and he has afforded ample time and opportunity for the respondent to appear at the Education Department and confront appellant's counsel. Neither is it sufficient for the principal of the school to set forth that the pupils have been demoralized by reason of what has happened; that the teaching results in the academic work have been as good since the appellant's transfer therefrom as before, and that additional demoralization will result from her reinstatement. All this ignores the teacher's rights. They are not any too many or any too great, and, such as they are, they should be conserved. If the board of education had charged in any definite or tangible way that the appellant was inefficient, that she did not teach competently or was unable to control the pupils, that she had been insolent to the board or to the principal, that she had done anything to demoralize or discredit the school, and if they had produced any evidence to sustain such allegations, I should be disposed to uphold the board on the ground that they must be presumed to act honestly and with information superior to my own, but it would be a violation of the statutes of the State and a serious hurt to the school system, as well as an outrage upon the rights of the teacher, to hold that a board of education has any absolute power to remove a teacher without assignable reason, and this would be most emphatically so when the teacher pursues the

course of the appellant and demands a statement in the open of the reasons of their action concerning her.

The appeal is therefore sustained, and the board of education is directed to forthwith restore the appellant to the position in which she was and to the work which she was doing prior to their action assuming to dismiss her.

3898

In the matter of the appeal of Catharine L. Valentine v. The board of education of the city of Brooklyn.

The authority of a board of education to transfer a teacher in its employ from one position to another, where there is no reduction of compensation, and which shall seem to such board calculated to promote the efficiency of the schools in its charge, upheld.

Decided August 2, 1890

Draper, *Superintendent*

In 1868 the appellant was appointed a class teacher in public school no. 34 of the city of Brooklyn, and about the 1st of September 1881, she was appointed head of the intermediate department in said school. Previous to March 1889, she was absent from her work for a period of more than two years in consequence of sickness. This absence was by the leave of the board. On the 7th of March 1889, she resumed her position and occupied it until the summer vacation. In November 1889, she was absent from her work for several days, by further sickness. On the 14th of November 1889, she received a letter from the chairman of the local committee having charge of her school, advising her that it had been decided by a unanimous vote of that committee, to transfer her from the position of head of the department to the second primary grade. This letter was very kind in its allusions to her, advising her that she was being transferred to a position where she would receive the highest pay in the department, and which would call for the least expenditure of strength. The appellant declined to accept this transfer, or to enter upon the new position assigned her. She appealed to the board of education. The matter was investigated by the teachers' committee of the board which sanctioned the action of the local committee. The report of the teachers' committee was approved by the board of education. The appellant still refused to accept the transfer. The matter was again considered by the teachers' committee of the board of education, and the committee reported, recommending that she be dismissed from the service of the board in consequence of such refusal. The board adopted the report. From such action this appeal is taken.

I can entertain no doubt of the authority of the board of education to transfer teachers in its employ from one position to another in any way which shall seem to such board best calculated to promote the efficiency of the schools in its charge. Nothing appears in the papers presented to indicate that the respondent

in the present case did not act upon a clear conviction of duty, and for the purpose of advancing the best interests of the school.

I must add, moreover, that it seems to have acted with deliberation, patience, and with great consideration for the circumstances and feeling of the appellant. It is much to be regretted that she could not accept the same gracefully and in the same spirit.

The appeal must be dismissed.

5416

In the matter of the appeal of Jennie Wight from her dismissal from the faculty of the Delaware Literary Institute and union free school district no. 10, town of Franklin, Delaware county.

Dismissal of teacher. Where a teacher has been paid in full and dismissed by a board of education for cause which does not affect her reputation as teacher, the Commissioner will not interfere with the determination of the board; this is especially so where the teacher is not injured by such determination and the appeal is apparently brought to settle a personal controversy.

Decided October 13, 1909

E. A. Mackey, attorney for appellant

Draper, *Commissioner*

The appellant seeks to set aside the action of the board of education of union free school district no. 10, town of Franklin, county of Delaware, in dismissing her from her position as teacher in the Delaware Literary Institute and Union Free School, and refusing to reinstate her in said position. The appellant was notified of her dismissal June 18, 1909 only a few days prior to the termination of her contract of employment. At this time she had been engaged to teach for the following year in another school. Subsequent to her dismissal she received full payment for her services as teacher in such school.

No charge is made against Miss Wight which affects her teaching capacity or her conduct. From the facts alleged in the papers herein, the controversy seems to be a personal one between the teacher and the principal. The board apparently determined that the educational interests of the school required that the principal should be sustained. This determination may have been affected by the fact that the principal had been reengaged for another year, and that the appellant had secured a position in another school. The appellant was paid in full for her services, which is in effect an admission on the part of the board that she had satisfactorily completed the terms of her contract. It does not appear that the appellant has been materially injured in her profession by the action of the board, for at the time of her dismissal she was engaged as teacher in a larger school, presumably at a greater compensation. In view of these circumstances I do not deem it necessary to interfere with the board's determina-

tion. To do so would be merely to settle the personal controversy which arose between the appellant and her principal. This is not within my province. I therefore dismiss the appeal.

3603

A contract of employment between a trustee and teacher "for one day only and to close every night," is void as being in conflict with the spirit of the school laws and against sound public policy.

Decided July 20, 1887

Draper, *Superintendent*

The appeal is from the action of the trustee in discharging teachers. The main issue is as to the terms of the contract of employment. The appellants each swear that the employment was "for the term of one year or so long as said Phillips was trustee of said district."

The respondent swears "that he informed said teachers when he employed them that he hired them *for one day only and that their time would close every night,* but that if they gave satisfaction he would keep them as long as he remained trustee."

But if I assume that the agreement was as the trustee alleges, which I am obliged to do because it is not clearly proved otherwise, I find myself unable to uphold such a contract because I think it was an unconscionable contract, without sanction of law or good usage and against sound policy. I am of the opinion that a contract of employment between a trustee and teacher "for one day only and to close every night" is void as being in conflict with the spirit of the school laws and against sound public policy. Teachers are compelled to have a license issued pursuant to law before they contract to teach. This license carries with it an assurance of qualifications and fitness. The law provides for revoking any license where sufficient cause is shown for such a step. The revocation of a license works a dissolution of any contract which may have been based upon it. This is the ordinary course of procedure for getting rid of an unworthy or unfit teacher in the middle of a term of employment. Trustees may, undoubtedly, at times summarily dismiss a teacher for a palpable breach of contract or gross and open immorality, but such action must be taken, if at all, upon the personal responsibility of the officer. But these are exceptional cases, outside of the general rule. There can be no pretense that the case under consideration is one of that nature. Moreover trustees ought not to be permitted to absolve themselves from the responsibility of making investigations and of exercising proper precautionary care and good judgment when employing teachers, by reserving the right to discharge them at any moment. A duly licensed and employed teacher ought to have security of position for a reasonable length of time, which should be long enough to prove himself successful or to demonstrate his inability to do so. It is humiliating to self-respecting teachers to be at all times liable to dis-

charge from employment because others may want their places or because of the antagonisms which a vigorous and wholesome performance of their duties in the schoolroom, may engender. To adopt this doctrine is only to drive the most self-respecting and the best qualified persons from teachers' work. This is unquestionably against wise policy. Furthermore, if the trustee could discontinue these teachers at any time, they could abandon their places at any time. But the school must continue without interruption. Teachers must be under a legal and honorable obligation to so continue it. An agreement between trustee and teacher, which does not involve this is manifestly against the interests of the public school system.

What is a reasonable length of time for which a trustee and teacher may properly enter into a contract of employment, depends upon the circumstances and custom in each district and must be determined upon the fact of each case as it arises. It appears in the papers in this case that the appellants had taught one term of nine weeks and that they had commenced teaching another term when dismissed. I am, therefore, led to hold that their employment must have been for terms of at least that length of time and that having taught one such term and entered upon another, they were entitled to employment for at least another term of the same length if they were ready and able to fairly discharge the duties of the places in which they were employed.

It only remains to consider whether the trustee was justified in discharging them in the middle of a term of employment. As already suggested there may be exceptional cases in which a trustee would be justified in summarily dismissing a teacher for gross immorality or for utter failure to fill the position properly resulting in a palpable breach of contract. In such a case he would act upon his own responsibility relying upon the clearness of the case and the exigency of the occasion for his justification. Was this such a case? I think not.

The trustee alleges as the reason for discharging the appellants that their work was not satisfactory. He says they failed in discipline and did not produce desirable results. This is strenuously contradicted by a large number of reputable patrons of the school. In any event, the trustee could hardly expect the highest professional talent for four dollars per week. The trustee also alleges certain improprieties between the appellants, such as being out together late at night and kissing each other in the presence of pupils in the school. Such allegations as these should not be set up unless capable of unquestioned proof. Character ought not to be attacked by anyone, much less a public officer, wantonly or carelessly. There is no proof whatever to sustain these allegations so far as I can see. Making such allegations without following them with competent proof, ought to weigh against the party responsible for it. I am unable to sustain the respondent in dismissing the appellants in the summary manner he did. It is shown that they stood ready to continue their service and I am of the opinion that they have a legal claim against the district for nine weeks pay at the rate of four dollars per week. Appeal sustained.

Where a teacher after teaching three days of his term found the schoolhouse locked against him, and without applying to the trustee left and made no demand for opportunity to continue his school until fifteen days afterward, *held* that he had abandoned the contract voluntarily.

Decided March 30, 1861

Van Dyck, *Superintendent*

This is an appeal from the refusal of the trustee to carry out a contract made by a former trustee with the appellant.

The appellant fails to establish that the contract was first violated by the trustee. He admits that he was suffered to occupy the schoolhouse for three days, and that then the door was locked against him. He does not say by whom this was done, and admits that the first demand he made upon the trustee for opportunity to continue his school was fifteen days after the time at which he alleges the door was closed against him. There is no evidence produced by him that he sought any opportunity to continue his engagement, or made any demand for such opportunity, prior to the expiration of fifteen days. This I think effectually concludes the case against him. By all ordinary construction and usage I think this must be regarded as an abandonment of the contract on his part, which left the district to enter into another engagement.

3468

A teacher is entitled to pay for services during the time a school shall be closed by the trustee on account of an infectious or contagious disease in the district, when such closure occurs during a term for which the teacher was employed.

A teacher can teach another school or engage in any other occupation during vacation time between terms for which such teacher was hired.

Decided January 18, 1886

Morrison, *Acting Superintendent*

The appeal is brought from the refusal of the trustee to pay the teacher for three weeks of service as claimed.

On the 2d day of September 1884, this appellant and P. P. Warren, the trustee of school district no. 9, Schroon, entered into a contract under the terms of which Belle M. Doherty, then a duly licensed teacher, was to teach the district school in said district for a period of thirty-two weeks at a weekly compensation of eight and one-fourth dollars.

The thirty-two weeks were to be divided into two terms, the first term commencing on the 15th of September and ending on or about the 1st day of January following. The school was then to be closed during the winter months and until the last of April, owing "to the condition of the roads, severity of the weather, and the distance of the houses of the children from the schoolhouse which is in a

sparsely-settled portion of the Adirondack region." The balance of the thirty-two weeks were then to be taught.

In accordance with this contract, the appellant commenced teaching the school on the 15th of September 1884, and continued to teach the same until the 3d day of December 1884, when the school was closed by the trustee in obedience to an order of the board of health of said town "through fear of contagion of some disease then prevailing in said town." The school remained closed by virtue of said direction during the remainder of the first term. The school was not again open until the 27th day of April 1885, when the trustee directed that the second term should be commenced. This second term was continued until closed by the trustee at the end of the school year, making the time actually taught twenty-eight weeks and two days.

It will be seen from the above that there were three weeks and three days of this time during which the school was closed by order of the trustee; and the trustee of the district, elected at the annual meeting in 1885, refused to pay appellant for such time. The appellant thereupon offered to continue the school to make up for the lost time, but said offer was also refused by the trustee.

The question to be passed upon is, that of the liability of the district to the teacher for three weeks and three days. This is easily disposed of for the following reasons:

First. As a matter of law, a teacher is entitled to pay for services during the time a school shall be closed by the trustee on account of an infectious or contagious disease in the district, when such closure occurs during a term for which the teacher was employed. The school was not taught by this appellant for the three weeks and three days for the reason that it was so closed. *Second.* It does not appear that there was any good or sufficient reason for refusing to allow the appellant to continue the school long enough to complete a period actually taught of thirty-two weeks, although under the law, as above stated, this offer of service was not necessary upon the part of the teacher.

It is urged by the respondents that the appellant is not entitled to any compensation for these three weeks and three days for the reason that during the period the school was closed she taught a school in another district for a few weeks. This objection is without any force, as it appears that under the terms of the contract there was to be a vacation during the winter months, and it was during this vacation period that the appellant taught for three or four weeks a school in another district. This she was legally entitled to do, or to engage in any other work or business she might desire, as district no. 9, town of Schroon, had no claim upon her whatever for such service during the vacation period between the close of the first term, on or about the first of January and the opening of the summer term on the 27th day of April.

The district is, therefore, indebted to this appellant under the contract for three weeks and three days at eight and one-fourth dollars per week, amounting to the sum of twenty-nine dollars and seventy cents.

Where one of the trustees is delegated to make known to teachers the conditions of engagement to teach, he acts as agent for the whole board, and the board is bound by the terms of agreement as stated by him and accepted by the teachers.

Decided January 25, 1862

Keyes, *Acting Superintendent*

On appeal from the action of the trustees in discharging certain teachers from employment before the close of their engagement, the question before the Department is whether the act of the trustees in discharging said teachers was or was not in violation of the contract entered into with them.

The following facts are disclosed by the testimony submitted.

1 On the 19th of September 1861, the trustees, at a meeting duly held, all being present, passed a series of resolutions, to the effect that it was the mind of the board to employ as teachers in the different departments of the district school the appellants in this case, for the term commencing October 1st, then ensuing, at wages named in the resolutions, and subject to the condition of a liability to be discharged if they should fail to fill their situations respectively to the satisfaction of the trustees.

2 G., one of the trustees, was formally or informally authorized to contract with the appellants under the authority of said resolutions.

3 The said appellants were employed by the trustee above named, but without any intimation on his part that any such condition as that named in the resolution, relating to the tenure of their term of service being dependent upon giving satisfaction to the trustees, was a part of the contract. Each of the teachers on her part consented to an engagement understood to be for a term of six months, at wages specified and subject only to the ordinary conditions that attach to any such contract.

4 The appellants entered upon their term of engagement, and discharged their duties to the evident and expressed satisfaction of the trustees until December 10th. On that day the trustees adopted resolutions to the effect that the teachers then employed had failed to give satisfaction, and that the school be closed and the teachers discharged on the Friday following, December 13th.

5 Notice was given to the appellants respectively of these resolutions, and causes of their discharge duly assigned, and they were directed to leave the school; but, by the advice of the dissenting trustee, they still continue in possession, and to discharge their duties as heretofore.

The question before the Department, as previously stated, relates to the just and legal claim of these teachers for a continuance of their services in said school until the expiration of six months, and for the wages agreed to be paid to them for such term.

In regard to this claim, it must be determined by the principles that govern and control the relations of principal and agent. The said trustee, G., in contracting with these teachers, acted as agent for the board of trustees. In considering how far the act of the agent is binding upon the principal we are not to

look so much to the actual authority conferred, as to what third parties may reasonably have supposed the agent to be invested with. No principle of law is better established than this, it having been repeatedly affirmed by the highest courts. The teachers had a right to presume that the terms offered to them were authorized by the board of trustees. They assented to no other terms than these, hence were parties to no other contract. They can not be permitted to suffer from the laches of the board, who permitted them to take their situations without informing them of the terms prescribed by the resolutions.

A contract made with a person authorized to represent the trustees is binding upon them, though contrary to the letter of their instructions. If any damage results to the trustees from this disregard of their instructions, the agent is responsible to them, but the trustees can not shield themselves from the responsibility to the teachers.

The conclusion is, therefore, that the contract with the appellants for a term of six months is valid and binding upon the trustees, and the services of these teachers can not be discontinued before the expiration of said term.

Appeal sustained.

A teacher can be employed only by the trustees. Therefore, a vote taken at a district meeting to dismiss a teacher and to substitute another in her place is illegal and void. Decided March 17, 1849

Morgan, *Superintendent*

Samuel T. Peck and James Smith, two of the trustees of district no. 1, Livingston, hired Miss Susannah Smith to teach their winter school, to commence November 30, 1848. Mr Lament, the other trustee, was consulted, but did not consent to the contract.

Miss Smith commenced the school in the schoolhouse of the district at the stipulated time.

Mr Lament, not being satisfied with the agreement of the other trustees, hired Miss Horford to teach a school in another room.

At a special meeting held in the district January 20, 1849, for the purpose of voting a tax to repair the schoolhouse, and for other purposes, a vote was taken and carried to substitute Miss Horford in the schoolhouse as teacher in place of Miss Smith.

From this proceeding the two trustees appeal.

In employing teachers, the trustees should consult, as far as possible, the wishes of the inhabitants of the district. But when the trustees have contracted with a teacher, thereby binding themselves and the district, the inhabitants can not free themselves from the obligations thus imposed by the official acts of the trustees.

Teachers can be employed only by trustees.

A contract made by two trustees, the third being consulted, is valid; but one trustee can perform no official act without the concurrence of at least another and a consultation with both.

In this case, Miss Smith was legally employed as the teacher for the district, and could not be dismissed except by the trustees. Therefore, the proceedings of the district meeting on the 20th of January, to dismiss Miss Smith and substitute Miss Horford as teacher, were illegal and void, and Miss Horford is not entitled to recover any of the public money or to continue her instruction in the district schoolhouse. Appeal sustained.

A teacher who closes his school upon other than legally authorized days for closing, without the consent of the trustees, abandons his contract and is liable to be superseded.

Decided March 21, 1860

Van Dyck, *Superintendent*

This is an appeal of V. H., a teacher, from the action of the sole trustee in discharging him from the school before the term of his contract had expired.

On a careful examination of the statements I discover two facts, namely, that the appellant dismissed his school on Tuesday, January 24, 1860, for the rest of the week, without permission from the trustee, but rather in opposition to his expressed wishes, and that on Thursday, January 26th, the trustee discharged him from the remainder of his engagement.

Among the clearly implied conditions of every contract to teach is this one, that the school shall be regularly taught from the beginning of the term until its close. The teacher can not, therefore, close his school except upon the regularly appointed days, unless with the approval of the trustee. In doing so he renders himself liable to the charge of abandoning the contract, and the trustee has the legal right to regard the contract as concluded.

3504

When a teacher utterly fails as a disciplinarian, and does not possess the ability to detect and search out the beginnings of disorder, the board of education will be sustained in discharging him.

It is the duty of a member of the board of education, upon hearing that a disturbance is threatened in the school of a serious nature, not only to warn the teacher and advise him to send for a constable, but to remain at the school and see that the peace is kept, and the order of the school and community maintained.

Decided April 6, 1886

Morrison, *Acting Superintendent*

The appellant entered upon the discharge of his duties as principal of the school at the time when he feared that his health would not permit him to endure the work. He was, at the time of his employment, wholly without experience as a teacher. The appellant commenced his term of service on the 31st day

of August 1885, for a trial term which would expire on the 27th day of November of that year. On the 31st day of October he wrote a letter of resignation, stating that on account of his health he thought it his duty both to himself and to the district, to sever his connection with the school. This letter was placed in the hands of the president of the board, with the request that it be presented at the next meeting. The president, however, advised the withdrawal of the resignation, stating that the appellant was giving better satisfaction than had been expected, and advising him not to resign under the circumstances, but that if he still wished to resign he could return the letter before the meeting of the board that evening, November 2d. The letter was not returned, but at the meeting of the board, on the 2d day of November, with but one dissenting voice, it was voted to retain him in his position for the remainder of the year.

The appellant's second term commenced on the 30th day of November. It appears that he had trouble in disciplining the school and this trouble was of so grave a character that on the 7th day of December the board unanimously voted to sustain him in his position. On the 9th day of December, while engaged in teaching, he was set upon and forcibly removed from the schoolroom by several of the boys of his class. The leader of them was the son of a member of the board of education, and had been suspended for misconduct and was at school in defiance of the principal. At a meeting of the board, in the afternoon of the same day, the appellant was requested to resign. On his declining to do so, the schoolroom was closed against him.

Due notice of that fact and that he stood ready to fulfil his contract was given to the board, and on the 14th of December the board voted to discharge him from his employment. On the 23d of December a tender was made to him of $10.50 in payment in full of the services rendered up to noon of December 9th, it being claimed that he abandoned his contract, whereas he was not discharged until the 14th day of December following. He declined to receive the amount so tendered to him.

The appellant further alleges that the boys were encouraged and abetted in their plot to put him out, by at least one of the members of the board of education.

I find from the evidence that, after the appointment of the principal at a regular meeting of the board in November, during the first days of the winter term, serious disturbance and disorder in the grammar department was reported to various members of the board. A committee of the board visited the school and found the class taught by the principal without discipline and in a condition where proper teaching was out of the question. It was suggested that the principal might be encouraged and the pupils brought into proper relations to their teacher by the passage of a resolution sustaining all teachers in disciplining the school, and the appellant in particular. The resolution was passed and was announced by the president of the board, the object being to encourage and support discipline.

In all the evidence of this case I fail to see how the board could have taken other action than it did. The teacher seems to have utterly failed as a disciplinarian, and I am led to agree with the board that had he possessed the ability to detect and search out the beginnings of the disorder, and had he earnestly and wisely endeavored to check the disturbance in the beginning, he might have filled the position to his credit and to the satisfaction of the community.

I am free to say that I can not consider that member of the board of education blameless, who, having been advised of a conspiracy among the more turbulent spirits of the class in charge of the appellant forcibly to eject him from the room, considered his whole duty done when he informed the principal of the anticipated outrage and suggested to him to go for a constable. That member of the board, himself an officer of the peace, should have remained at the school to see that peace was kept and the order of the school and of the community be maintained. Had he done so, the necessity for this appeal might not have arisen. Nevertheless, I think from all the evidence in this case, the appellant showed himself at the time unable to perform the terms of his contract.

3732

In the matter of the appeal of Henry C. Mapes, Irving Washburn and others v. the board of education of union free school district no. 1, town of Westchester, and Michael E. Devlin.

A board of education previous to the annual school meeting employed a new principal of a union school. At the annual meeting trustees were elected known to favor the retention of the old principal, and a resolution was adopted directing the board to re-employ the former principal, and raise by tax sufficient money to meet any claims which might be adjudged to the teacher employed by the old board, in consequence of the violation of the contract entered into with him, and the board acted accordingly.

Held, first, that the district had no power to compel the board to take any specific action touching the employment and pay of teachers.

Second, that the district meeting had power to authorize the trustees to raise the additional sum by tax for teachers' wages.

Third, that the board, having the support of the district, had power to disregard the action of the former board touching the employment of teachers upon the payment of damages suffered by the aggrieved teacher in consequence of such action, or upon provision being made therefor.

Decided November 21, 1888

Milton A. Fowler, attorney for the appellants
H. C. Henderson, attorney for the respondents

Draper, *Superintendent*

The respondent, Michael E. Devlin, has been principal of the school in union free school district no. 1, of the town of Westchester, since 1881. At a meeting of the board of education held on the 7th of August 1888, it was determined by

the board by a vote of five to four to appoint the appellant, Irving Washburn, as principal of the school for the ensuing year, at a salary of $1800 per annum. Subsequently a written agreement was entered into between said Irving Washburn and the president and clerk of the board, whereby Washburn agreed to serve the board as principal for the period of one year from the 20th of August 1888, and the board agreed to pay him for such service the sum of $1800. The action of the board in employing a new principal is shown to have aroused considerable feeling in the district and the annual school meeting held on the 28th of August was largely attended. At such meeting three trustees were elected to serve for a term of three years each, and one to serve an unexpired term of two years. Two tickets were presented for these places. The main issue between them being the retention of the old principal or the recognition of the new one. Some 350 votes were polled and trustees favorable to the retention of the old principal were selected by a vote nearly double that given to their opponents. The meeting also adopted the following resolutions:

Resolved, That the action of the board of education of this district in discharging Michael E. Devlin without cause is hereby condemned, and the board of education is hereby directed by the legal voters of district no. 1 of the town of Westchester to discharge immediately Irving Washburn.

Resolved, That the sum of $2100 is hereby ordered to be added to the requisition asked for by the board of education to be paid to Michael E. Devlin in event that the courts decide Irving Washburn entitled to his full salary under his contract; and,

Resolved, That the said board of education is hereby empowered by this district to employ counsel to contest the right of Irving Washburn to any salary under his contract with the board.

At a meeting of the new board of education held on the first of September following, the following preamble and resolution were adopted:

WHEREAS, The taxpayers and legal voters of district no. 1 of the town of Westchester, at their annual school meeting held August 28, 1888, voted unanimously a resolution directing this board of education to employ Michael E. Devlin for the ensuing year at a salary of $2100; therefore, be it

Resolved, That Michael E. Devlin is hereby appointed by the board of education to be principal of this school district for the ensuing year, beginning September 1, 1888, and ending August 31, 1889, at a salary of $2100 per annum.

Mr Devlin accepted this reemployment and has since been acting as the pirncipal of the school. Mr Washburn has claimed the right to act as principal, but has been enjoined from interfering with the school or assuming to perform the duties of principal, by an order of the Supreme Court in proceedings commenced after the petition in this appeal had been served.

Mr Washburn as well as numerous residents and taxpayers in the district now appeal against the action of the district meeting and the subsequent action of the board of education above quoted.

There are many other things set forth in the voluminous papers served and filed by the respective parties, but I consider the foregoing to be the material facts upon which I am called to act.

It has always been held by this Department that a district meeting could neither control the selection of a teacher, nor determine the amount of salary which should be paid for his services. It is the policy of the law to leave those matters exclusively to the discretion of trustees. The action of the district meeting, therefore, in directing the board of education to discharge Mr Washburn, or disregard his employment, and to reemploy Mr Devlin, had no binding force upon the board. It was under no lawful obligation to follow such direction, but the board seems to have been more than willing to take such action. It is true that in its action it recites the fact that the annual school meeting has directed it to take such action, but there can be no pretense that any coercion was required to induce the board to pursue the course which it did. Indeed, the greater number of the members of the board seem to have been chosen for that particular purpose. The annual school meeting recognized the fact that the district might be liable, under the contract with Mr Washburn, for it directed sufficient additional money to be raised to meet the whole of his year's salary, provided so much should be necessary.

The question is then squarely presented whether a board of education or a trustee, at the desire of a majority of the electors of the district, as expressed at an annual school meeting, can disregard a contract previously entered into for the employment of a teacher, provided only that the district shall pay such damages as may be adjudged against it for such breach of contract.

The learned counsel for the appellants argues very strongly and closely that the resolution of the district meeting to raise the sum of $2100 additional to the estimated expenditures, presented by the board of education, was illegal and void. Section 15 of title 9 of the Consolidated School Act makes it the duty of the board of education in a union free school district, to present to the annual school meeting a detailed statement in writing of the amount of money which will be required for the ensuing year for school purposes, exclusive of the public moneys. Section 16 provides that after the presentation of such statement the question shall be taken upon voting the necessary taxes to meet the estimated expenditures. It directs that the question shall be taken upon each estimate separately upon the demand of any voter present and then in words provides " that the inhabitants may increase the amount of any estimated expenditure or reduce the same, except for teachers' wages and the ordinary contingent expenses of the school or schools." Counsel insists that the language here quoted prevents the district meeting from raising any more or less money for teachers' wages, than may have been shown to be necessary in an estimate presented to the meeting by the board of education.

I am unable to agree with him in this view. It seems to me very clear that the intent of the statute is to prevent reducing the estimate for teachers'

wages, but I can not think that it was intended to preclude the annual meeting from increasing such estimate.

Section 10 of title 9 of the Consolidated School Act is the one which confers upon the annual meeting in union free school districts, other than those whose limits correspond with an incorporated city or village, power to levy taxes for school purposes. Among the powers, by this section conferred upon the annual meeting, is authority to levy taxes. "For paying the wages of teachers and the necessary expenses of the schools, or for such other purpose relating to the support and welfare of the school, as they may by resolution approve." This same section 10 goes on and provides that no tax for the purchase of a new site or an addition to a site, or for the erection of a new schoolhouse, or an addition to an old one, etc., shall be levied except after notice of such proposed action shall have been given by publishing or posting the same in advance of the annual meeting. But there is no such limitation placed upon the authority conferred for raising money for teachers' wages or other ordinary expenses. It must be remembered too that the statutes confer larger powers upon boards of education and an annual school meeting in a union free school district, than in an ordinary common school district, and taking all of the provisions of the statutes together I have no difficulty in arriving at the conclusion that the annual meeting had the legal power to authorize the levying of an additional tax, over and above the sum estimated by the board of education for teachers' wages, moreover, it is to be remembered that the real question here is not whether the annual meeting had the power to raise the additional sum of $2100, but it is whether the board of education has the power to disregard a contract made by a previous board, involving the displacement of an old teacher and the employment of a new one after such action is shown to have been opposed by a majority of the district as represented in the annual meeting. If the board has the right, then there certainly would be no trouble upon the residents' view of the statute in raising the additional money necessary to pay the salary of the teacher last employed and liquidate the damages adjudged to the one first employed, for the board could present its estimate at any special or annual meeting of the district, when the meeting would be called upon to vote the amount.

I come then to what I consider the principal question involved in the case, namely, Is Mr Washburn entitled to a specific performance of the contract made between himself and the old board, or, can the present board of education disregard such contract upon the payment of such damages as he may be adjudged to be entitled to, by competent authority? It is well settled that one party to a contract can claim a specific performance of the same only when he can show that other legal remedy is inadequate, and that without such specific performance injustice or irreparable injury will be done him. A claim for such a performance is one which is always addressed to the equitable jurisdiction of the court. The relief sought by the claimant in such a case is not one which is asked as a right, but one which is addressed to the discretion of the court, after showing that legal remedies are inadequate. The appellant, Washburn, can not bring

himself within these well-settled rules of law. The injury to which he may be subjected by the later action of the board of education is one which can readily be compensated for by the payment of money. The action of the district meeting plainly contemplates a settlement with him upon some moneyed basis. The interminable quarrel in that district leads me to apprehend that such a settlement will be more to his interest than it would be to be able to exact a specific performance of his agreement with the board.

If Washburn is not entitled to exact a specific performance of his agreement, it seems to be that taxpayers in the district are not. They are bound to pay such taxes for school purposes as may, in the discretion of the district meeting and the board of education, acting within their legal authority, determine to be necessary to the best educational interests of the district.

Finding no insuperable legal objection to the course pursued by the district meeting and the board of education, I am led to inquire whether there is any objection on principle and whether upholding such action would be a precedent unwise to establish. It may be said that when a teacher has once entered into a contract with a board of education he ought to know that the agreement means something, and that the board will fulfill the same on its part. It may be said also that school districts ought not to be subject to endless confusion and uncertainty about the employment of a teacher or to the manipulation of interested persons, but I see no good reason why contracts touching the employment of a teacher should be subject to any other limitation or regulation than other contracts. The fact that the district must pay such damages as may be suffered by the teacher who has been employed, but is subsequently displaced, would seem to be sufficient to deter the board of education from such action, unless the manifest sentiment of the district approves it. In cases where such general sentiment does approve such action and is willing to pay the expense involved, it seems to me that it ought to have its way.

In view of the foregoing considerations, I come to the conclusion that it is my duty to dismiss the appeal.

5422

In the matter of the appeal of Margaret E. McCullough from the action of the trustees of school district no. 3, town of North Hempstead, Nassau county.

Teacher's contract; annual compensation paid monthly. A contract with a teacher which provides that she shall teach "for a term of forty-two consecutive weeks . . . at a yearly compensation of $600, payable one-twelfth at the end of each thirty days until close of year in June, when balance shall be paid" is not to be construed as providing for a deduction in case of a failure to complete the term of forty-two weeks.

Decided November 18, 1909

W. H. Weller, attorney for appellant
Harry W. Moon, attorney for respondents

Draper, *Commissioner*

The appellant, Margaret E. McCullough, was employed as teacher by the trustees of school district no. 3, town of North Hempstead, county of Nassau, for the year 1908–9. She commenced her services under her contract September 8, 1908, and continued them until March 12, 1909, when she was released at her request by the trustees of the district. She had then taught, according to her statement, which is not denied by the respondents, for a period of twenty-six weeks. The contract executed by the parties provided that the appellant should "teach the public school of said district for a term of forty-two consecutive weeks, except as hereinafter provided, commencing September, 1908, at a yearly compensation of $600 and no cents, payable one-twelfth at the end of each thirty days until close of year in June when balance shall be paid.

The trustees paid the appellant under this contract $50 at the end of each thirty days, and upon her leaving the school, $25 for the time taught in March, making a total of $325. At the close of school in June she demanded payment of $65, which she claimed was the balance due her under the contract. The trustees refused to pay her anything and insist that nothing was due. They base this claim upon the assumption that the contract calls for the payment of only $50 for each calendar month, and that since the appellant failed to complete the year, there was nothing due her at the close of the school in June.

This is an unwarranted interpretation of the contract. The contract must be construed as requiring the payment of $600 for forty-two weeks of teaching. The appellant actually taught twenty-six weeks and she is entitled to full compensation therefor. The trustees voluntarily released her from her contract without reservation or condition. The contract did not specifically provide for a deduction in case of a failure to complete the term of forty-two weeks, and in the absence of an express provision to that effect it should not be so construed. The amount which should be paid the appellant for twenty-six weeks of teaching is $371.41. She has been paid the sum of $325, and there is now due her the sum of $46.41.

The appeal is sustained.

It is hereby ordered, That the trustees of school district no. 3, town of North Hempstead, county of Nassau, issue an order in the manner provided for by law for the payment of the sum of $46.41 to the said Margaret E. McCullough, and that if no funds are available for such payment, the trustees of such district raise by district tax a sum sufficient for such payment.

5437

In the matter of the appeal of Syrena H. Stackpole from the action of the board of education of district no. 5, Islip, Suffolk county, in dismissing her from her position as preceptress in Bayport Union School.

Dismissal of teacher by board of education; dismissal not sustained for alleged insubordination. The dismissal of a teacher by a board of education will not be sustained where the only facts presented are to the effect that the teacher was the aggressor

in a controversy with the principal which occurred out of school hours and which did not affect directly the discipline of the school. Lack of harmony between a teacher and the principal is not of itself sufficient cause for dismissal. A board of education can only insist that a teacher properly perform her duties as such and that she comply with the reasonable directions of the principal relative to the school over which he has control.

Decided February 17, 1910

John R. Vunk, attorney for appellant
R. S. Pelletreau, attorney for respondent

Draper, *Commissioner*

The appellant, Miss Syrena H. Stackpole, was employed as preceptress of the Bayport Union School, by the board of education of union free school district no. 5, town of Islip, in the county of Suffolk, for a period of forty weeks, commencing September 7, 1909. She served in such position until December 8, 1909, when she was summarily dismissed therefrom by the board of education. She brings this appeal from such dismissal and asks that such dismissal be set aside and that she be reinstated with all the rights and emoluments to which she is entitled under her contract with such board of education. The grounds for the dismissal as stated in the notice is that the appellant questioned the authority of the principal and declared that she had no respect for him and told him he was no gentleman. It was further stated in the notice that the appellant had not "fulfilled her contract as a teacher in said school," and that to retain her "would be detrimental to the welfare of said school."

It is apparent from the papers that there was a personal difference between Miss Stackpole and the principal, Matthew J. Pechtel. The only question for decision seems to be whether the appellant has been guilty of a sufficiently grievous offense to justify her summary dismissal. She expressed her unfavorable opinion of the principal in his presence, outside of school hours, in forcible language. The principal naturally resented such conduct on her part and submitted the matter to the board of education. The board was apparently compelled to decide as between the two teachers, for it seems established that the principal proposed to resign unless the board dismissed the appellant. It is probable that in determining the matter against the appellant the board acted in good faith and for what it deemed the best interests of the school.

There is nothing in the record against the efficiency of the appellant as a teacher. There is no charge of incompetency. The board merely asserts that she was the aggressor in the controversy with the principal and that her conduct was, in effect, insubordination. It is probably true that the appellant was unduly severe in her language, and that she was somewhat hasty in her action. There is nothing here to indicate insubordination on her part. There is not sufficient proof of the allegation that the appellant questioned the authority of the principal. She professes her willingness to obey the principal and perform her duties under his reasonable direction and control.

The conclusion necessarily is that the board dismissed the appellant for her part in a controversy with the principal which occurred outside of school hours, and which did not affect directly the discipline of the school. If both parties to the controversy continued in the proper exercise of their respective duties there was no reason why the school could not have been successfully conducted with both teachers in the positions for which they had been employed. The wrong committed by the appellant was too trivial in itself to justify her dismissal. The board could not legally terminate her contract upon the ground that the lack of harmony between the appellant and the principal threatened to break down the discipline of the school and to demoralize its work. The board may properly insist that she perform her duties in such position, and that she comply with all reasonable directions of the principal, relative to the school over which he has control. The board may not complain of the personal differences between these teachers, so long as they perform their duties in an efficient manner. The school may prosper even if they have no mutual respect or regard for each other. In any event, the appellant should not be punished by loss of her position and the consequent injurious effect upon her reputation as a teacher because she has professed her lack of respect for the principal.

The appeal herein is sustained.

It is hereby ordered, That the dismissal by the board of education of union free school district no. 5, town of Islip, county of Suffolk, of Syrena H. Stackpole, as preceptress of the Bayport Union School, under date of December 8, 1909, to take effect at the close of school on such day, is hereby set aside and declared of no effect, and that said board of education shall immediately, upon the filing of this order, reinstate the said Syrena H. Stackpole as preceptress in said school, under and pursuant to the terms of the contract entered into by the said board and the said Syrena H. Stackpole, and that the said board shall pay to the said Syrena H. Stackpole all such sums as may be due to her under such contract from the date of such dismissal to the date of her reinstatement as above directed.

5458

In the matter of the appeal of Ella Baldwin from the action of Gilbert L. Mosher, as trustee of school district no. 9, town of Danube, Herkimer county.

Dismissal of teacher; lack of punctuality. The persistent failure of a teacher to observe the hours fixed by a trustee for opening school is sufficient cause for dismissal. A trustee is authorized, and it is his duty, to insist that the teacher employed by him shall keep the hours prescribed. A teacher can not expect promptness on the part of her pupils who is herself guilty of habitual lack of punctuality.

Decided June 11, 1910

Lewis & McIntosh, attorneys for appellant
Robert T. Livingston, attorney for respondent

Draper, *Commissioner*

The appellant Ella Baldwin, was employed by the respondent, Gilbert L. Mosher, as trustee of school district no. 9, town of Danube, Herkimer county, to teach the school in such district for a term of thirty-two weeks, commencing September 13, 1909. The appellant was dismissed from her employment December 10, 1909, according to the statement of the respondent, although the appellant alleges that she was dismissed on December 20th. The appellant contends that the dismissal was without cause and asks that she be reinstated and that the trustee be directed to pay her the balance due under the contract.

The evidence presented is conflicting and it is difficult to definitely ascertain the actual facts as to all the issues raised. The respondent evidently did not act hastily in dismissing the appellant. The record shows that he sought the advice of the school commissioner of his district and of the State Education Department before taking any action. He had a perfect right, and it was indeed his duty, to do this, although the appellant seems to resent it. The chief cause of complaint against the teacher by the trustee is her failure to open and close the school regularly at the hours prescribed by him. The teacher resided during the term at her home in Little Falls, a distance of about six miles from the school. She proposed to drive to and from the school morning and night. The trustee knew this and refused to engage her until, as alleged in his affidavit, she promised that she would be punctual in the morning and would not close her school until four in the afternoon. The respondent trustee then asserts that after a week or so the appellant failed to be punctual and from then until the time of her dismissal " she usually arrived late and failed to open the said school until 9.15 to 9.45 o'clock in the morning and made almost a daily practice of closing said school at from 3 to 3.10 o'clock in the afternoon." The respondent insists that he had many talks with appellant about it and had frequently told her that " she must be there and open the school at 9 o'clock in the morning and keep it until 4 o'clock in the afternoon; otherwise he would not continue her services and that she would be dismissed according to her agreement which she had made in the beginning." The appellant says that the trustee consented to a shortening of the noon hour and afternoon recess so that the school should be closed at 3.30 o'clock, but she does not deny the charge of want of punctuality, nor has she specifically denied that she has frequently closed the school before the prescribed hour. The respondent's statements as to the late opening and early closing of school are supported by the affidavits of two other persons. The respondent has shown by a preponderance of evidence that the appellant has been habitually late in opening her school against his frequent protest and that she has also closed the school without his consent at an hour earlier than that prescribed by him.

The question to be determined is whether the persistent failure of the appellant to observe the hours fixed for opening and closing school is sufficient cause for her dismissal. A trustee is authorized, and it is his duty, to insist that the teacher employed by him shall keep the hours prescribed. Irregularity in

the time of opening the school must lead to confusion. A teacher, who is herself guilty of habitual lack of punctuality, can not expect promptness on the part of her pupils. If a teacher wilfully or persistently fails to comply with a trustee's directions as to the time of opening her school, she should be disciplined. Such conduct is a sufficient cause for dismissal. The facts in this case indicate that such a cause exists, and for this reason the appeal must be dismissed.

There are a number of other causes alleged in the respondent's answer, which he claims were sufficient to justify the appellant's dismissal. Having decided that the cause above considered was sufficient, it will not be necessary to give attention to the other causes.

The appeal is dismissed.

4349

In the matter of the appeal of Edith L. Porteus v. Joseph Rutherford, trustee, school district no. 15, town of Lisbon, St Lawrence county.

Under the school law and the decisions of this Department and the courts of the State, a trustee has the right, for cause, to dismiss a teacher during a term of employment, and that the failure on the part of a teacher to maintain order, good government and discipline in the school, is sufficient cause for such dismissal. The certificate held by a teacher is *prima facie* evidence of his or her moral and mental qualifications to teach, and he or she may possess an excellent method of imparting instruction to pupils and still be deficient in the ability to manage and govern the school. Without good government and discipline which secure obedience, command respect and preserve order learning is of little avail.

Decided April 1, 1895

Sellar Leishman, attorney for appellant
George E. Van Kennen, attorney for respondent

Crooker, *Superintendent*

The appellant in the above-entitled matter appeals from the action of the respondent in dismissing her as a teacher during a term of employment without cause.

The respondent has filed an answer to the appeal, and to said answer the appellant has replied, and to the reply a rejoinder has been made, and to the rejoinder the appellant has filed a replication. The pleadings and proofs have received careful consideration and examination. The questions presented to me for decision are, first, was the appellant dismissed during a term of employment, and, second, if yes, was there sufficient cause for such dismissal. Upon the proofs presented the following facts are established:

That on or about August 25, 1894, the appellant herein, then holding an unexpired second grade certificate, and the respondent herein, the sole trustee of school district no. 15, town of Lisbon, St Lawrence county, entered into a verbal contract by which the respondent employed the appellant, and the appellant contracted to teach the school in said district for twenty weeks, of which twelve

weeks were to constitute the fall term and eight weeks the winter term of said school; that for the fall term the respondent agreed to pay and the appellant agreed to receive $5 per week and be boarded, and for the winter term $6.50 per week; that the appellant entered upon her duties as such teacher and taught eight weeks when a further agreement was made between the appellant and respondent, whereby the appellant taught two additional weeks, making the fall term one of ten weeks, and the winter term to be one of ten weeks instead of twelve weeks as agreed upon in the original contract of the said parties thereto; that the appellant was paid in full by the respondent for the ten weeks taught by her as aforesaid; that on or about December 17, 1894, the appellant commenced teaching said school for said winter term of ten weeks and taught said school until on or about January 16, 1895, when the respondent came to the schoolhouse and informed the appellant that he (respondent) would not allow her to teach said school any longer, and that he should close the school that night, and then and there dismissed the appellant as such teacher; that subsequently the respondent hired another teacher for said school; that the appellant has not been paid for her services for teaching said school for the two weeks she taught in said winter term; that the reasons given to appellant by the respondent for dismissing her as such teacher were that she did not maintain good order and government in said school and that she failed as a disciplinarian.

By subdivision 9, of section 47, article 6, title 7, of the Consolidated School Law of 1894, chapter 556 of the Laws of 1894, it is enacted, "nor shall any teacher be dismissed in the course of a term of employment, except for reasons which, if appealed to the Superintendent of Public Instruction, shall be held to be sufficient cause for such dismissal." The respondent herein alleges that during the fall term of said school many complaints were made to him that the appellant was not maintaining proper order and discipline in said school, and that by reason of the dissatisfaction on the part of many of the patrons of the school by reason of such want of proper order, government and discipline pupils were not attending the school regularly; that the respondent visited the school at the beginning of the second week of the winter term and found said school unsatisfactory as to order and discipline therein.

It is clear that during the fall term of said school there was dissatisfaction among the patrons of the school as to the order, government and discipline of the school by the appellant, else why should Messrs Hyde and Randles, as sworn to in the affidavits filed with the reply of the appellant, have called among many of the patrons of the school on December 14, 1894, to ascertain and learn how the appellant pleased them as a teacher?

The respondent, with his rejoinder herein, has filed the affidavits of every person in said district who had children attending said school (except one Hyde, who is a brother-in-law of the appellant) and with said exception, and one other the affidavits of every other resident taxpayer of said district, showing the absence of order, good government and discipline in said school while the same was being taught by the appellant.

The said affidavits showed that noise and confusion existed in the schoolroom during school hours, thereby disturbing those pupils who desired to study; that pupils during school hours would stroll about the schoolhouse grounds; that pupils did not obey the bell calling them to resume their studies after recess or the noon hour; that pupils during school hours would move about the schoolroom and talk and failed in obeying the appellant, and that she had no control over said pupils. The respondent alleges in his answer that at the time of entering into contract with the appellant it was expressly understood and agreed between the parties that if in the opinion of the respondent the appellant failed to maintain order, decorum and good government in the school he might terminate the contract at the termination of any term, and that said contract was conditional and dependent entirely upon the ability of the appellant to maintain order and discipline and control the pupils attending said school. This the appellant denies and alleges that the contract was positive and absolute and not contingent in any respect whatsoever. It is not material whether the respondent is correct or not in his understanding of the conditions of the contract, as under the school law, and the decisions of this Department and the courts of the State, a trustee has the right, for cause, to dismiss a teacher during a term of employment, and that the failure on the part of a teacher to maintain order, good government and discipline in a school is sufficient cause for such dismissal.

A contract with a teacher, without expressed conditions, is to be interpreted by the conditions implied in the very nature of the contract, and the purposes for which it is entered into. Every such contract implies distinctly that the teacher employed possesses the essentials of moral character, learning, ability and will. In Gillis v. Space, 63 Barb. 177, the Supreme Court said "The license which he holds from the proper officer is prima facie evidence only that the applicant possesses these requisites, but it is not conclusive; the presumption raised by it may be rebutted by direct evidence tending to show that the holder of such license lacks any or all of these qualifications."

The certificate held by the appellant was prima facie evidence of her moral and mental qualifications to teach, and she may have possessed an excellent method of imparting instruction to her pupils and still have been deficient in the ability to manage and govern a school. Without good government and discipline, which secure obedience, command respect and preserve order, learning is of little avail.

I am satisfied that the respondent has, by a preponderance of proof, established the fact that the appellant did not maintain order and good government in the said school, and that she failed as a disciplinarian, and that the respondent had sufficient cause to dismiss the appellant as teacher in said school during her term of employment.

The appellant alleges that she has not been paid the sum of $13 for the two weeks of the winter term in which she taught the school. She should be paid such said sum by the respondent.

The appeal herein is dismissed.

In the matter of the appeal of Peter E. Demarest v. the board of education of Long Island City.

Where a teacher was hired for the term of one year from September 12, 1892, and was dismissed before the term of employment had expired by the board of education without cause; *held* that such dismissal was unlawful.

Decided November 2, 1893

Foster & Foster, attorneys for appellant
William E. Stewart, attorney for respondent

Crooker, *Superintendent*

This is an appeal from the action of the board of education of Long Island City, county of Queens, taken at a meeting of said board on the 30th day of January 1893, purporting to remove the above-named appellant from the position of principal of the fifth ward (new) school in Long Island City.

The appellant alleges as grounds of appeal:

1 The meeting of said board at which such action was taken was a special meeting and not called for the purpose of acting upon said matter.

2 That appellant's term of service for which he had been employed had not expired, and no cause whatsoever touching the qualifications or duties of appellant as principal of said school, was assigned for said action.

3 No actual cause existed for said action, arising from any fault or misconduct whatever on the part of the appellant.

4 That no charges or specifications were ever served upon or delivered to the appellant.

5 That no proper opportunity was given to or afforded the appellant to appear before said board of education, or opportunity given him to be heard.

6 That the alleged acts of said board of education were illegal and void.

An answer to the appeal herein was interposed by the board of education of Long Island City.

The papers presented by the respective parties in this appeal are quite voluminous, and have been carefully read and considered.

It is admitted by the respondents that the appellant was employed as principal of the fifth ward (new) school, Long Island City, for the term of one year, from September 12, 1892, at the annual salary of $1800, payable monthly in ten equal parts at the end of each month, except the months of July and August; and that said appellant was dismissed as such principal by the respondents before the expiration of the term for which he was employed.

The following facts are established by the papers presented upon this appeal:

That the appellant after his employment as principal of the said fifth ward school, duly entered upon the performance of his duties as such principal, and continued in the performance of the same, until forcibly prevented as hereinafter stated. That at a meeting of the board of education of Long Island City, held on January 11, 1893, a resolution was adopted that the appellant, principal of the fifth ward school, be directed to act as superintendent of schools of

Long Island City, in addition to his duties as principal of the new fifth ward school, without compensation, until further notice from said board; that a communication dated January 11, 1893, signed by Thomas A. Larkin, president board of education, and addressed to the appellant as principal of said fifth ward school, in which the appellant was informed that said board of education, at a meeting held that evening, had appointed appellant "acting superintendent" of schools in addition to his then position of principal of said fifth ward school, he to hold such position until the further orders of said board, such duties to commence at once. That said appellant received a communication, under date of January 11, 1893, signed by Thomas A. Larkin, president, addressed to appellant as principal of the fifth ward school, informing the appellant that Mrs Mary L. Woods had, on that day, been appointed your (the appellant's) assistant principal to take charge of school in your (appellant's) absence, at same salary as at present, until further orders of said board, and that a teacher for Mrs Woods's class would be sent in a day or two. That the appellant continued to perform his duties of principal of said school, until the morning of January 30, 1893, when he was prevented by force from entering the school building and house, and performing his duties as such principal. That the new mayor of Long Island City qualified and assumed the duties of said office on January 21, 1893, and on January 24, 1893, the respondents herein qualified by filing their oaths of office.

That the following is an extract from the minutes of said board. "City Hall. January 24, 1893, 8.30. The following letter was prepared and ordered sent to each of the several schools of the city, and the same directed to be read aloud to the teachers by each principal:

Long Island City, N. Y., January 24, 1893

To all the principals and teachers in the public schools of Long Island City:

In consequence of the recent outrageous attempt of the late mayor of this city, to usurp the authority and powers of the rightful incumbent and present legally constituted mayor of this city, Hon. Horatio S. Sanford, by appointing and dismissing persons without authority, we, the duly appointed and qualified board of education of Long Island City, hereby direct that until further notice from this board, you are requested to recognize Mr Sheldon J. Pardee as the superintendent of schools of this city. Any principal or teacher failing to fully assent to and act upon this requirement will be considered as insubordinate and will be disciplined or dismissed, as in the opinion of this board may be considered advisable

By order of the Board of Education.

There is no proof produced of the time and place when and where such letter was served upon the appellant. Mr Pardee alleges that he delivered it to appellant, and the appellant alleges Pardee did not deliver it to him.

That the appellant, on or about January 30, 1893, and after he had been forcibly prevented from entering the schoolhouse in the fifth ward, received a communication, under date of January 28, 1893, signed by Sheldon J. Pardee,

superintendent, suspending the appellant from his position and directing him to appear before the board of education, at a meeting to be held in the board rooms in the city hall on Monday, January 30, 1893, but there was nothing in said communication to show that it was written by direction of, or authorized by, such board.

That on January 30, 1893, the board of education adopted the following resolution: "That Peter E. Demarest, principal of the fifth ward new school be dismissed upon evidence before this board for deserting his school and for insubordination, having refused to obey the order issued by this board on January 24, 1893. The above to take effect immediately"; that notice of the foregoing resolution was transmitted to appellant by letter signed by Sheldon J. Pardee, superintendent, and dated January 31, 1893; but was not received by appellant until March 8, 1893.

That no charges or specifications against the appellant as teacher in said public schools of Long Island City, or as principal of said fifth ward school, whatever, were ever served upon or received by the appellant, nor does it appear that any such charges were ever made by or filed with the respondent, the board of education.

The respondent present with their answer statements that on January 26, 1893, the appellant visited certain schools, and that on January 13 and 24, 1893, he visited the fourth ward school, that up to 1.30 p. m., January 22, 1893, he was not present at the fifth ward school; also an affidavit of Mary L. Woods that appellant after January 11, 1893, did not attend the fifth ward school as principal, but came to the school occasionally, asking her how matters were going on. Mrs Woods corrects this affidavit and states that the words "did not attend as principal" should read "did attend as principal." In connection with these statements, which are evidently presented to sustain the allegation that the appellant neglected his duties as principal of the fifth ward school, should be taken the fact that on January 11, 1893, the appellant was appointed by the board of education as acting superintendent of the schools of Long Island City, in addition to his duties as principal of the fifth ward school, and that Mrs Woods, a teacher in said school, was designated as assistant principal of said school to take charge of the school during the absence of the appellant. The board of education knew that the appellant in the duties of acting superintendent would necessarily be absent at times from his school; that such necessary absence had the sanction of said board, and Mrs Woods was authorized to take charge of the school in such absence of the appellant. The respondent's charge of insubordination seems to be based upon the allegation contained in the affidavit of Mr Pardee that the appellant did not recognize the authority of Pardee as superintendent of schools, or to read the resolution passed by respondents on January 24, 1893, hereinbefore mentioned. Pardee avers a copy was given to the appellant, and the appellant avers it was not delivered to him. The affirmative is upon the respondents to establish the allegation of Pardee and in this the respondents have failed.

It appears that there was a contest in Long Island City relative to the election of a mayor, in which the schools were drawn so far as the personnel of the board of education was concerned, and the inhabitants of the city were greatly excited and each inhabitant took sides with one or other of the contestants for the office of mayor. On January 1, 1893, Mr Gleason, as mayor, appointed certain persons to constitute the board of education of said city and such board removed Pardee as superintendent and appointed the appellant as acting superintendent, as hereinbefore stated. On January 21, 1893, Mayor Sanford assumed the duties of mayor and claimed Mr Gleason was without power to appoint the members of the board of education and that the board so constituted was without power to remove Pardee as superintendent of schools. It is claimed that appellant refused to recognize Mr Sanford, but even if this was true, the failure of a school teacher to instantly recognize a change in the political government of a municipal corporation is not sufficient ground for dismissal. It would seem that under the excitement existing in said city by reason of the mayoralty contest, the position taken therein by the appellant, was, to some extent, the cause of the action taken by the respondents on January 30, 1893, in dismissing the appellant as principal of the fifth ward (new) school.

The respondents contend that the Superintendent of Public Instruction has not jurisdiction to entertain and decide the appeal herein. The board of education of Long Island City exists under acts of the Legislature relating to said city and is a body corporate. The trustees of the common and union free school districts of the State are elected pursuant to the Consolidated School Laws of the State, passed May 2, 1864, and the acts amendatory thereof, and are bodies corporate. The schools of said city are not designated as "common" or "union free schools," but they are public schools, forming a part of the common school system of the State, and supported in part from public school moneys of the State, and under the supervision of the Superintendent of Public Instruction of the State. By section 1 of title 12 of the Consolidated School Law, it is provided that any person conceiving himself aggrieved in consequence of any decision made as specified in subdivisions 1 to 6, inclusive, may appeal to the State Superintendent, and subdivision 7 enacts: "By any other official act or decision concerning any other matter under this act, or any other act pertaining to common schools, may appeal to the Superintendent of Public Instruction, who is hereby authorized and required to examine and decide the same; and his decision shall be final and conclusive, and not subject to question or review in any place or court whatever."

By section 23 of Charter Laws of 1871, chapter 461, page 969, the right of appeal to, and the jurisdiction of, the Superintendent of Public Instruction to entertain appeals is recognized in the provisions that in any suits which shall be brought against the said board, etc., for any act performed, etc., which might have been the subject of an appeal to the Superintendent, no costs shall be allowed the plaintiff, etc.

The provisions of section 23 are, in substance, the same as the provisions contained in section 6 of title 13 of the Consolidated School Law of 1864. The contention of the respondents is not well taken.

The respondents contend that the appellant is guilty of laches in bringing his appeal. It appears from the proofs that although the resolution of the respondents, dismissing the appellant as principal of the fifth ward school, was passed on January 30, 1893, no copy of said resolution was given to the appellant until March 8, 1893. The appeal herein was verified April 5, 1893, a copy was served upon the respondents on April 6, 1893, and the original appeal, with proof of service of a copy on respondent, was duly filed in the Department on April 7, 1893.

By rule 5 of the rules of practice of this Department on appeals, it is provided that the original appeal and all papers annexed thereto, with proof of service of copies, must be sent to this Department within thirty days after the making of the decision or the performance of the act complained of, or within that time after the knowledge of the cause of complaint came to the appellant, or some satisfactory excuse must be rendered in the appeal for the delay. The contention of the respondents that the appeal was not brought in time is not well taken.

The courts of this State have held that the trustees can not dismiss a teacher, without cause and against his consent, before the expiration of his contract. This Department has so held. In appeal no. 3864, A. Hall Burdick v. the Board of Education of Long Island City, and appeal 3865, Annie M. Lawton v. the Board of Education of Long Island City, decided March 26, 1890, my predecessor, Superintendent Draper, so held. In appeal no. 3864, Superintendent Draper says: "There is no difference between the legal powers and duties of school trustees in cities, and like officers in all other parts of the State, except as such differences have been created by statutes having special application to a particular city. It does not appear that there is any special statute conferring any greater or different powers upon the board of education of Long Island City, so far as the dismissal of teachers is concerned, than trustees of schools have in general." I concur with Superintendent Draper.

In subdivision 9 of section 49, title 9, of the Consolidated School Law, as it existed at the time of the employment of the appellant herein, it is provided: "Nor shall any teacher be dismissed in the course of a term of employment except for reasons which, if appealed to the Superintendent of Public Instruction, shall be held to be sufficient cause for such dismissal."

I decide that the reasons for which the appellant was dismissed are not held by me to be sufficient cause for such dismissal. This being so, the action of said board in attempting to dismiss the appellant in January 1893, without cause, was unlawful.

The appeal is sustained, and the action of the board in dismissing the appellant is held to be unlawful and invalid.

3824

In the matter of the appeal of E. Grace McDowell v. school district no. 2 of the towns of Middletown and Southfield, in the county of Richmond.

The employment of a teacher by two of three trustees without consulting the third, illegal.

The teacher may have her remedy against the persons who employed her, but her claim for damages, if any, can be enforced only by an action.

Decided November 9, 1889

John Widdecombe, attorney for appellant
Van Hoevenberg & Holt, attorneys for respondent

Draper, *Superintendent*

The appellant alleges that on the 15th day of July last she was employed to teach the school in the above-named district for the term of one year, commencing on the 2d day of September; that she has held herself in readiness and attempted to fulfil the terms of the employment on her part, but has been altogether prevented from doing so by the majority of the present board of trustees. She has demanded her pay for the first month of the term of employment, and been refused. She brings this appeal for the purpose of determining and enforcing her rights.

Two of the three trustees answer and say that the appellant was never legally employed, inasmuch as one of the three trustees received no notice of the meeting at which such action was assumed to be taken. They also say that one of the two trustees who assumed to employ her, went out of office by expiration of his term, and was not reelected. They admit that they have declined to recognize the employment or to pay appellant.

This is evidently one of many cases in which trustees endeavor to forestall the action of school meetings, or their successors in office, by acts just prior to the close of their term of office. The Department does not look with favor upon such acts, and will not uphold them, unless clearly and unmistakably authorized by law.

It is undisputed that the appellant was employed, if at all, by the action of two trustees without consultation with the third. This was illegal, although the teacher might possibly have redress against the two who assumed to employ her. If she has any remedy, it is by an action at law for damages, rather than by an appeal to the Department to have the contract enforced. The Department has no facilities for measuring damages. Whether the appellant is entitled to recover damages, and if so, to what extent, should be determined by the courts.

The appeal is dismissed.

3565

In the matter of the appeal of W. M. Hill, D. A. Stark and others, composing the board of education of Millport free school district no. 8, town of Veteran, Chemung county v. Harris Wickham.

The State Department will not remove a teacher on the ground that he disregards the wishes and directions of a board of education. It is for the board to dismiss him if he is guilty of such insubordination as to justify it. From such act an appeal will lie, but the aid of the Department can not be invoked in the first instance.

Decided February 14, 1887

Draper, *Superintendent*

This proceeding is brought by the board of education of Millport union free school district no. 8, of the town of Veteran, for the removal of Harris Wickham, a teacher in the employ of said board. The board alleges, as reasons for the removal of Wickham, that he acts contrary to the directions of the board, and specifies several instances in which this has occurred. It is said that he commenced the term of the school contrary to the directions of the board; that he refused to permit the board to clean the school building; that he has insulted the board by undertaking to have the members arrested when endeavoring to have the building cleaned and repaired; that he has refused to meet the board for the transaction of school business; that he has exchanged textbooks contrary to the wishes of the board; that he has received nonresident pupils without the knowledge of the board, and that his discipline in the schoolroom is inefficient. The teacher sets up in answer, that this Department can not remove him as a teacher except by revoking his license to teach.

This is not a proceeding to revoke the teacher's license on the ground of immoral conduct. No allegation is made against the moral character of the teacher, nor against his mental capacity. The things complained of are, if true, indicative of insubordination on the part of the teacher toward the board, for which the board itself would have the right to discontinue his services. The teacher does not say whether they are true or not. He takes the position that it is for the board, and not the Department, to remove him, in the first instance. In this he is right. If the proceeding had been one for the revocation of his license to teach, the Department would have had jurisdiction; but, as it is, the board itself must act in the first instance. The act of the board may be made the subject of appeal, when the truth or falsity of the allegations against the teacher will have to be inquired into.

The appeal must be dismissed.

4588

In the matter of the appeal of William H. Witbeck and others v. Myron Hungerford, James Johnston and Andrew J. Stahle, jr, as trustees of school district no. 11, town of Guilderland, Albany county.

When a trustee or the trustees of a school district employ a teacher for the school in such district who is related by blood or marriage to such trustee or to some one of the

trustees and a special meeting of the inhabitants of the district is held to act upon the question of approving such contract and at such meeting two-thirds of the voters present and voting approved of such employment, such trustee or trustees during their term of office may legally enter into a further contract with such person to teach in the district without any further action by the voters of such school district.

Decided October 8, 1897

A. Helme, attorney for appellants
Clute & McCormic, attorneys for respondents

Skinner, *Superintendent*

This is an appeal by the appellants in the above-entitled matter from the action of the respondents herein as trustees of school district no. 11, town of Guilderland, Albany county, employing a teacher for the school in such district for the school year of 1897–98, a person related to one of said trustees, namely, Myron Hungerford, in violation of the provisions of the Consolidated School Law. The above-named trustees have answered the appeal.

From the uncontroverted statements contained in the appeal and answer it appears:

That for the school year of 1896–97, Messrs Hungerford, Johnston and Stahle constituted the board of trustees of said school district, and early in such year desired to employ one Anna Radcliff, a relative of Trustee Hungerford, to teach the school in such district; that on August 17, 1896, at a duly called special meeting of such district, by the affirmative vote of two-thirds of the voters of such district, present and voting upon the question of approving such hiring by such trustees of Miss Radcliff, as such teacher, such hiring was approved; that such special meeting did not determine or specify any term of time for which such employment of Miss Radcliff should be made, but simply voted to approve her hiring by such trustees notwithstanding her relationship to Trustee Hungerford; that after such special meeting of August 17, 1896, said board of trustees employed Miss Radcliff to teach the school in such district, and under such contract of employment she taught such school, commencing on September 7, 1896, and terminating on June 30, 1897; that on July 28, 1897, such trustees employed Miss Radcliff to teach the school in such district for the school year 1897–98, to commence on or about September 1, 1897, and terminate on or about July 1, 1898.

It further appears that the board of trustees of such district for the present school year is composed of the same persons as in the school year of 1896–97; Mr Johnston, whose term as trustee expired on August 3, 1897, was at the annual meeting of the school district, held on August 3, 1897, reelected as trustee for the term of three years.

The trustees of school districts alone, under the provisions of the Consolidated School Law of 1894, can make contracts with teachers for the district schools. The qualified voters of a district can not control the action of the trustees in the matter, although they may, as provided in such school law, approve

the hiring of a teacher in certain cases in which such trustees are prohibited from hiring without such approval.

In subdivision 9 of section 47, article 6, title 7, of the Consolidated School Law of 1894, it is enacted that no person who is related to any trustee or trustees (that is, to a sole trustee, or to any of the trustees, if there are more than one), by blood or marriage shall be employed as a teacher except with the approval of two-thirds of the voters of such district present and voting upon the question at an annual or special meeting of the district.

Prior to June 30, 1894, when the Consolidated School Law of 1894 became a law, no person could be employed as a teacher by any trustee or trustees who was within two degrees of relationship by blood or marriage to such trustee or trustees, except with the approval of two-thirds of the voters of such district present and voting upon the question at an annual or special meeting of the district. Under the law, since June 30, 1894, no person who is related to any trustees by blood or marriage in any degree whatever can be so employed without such approval as aforesaid. The approval on the part of the voters of the district must be by a vote either at an annual meeting or at a special meeting called for that purpose. Such approval can not be given individually, and although every inhabitant of the district might sign his or her approval to a paper circulated in the district it would not meet the requirements of the school law, and would not make a contract of employment legal and binding upon the district.

The ruling of this Department has been that such consent may be made after as well as before the time of employment.

When, at any meeting in a school district, the question presented for its action is simply the approval, on the part of the qualified voters present and voting, of the employment of a person named as a teacher in the school in the district notwithstanding such person is related in some degree, by blood or marriage, to the trustee, or to some one of the trustees if the district has more than one trustee, the voters are not called upon, nor have they any authority under the school law, to approve any specific contract of employment of such person for a term of time, or at a specified rate of compensation, but only to approve or refuse to approve his or her employment as a teacher notwithstanding such relationship.

From anything that is stated in the papers presented herein, the only question considered and acted upon at the special meeting held in such district on August 17, 1896, in reference to the employment of Miss Radcliff, as a teacher in the school therein, was, Shall we approve her employment as such teacher notwithstanding her relationship by blood or marriage to Mr Hungerford, one of the trustees of the district? and that such approval was given pursuant to the provisions of the school law.

The contention of the appellant is, that such approval was given for the employment of Miss Radcliff for the school year of 1896–97 only, and that the respondents could not, as trustees of such district, legally employ her on July 28, 1897, for the school year of 1897–98, or any part of such school year, except with

the approval of two-thirds of the voters of such district present and voting upon the question at the annual meeting on August 3, 1897, or at a special meeting duly called. Such contention is not supported by the facts, or the school law, or decisions of this Department.

1 It is not established by the proofs that the approval of the school meeting of August 17, 1896, was limited to the employment of Miss Radcliff as a teacher for the school year 1896–97.

2 Admitting for the purpose of argument that the approval was limited to her employment for such school year, I am of the opinion that the meeting did not possess the authority to approve or disapprove any specific contract between the trustees and the teacher, but could only approve or refuse to approve her employment by such trustees notwithstanding her relationship to one of the trustees.

3 That the approval of the special district meeting of August 17, 1896, of the hiring of Miss Radcliff as a teacher, being given, the trustees, during their term of office, could legally enter into a contract with her to teach in the district, without further action by the voters of the school district.

4 That it appears that the trustees of such district are composed, the present school year, of the same persons as during the school year of 1896–97; James Johnston, one of such trustees, whose term of office expired at the annual meeting held on August 3, 1897, at such meeting, was reelected as trustee for the full term of three years.

The appeal herein is dismissed.

3758

In the matter of the appeal of Ambrose Green v. John H. Galloway, sole trustee of school district no. 15, town of Cambridge, Washington county.

The hiring of a teacher who is related to the trustee within the prohibited degrees, without the requisite consent of the voters at a district meeting being previously secured, is cured by subsequent action of the voters by a two-thirds vote, approving such employment. The trustee, the teacher, and their relatives, if qualified voters of the district are entitled to vote upon such a question.

Decided January 26, 1889

Draper, *Superintendent*

This is an appeal taken by a voter in school district no. 15, town of Cambridge, Washington county, from the action of the sole trustee of said district, in employing as a teacher a person related to the trustee within the prohibited degree.

The respondent has filed an answer and therein admits the fact as alleged by the appellant, but shows affirmatively that since the hiring, a district meeting, by a two-thirds vote, has approved and ratified the employment of such teacher by the trustee.

The appellant replies and avers that the meeting was not properly called and conducted, and that the teacher and trustee and relatives of each voted upon the question in the affirmative, thereby making the requisite vote.

The provision of the law relative to the employment of a teacher who is related to the trustee, is sufficiently complied with when it is made to appear that the legal voters of the district, by a two-thirds vote of their number present and voting, have shown their satisfaction with such employment. It is not claimed that the trustee and teacher and their relatives who voted were not qualified voters. If they were qualified, they had a perfect right to vote upon the question. I am satisfied that a proper notice of the meeting was given and the meeting properly conducted, and that the meeting, by the requisite vote approved the hiring. That the vote was taken subsequently to the time of the employment is not consequential.

I conclude, therefore, that a decision of this appeal is unnecessary, and have made such note upon the records.

3575

In the matter of the appeal of Ida L. Griswold v. Alexander Rossman, trustee of school district no. 4, town of Claverack, county of Columbia.

At the time of employment of a teacher, it was agreed that she should board with the trustee. *Held,* That such agreement was void, and that she could change her boarding place at any time.

While a teacher may board with a trustee, it can not be made obligatory upon the teacher to do so.

A trustee is guilty of gross neglect of duty in delivering a tax list and warrant to a collector before a satisfactory bond has been furnished.

A collector who voluntarily pays over the district money to a trustee is personally liable therefor, and a trustee is censurable for receiving it.

Decided May 25, 1887

Charles Beale, attorney for appellant
John V. Whitbeck, attorney for respondent

Draper, *Superintendent*

This is an appeal by Ida L. Griswold, who was employed as teacher of the school in district no 4, town of Claverack, county of Columbia, against the trustee of said district, demanding the removal of said trustee from office.

The appellant alleges as grounds therefor that the trustee has used insulting language toward her and in relation to her; that he has prevented her from fulfilling her term of teaching; that he has taken from the collector the district moneys and retained them, and that he has neglected to pay her for the services she has rendered.

The respondent in answer admits that he received from the collector all the district moneys then held by that officer, and alleges as an excuse therefor that

while he, the trustee, was responsible for the safe keeping of the same, the collector was not and had given no bond as such collector. He admits also that the teacher taught from September 4, 1886, until February 4, 1887, when dissatisfaction having been manifested in the district with her teaching, and the funds not being sufficient to continue school longer, he closed the school. He alleges that he reserved the right to terminate the teacher's engagement for either cause. The trustee denies that he had insulted the teacher, but admits using strong language toward her while in a passion caused by alleged tantalizing conduct toward him on the part of the teacher. The trustee makes other charges against the teacher which are not necessary to be considered upon this appeal, as the trustee and not the teacher is the accused person.

The allegations are so conflicting that I directed Oliver W. Hallenbeck, school commissioner of the first district of Columbia county, to give notice to the respective parties and take their testimony, as well as that of such witnesses as might be offered by them. Notices having been regularly given by the commissioner, the hearing was proceeded with and the testimony returned to me.

From the evidence so taken and from the admissions made by the parties, I find the facts to be as follows: The appellant was employed to teach by the respondent as trustee for from thirty to forty weeks of school to commence September 4, 1886, or until the district moneys were exhausted, unless in the meantime general dissatisfaction should prevail in the district toward the teacher when her term should end. She was to receive six dollars a week and board with the trustee, he to charge her for such board, including washing, at two dollars and fifty cents per week.

The appellant taught from September 4, 1886, until February 4, 1887, when the trustee discharged her and closed the school. As the teacher was absent several days, I can not determine from the testimony before me just how much salary she is entitled to.

During Christmas week the appellant ceased to board with the trustee, and a bitter feeling sprang up between the parties to this appeal. The teacher had a perfect right to change her boarding place at any time. An agreement with the trustee to the contrary is illegal and void. While a teacher may board with a trustee, it can not be made obligatory upon the teacher so to do.

The trustee has been guilty of gross neglect of duty in delivering a tax list and warrant to a collector before a satisfactory bond has been executed and delivered to him as required by law, and a person who has held the office of trustee for three successive years can have no reasonable excuse for such neglect.

The collector rendered himself personally liable when he voluntarily paid over the district moneys to the trustee, as the trustee was blamable when he received them.

I have concluded in view of all the facts, to make the following disposition of this appeal: The trustee is hereby ordered and directed to pay over all the district moneys in his hands to the collector, first requiring such collector to give a sufficient bond to protect the district from loss, and take his receipt there-

for. He is also directed to deliver or offer to deliver to the appellant an order upon the collector for the full amount due her for teachers' wages. This I direct to be done within ten days from the date of this decision. Upon satisfactory proof of a compliance with this order, this appeal will be dismissed; otherwise, a further order will be made in the premises.

3640

In the matter of the appeal of Pierce Craw v. Elisha Teter, Charles Rice and Reuben W. Mackey, trustees of school district no. 12, town of Rensselaerville, Albany county.

In a district having three trustees, a teacher was engaged for the school year in advance of the holding of the annual meeting. *Held,* that the hiring was both proper and legal.

No written memorandum was delivered at the time of hiring, nor has one been filed with the district clerk. *Held,* that the failure to give such memorandum to the teacher would not invalidate the contract. It could be given at any time. Filing of such a memorandum is not required.

Where a district lies in a cold, hilly country, and in winter the woods are frequently impassable by reason of snow, the trustees exercise a proper discretion in deferring to fix the time of the next winter term until the condition of the roads can be determined.

Decided October 25, 1887

Draper, *Superintendent*

This proceeding is an appeal by a resident and taxpayer of school district no. 12, town of Rensselaerville, Albany county, N. Y., against the action of the trustees of last year, two of whom continue to be trustees this year, in employing a certain person as teacher for the present school year, in advance of the holding of the annual school meeting in said district, and from the action of the annual meeting in letting a contract for furnishing wood for fuel for the school year, to the person whose term as trustee had just ended by the election of his successor. It is averred by the appellant that the trustees refuse to continue school in the winter months, and thereby deprive many children of the district from the benefits of the school. It is alleged that in hiring the teacher, the trustees did not act as a board, and did not at the time of hiring make and deliver to the person so employed a memorandum in writing of the terms of the agreement as required by law, and that no such memorandum was filed with the district clerk.

The respondents, in answering the petition of the appellant,

First, raise a technical objection to the form of the appellant's papers; second, aver that the hiring of the teacher was legal; that the person so employed was the teacher who taught the district's school the preceding year, and that the early action by the board was necessarily taken to secure the services of the teacher who had repeated offers of other schools; that the employment was for a period of twenty-eight weeks, and was, after consultation between all of them,

to be divided into terms, as the interests of the children of the district would seem to demand; school, however, to commence on September 19th.

The written memorandum was not prepared and delivered to the teacher, for the reason that the respondents were unaware of the enactment of the law of last winter, which requires it; since the appeal, this provision of law has been complied with.

The respondents further state that the district is located in a hilly country, and the roads in winter are blockaded with snow, and for this reason the trustees have not yet decided upon the terms of the school, and their action relative thereto will depend upon the condition of the roads. Relative to fuel, they allege that the contract was let to the lowest bidder, and the price to be paid therefor was not exorbitant.

In considering the question raised by the pleadings herein, I shall not pass upon the technical defects in appellant's papers, but must hold:

That the trustees being in a district composed of three trustees, had the right to employ a person as teacher for one year in advance; that proper consultation was had between all three trustees, and a valid contract entered into; that, while the trustees were derelict in duty in failing to give to the teacher a written memorandum of the terms of the hiring, that failure did not vitiate the contract, and that the law does not require the memorandum to be filed in the clerk's office, or elsewhere; that, from the pleadings and proof presented, I do not find that the trustees were acting contrary to the wishes of the inhabitants in hiring a teacher for only twenty-eight weeks, or for neglecting to hold school in the severe winter, in a district situated as is the one to which this appeal relates.

I am unable to determine, from the appellant's statement, that the price for furnishing fuel to the district was exorbitant.

I therefore dismiss the appeal.

4002

In the matter of the appeal of Louise Clemens v. Isleton Stedman, sole trustee of district no. 7, of the town of Osceola, in the county of Lewis.

A school district trustee refused to continue a teacher in school who had failed to receive a renewal of her certificate. It appears that a second temporary license was not received by the teacher until after the time of the trustee's action.

Held, that the trustee acted legally. He could safely have taken no other course.

Decided September 15, 1891

Draper, *Superintendent*

The appellant alleges that she was employed by the respondent to teach the school in the above-named district, for the term of sixteen weeks at $5.50 per week. The agreement was a verbal one and no memorandum of the hiring was

given the teacher. After she had taught seven weeks in all, the trustee prevented her from continuing. He alleges that the reason for this was because she had no license. It seems that she had no license at the time of the alleged hiring, but that she received from the school commissioner two temporary permits, one dated April 6th, and the other May 18th. The second permit was granted by the school commissioner after asking leave of the Department. The school district is some distance from the school commissioner and the communication is irregular, and considerable time was consumed in correspondence over the matter, so that the second temporary permit was not received by the teacher until after the time when the trustee had prevented her from continuing.

I find nothing in the papers to lead me to believe that the action of the trustee in causing the teacher to cease work was due to any other cause than the lack of a certificate on her part. If this was the only cause, then he acted with entire propriety, indeed he could safely have done nothing else. It does not matter that a second temporary permit had at that time been granted, and was in course of transmission. There can be no question upon the papers but that the teacher was remiss in the matter of a certificate.

In view of these facts, the appeal must be dismissed, but the trustee is directed to settle with the appellant for the time actually taught.

3586

In the matter of the appeal of Nellie A. Hennessy v. Fred W. Rocks, trustee of school district no. 6, town of Fabius, Onondaga county.

The contract of hiring made between a *de facto* (but not a *de jure*) trustee and a teacher who entered upon the performance of her contract, sustained.

Decided April 16, 1887

Draper, *Superintendent*

This is an appeal made by Nellie A. Hennessy, a person employed as a teacher by one Lawrence Long, then acting as trustee of said district, from the action of the respondent, the trustee of said district, in refusing to pay her in accordance with the terms of said employment. It is alleged by the appellant, and the facts seem undisputed, that the appellant was employed to teach school for a period of sixteen weeks at the agreed price of $5.50 per week, to commence on the 4th day of October 1886. The contract was entered into on the 25th day of September 1886, and she taught pursuant to said agreement, up to and including the 14th day of January 1887, when she was prevented from further fulfilling the terms of her contract by the action of the trustee, who locked the door and would not admit the appellant to the schoolhouse.

The respondent denies that Long was ever elected trustee of the district; asserts that he did not serve under color of title, and that he was a mere usurper, and consequently that the contract was illegal and in no way bound the trustee.

In order to properly understand the case, it is necessary to refer to a former appeal decided on the 5th day of January 1887, by the decision of which it was held that F. W. Rocks was duly elected trustee of said district at the meeting held for that purpose on the 7th day of September 1886. Upon the evidence adduced on that appeal, it appeared that there arose a dispute at the school meeting as to whether Lawrence Long or Rocks was elected trustee. The evidence was quite conflicting. It appeared that Lawrence Long assumed the duties of the office of trustee immediately after said meeting, employed the appellant as teacher and commenced school, and school was continued under his supervision as such acting trustee until the decision of said former appeal, when, upon the assumption of said office by the respondent herein, the appellant was prevented from further continuing school.

There is but one question raised by this appeal and that is, whether the action of Long, while acting as trustee, in employing Miss Hennessy for the term of sixteen weeks, was a valid contract so far as the district and the appellant were concerned, and whether the respondent herein is compelled by law to fulfil the conditions of the contract. It can not be disputed, from the evidence elicited upon the former appeal, that Lawrence Long acted as trustee under some color of title. From the action of the district meeting, at which the trustee was elected, I can not fail to reach the conclusion that Long was claiming and exercising the powers of trustee when the contract was entered into between him and the appellant, with some color of right to do so, and that the agreement became binding upon the district. Miss Hennessy was not obliged to wait until the dispute over the office was determined before she took the school. She was justified in contracting with a man who was acting and recognized as trustee. I, therefore, conclude that this appeal must be sustained, and the respondent is hereby directed to issue to Miss Hennessy, upon receiving from her the school register properly verified up to the date on which she was prevented from continuing the school, an order upon the supervisor of the town, if there are moneys in his hands to meet the same; and, if there are not, then he will levy a tax upon the district therefor, and deliver to her an order upon the collector of the district for sixteen weeks' pay, at the rate of $5.50 per week.

4355

In the matter of the appeal of Roy O. Carver v. Hugh McCarrell, sole trustee, school district no. 3, town of Portland, Chautauqua county.

Where it appears by a preponderance of proof that a teacher did not maintain order and good government in a school taught by him, and that he failed as a disciplinarian; *held*, that the trustee had sufficient cause to dismiss such teacher.

Decided June 25, 1895

H. C. Kingsbury, jr, attorney for appellant
Ottaway & Munson, attorneys for respondent

Skinner, *Superintendent*

The appellant in the above-entitled matter appeals from the action and decision of the respondent therein in dismissing the appellant as a teacher in school district no. 3, town of Portland, Chautauqua county, as alleged in said appeal, in the course of a term of employment, without sufficient cause.

The appellant alleges that in August 1894, he and the respondent as trustee of said school district, entered into a verbal contract by which the appellant contracted to teach the school in said district for the term of thirty-four weeks at a compensation of $9 per week for one-half of the time and $10 per week for the remaining half of the time, but that said contract was subsequently modified as follows: Said appellant was to be paid $9 per week for the fall term, $10 per week for the winter term and $9 per week for the spring term; that the appellant in August 1894, commenced teaching said school under said contract, and continued to teach until April 12, 1895, when by order of the respondent said school was closed for two weeks; that on April 22, 1895, the appellant received a letter from the respondent, dismissing the appellant as such teacher; that on April 29, 1895, the date when the appellant understood the school was to be resumed, he went to the schoolhouse prepared to resume his duties as teacher, but the respondent, whom he found at the schoolhouse, would not permit him to teach.

The respondent denies that he ever entered into a verbal contract with the appellant that the appellant should teach the school in said district, but avers that he made two written contracts with the appellant to teach said school, each for the term of ten weeks, one of which was made on August 20, 1894, and the other on December 10, 1894.

The respondent also alleges that the appellant as such teacher disobeyed the rules for the government and discipline of said school as prescribed by the respondent, especially in administering corporal punishment, and that the appellant did not maintain good order and government in said school, and failed as a disciplinarian. From the proofs presented by the parties to this appeal, the following facts are established:

That early in August 1894, the appellant applied to the respondent to teach the school in said district, and on August 8, 1894, also applied to the trustee of school district no. 10, of Portland, to teach the school in that district, and requested said trustee to let him know on August 10, 1894, whether he would entertain such application; that on or about said August 8, 1894 (the date at which the appellant alleges the verbal contract to teach the school was made by the respondent), in an interview between the appellant and respondent, at which a Miss Hale was present, the respondent stated he would hire the appellant to teach said school for the coming school year, providing he did not hire Miss Sawin; that on August 9, 1894, the respondent, in reply to an inquiry of the trustee of district no. 10, as to whether respondent had hired appellant, said that he had not, and that a lady teacher who taught the last term of school in his district had made application for his school and he was waiting to hear from

her before engaging any other teacher; that on August 20, 1894, the respondent delivered to the appellant a memorandum in writing, signed by him, hiring the appellant as a teacher in said school for the term of ten weeks from the date of such memorandum at the compensation of $9 per week, payable monthly, and appellant accepted said memorandum and entered at once on the discharge of his duties as a teacher in said school thereunder; that on December 10, 1894, the respondent delivered to the appellant another memorandum in writing, signed by him, hiring the appellant as teacher in said school for the term of ten weeks from the date of such memorandum, at the compensation of $10 per week, payable monthly, and appellant accepted said memorandum and entered upon the discharge of his duties as a teacher in said school thereunder; that after the expiration of the term mentioned in said memorandum, dated December 10, 1894, the appellant continued to teach said school without any further contract, verbal or written, between the appellant and respondent, until on or about April 12, 1895, when said school was closed by order of the respondent for two weeks; that on or about April 22, 1895, the appellant received a letter from the respondent, under date of April 20, 1895, in which respondent referred to the action of the appellant in whipping one Claude Alden, stating that the appellant knew that it was against the orders of the respondent for appellant to whip any scholars in the school, but when scholars did not obey, the appellant should send them home; that he had lost confidence in the appellant, and requesting the appellant to come and complete the register and verify it, and that he would settle with appellant and put in another teacher, and that appellant could not teach the school any longer; that at the expiration of the said two weeks' closure of the school and on April 29, 1895, the appellant went to the schoolhouse in said district prepared to continue to teach said school and there met the respondent, who refused to permit the appellant to further teach in said school. It further appears that prior to the appellant commencing to teach the school in said district the respondent in the establishing of the rules for the government and discipline of said school, forbade the appellant to administer corporal punishment to any of the scholars; that on April 11, 1895, one Claude Alden, a pupil about nine years of age, at the close of the afternoon recess did not return to the schoolroom until some ten minutes after the pupils were called to the schoolroom, and appellant directed said Alden to remain after the school was dismissed for the day, and explain why he did not return to the schoolroom with the other pupils; that after the school was dismissed and the appellant was engaged in some work, the pupil, Alden, left the schoolroom without the permission of the appellant and went home; that on April 12, 1895, at the time of the forenoon recess, the appellant kept said pupil, Alden, in the schoolhouse and punished said pupil by striking him with a stick or limb of a tree around the legs four to six times, stating to said Alden that he (appellant) was punishing him for not remaining in the schoolroom the afternoon previous after the close of the school, and giving appellant an explanation why he (Alden) did not come into the schoolroom with the other pupils at the close of the recess.

It also further appears that during the time appellant taught said school complaints were made by patrons of the school to the respondent in reference to the absence of order and discipline in the school; that the school was noisy and disorderly; that certain pupils were permitted to whisper and move about the schoolroom; that on more than one occasion the respondent was called in to quell disturbances in the school.

The appellant has failed to sustain his allegation in his appeal that in August, 1894, a verbal contract was made with the respondent by which the appellant was hired to teach the school in said district for thirty-four weeks during the school year of 1894–95. Had such a contract been made the appellant should not have accepted the memorandum of hiring, dated August 20, 1894, for ten weeks' service as teacher, but should have refused it, and insisted upon receiving a memorandum for the thirty-four weeks, and failing to obtain that, to stand upon his verbal contract. It is a well-settled principle of law that when a contract is reduced to writing and executed such written instrument is the contract of the parties, and that all prior negotiations and conversations had between the parties with reference to the subject matter of the contract are merged in the written instrument. On December 10, 1894, the appellant received, without objection, a second memorandum of hiring for ten weeks from the date of the memorandum. It does not clearly appear from the proofs presented herein for what, if any, specified term of time, the appellant was hired to teach said school after the expiration of the ten weeks commencing December 10, 1894, and I am of the opinion that after the expiration of said term the appellant had the right at any time to terminate his services as such teacher, and the respondent had the right to dismiss the appellant as such teacher.

Admitting for the purpose of argument only that the appellant on April 29, 1895, was dismissed by the respondent in the course of or during a term of employment, I am of the opinion that the respondent had sufficient cause for such dismissal. The respondent, as trustee of said district, had authority to establish rules for the government and discipline of the school, and it was the duty of the appellant to obey such rules and see that they were enforced. The appellant had no authority to establish rules, nor to punish by corporal punishment any pupil, nor to suspend or expel a single pupil without the order or consent of the respondent. The school law is silent in relation to corporal punishment in the public schools; it neither forbids nor permits it, but leaves the matter to the judgment and discretion of the trustees. In establishing rules for the government and discipline of the school in his district the respondent, as trustee, notified the appellant he must not whip any pupil for violation of such rules, but to send home any pupil violating the rules. The appellant disobeyed the order of the respondent and administered corporal punishment to the pupil, Alden.

Under the school law, the decisions of the courts of this State and of this Department, a trustee has a right, for cause, to dismiss a teacher, and that the failure on the part of a teacher to maintain order, good government and discipline in a school, is sufficient cause for such dismissal.

I am satisfied that the respondent has, by a preponderance of proof, established the fact that the appellant did not maintain order and good government in the school taught by him, and that he failed as a disciplinarian, and by reason thereof the respondent had sufficient cause to dismiss the appellant as such teacher.

The appeal herein is dismissed.

4311

In the matter of the appeal of Ella A. Woodward v. Hiram B. Hill, trustee, school district no. 10, town of Ancram, Columbia county.

Where the sole trustee of a school district, prior to the annual meeting of the school district on the 1st day of August 1894, entered into a contract for the employment of a teacher for the school in said district for not more than one year in advance, to wit, for the period of thirty-eight weeks, including the school year for 1894–95, the school to commence on September 3, 1894, at a compensation of $9 per week, such contract was legal and valid and binding upon the teacher and the trustee of the district elected at said annual meeting and upon said school district. The trustee elected at said annual meeting having neglected to open the school on the 3d of September and refusing to permit the teacher to commence teaching the school on that day and not commencing said school until October 15, 1894, was guilty of a breach of contract, and the teacher is entitled to be paid wages for the period of time between September 3d and October 15th, she being ready and willing to perform said contract upon her part.

Decided December 22, 1894

Crooker, *Superintendent*

On or about August 7, 1894, William H. Porter, then sole trustee of school district no. 10, town of Ancram, Columbia county, and the above-named appellant entered into a contract under which the said Porter, as such trustee, employed the appellant herein, a duly qualified teacher, to teach the school in said district for a period of thirty-eight weeks during the school year, commencing August 1, 1894, said school to commence on September 3, 1894, at a compensation of $9 per week. That at the annual school meeting held in said district on the first Tuesday of August, 1894, the respondent herein was elected trustee of said district. That the appellant on September 3, 1894, went to the respondent and asked for the keys of the schoolhouse and to open the school, pursuant to the terms of the aforesaid contract; but the respondent refused to give said keys to appellant or to permit the appellant to open said school. That on September 4 and 5, 1894, the appellant made like application to respondent and received a like refusal thereto. That the respondent did not permit said school to be opened until October 15, 1894, upon which day the appellant asked respondent for an order for wages from September 3, 1894, which request was refused; but the respondent paid the appellant for the week she attended the teachers institute. That the respondent still refused to pay the appellant any further sum under said contract between September 3, 1894, and October 15,

1894. From said refusal of the respondent to pay her the appellant appeals. The respondent, in answer to said appeal, alleges first, that the former trustee hired the appellant for more than the school term; second, that the appellant has plenty of time to teach the term; third, that the district is willing that the appellant shall teach the term if she fulfils the requirements called for; fourth, that respondent can not pay appellant for what she can not qualify to the register.

No statement is made or proof given by the respondent why he refused to allow the appellant to open the school on September 3, 1894, under and pursuant to the terms of her contract, nor why said school was not opened until October 15, 1894. Under the provisions of subdivision 9 of section 47, article 6, title 7 of the Consolidated School Law of 1894, Porter, as trustee of said district, had authority to employ the appellant herein as a teacher in said district for not more than one year in advance, and to fix the date when such employment should commence, and length of time such employment should continue, provided such term should be more than one year, and to fix the compensation to be paid, and such contract was binding upon the respondent as trustee of the district and upon said district. Under said school law the trustee or trustees of the respective school districts are authorized to determine the time during a school year in which a school shall be maintained in their respective districts. Such trustees are required to maintain a school in their respective districts during each school year for at least 160 days of school inclusive of all legal holidays that may occur during the term of said schools and exclusive of Saturdays, to enable such districts respectively to receive a proportion of the public moneys appropriated by the State for the public schools; but such trustee may maintain a school in their respective districts for such length of time in excess of said 160 days as they may determine. Said Trustee Porter determined that a school should be maintained in said school district no. 10, town of Ancram, for the period of thirty-eight weeks for the school year, commencing August 1, 1894, and that such school should commence on September 3, 1894, and made a contract with the appellant accordingly. Such decision of Trustee Porter and said contract are valid under the school law, and binding upon the respondent as trustee of said district and upon said district. The appellant was employed to teach in said district for the period of thirty-eight weeks, commencing on September 3, 1894, and she is only required to perform her contract, and it is immaterial whether or not she has plenty of time to teach in said district, during said school year, after October 15, 1894, for thirty-eight weeks. It is also immaterial whether the district is willing she should teach or not, as the qualified voters of the district had nothing whatever to do with the employment of teachers. As to the verification of the school register of the district by the appellant section 53, article 6, title 7 of the Consolidated School Law enacts that teachers in the respective school districts are required to perform certain duties specified therein in making entries of daily attendance, etc., upon such register *when the school shall be in session,* and to verify such entries, and until such entries are made and verified, trustees shall not draw order for the payment of the teacher's wages. The provisions above cited are applicable when a school is

being maintained in the district, and do not apply to a case where the trustee has refused to permit the school to be opened, and to allow the teacher to teach under her contract, and has been guilty of a breach of the contract.

It is clear from the proofs that the respondent is guilty of a breach of the contract made between the appellant and Trustee Porter, which contract was binding upon the respondent as the trustee of said district and upon said district. No good, valid or legal reason for the refusal of the respondent to open the school in said district on September 3, 1894, and for the refusal to permit the appellant from commencing to teach on that day, or for his refusal to pay the respondent her wages under such contract from September 3 to October 15, 1894, after deducting the amount paid to her for the week she attended the institute, is given.

The appeal herein is sustained.

It is ordered, That the trustee of school district no. 10, town of Ancram, Columbia county, without any unnecessary delay, pay to the appellant herein, Ella A. Woodward, her wages as a teacher under the contract hereinbefore stated, from September 3, 1894, to October 15, 1894, to wit, for six weeks less one week, in which appellant attended the teachers institute, and for which she has been paid, being for five weeks at $9 per week, amounting in the aggregate to the sum of $45.

It is further ordered, That if there is not a sufficient sum of money in the hands of the supervisor and collector, or either of them, applicable to the payment of teachers' wages, or there are no moneys in the hands of said supervisor and collector, or either of them, applicable to the payment of teachers' wages, to pay said appellant said sum of $45, the trustee of said district is hereby ordered and directed forthwith to levy a tax upon the property within said district liable to taxation for school purposes in a sufficient sum to pay said appellant said sum of $45.

4244

In the matter of the appeal of Edna Cyener v. Jacob Meyer, trustee, school district no. 6, towns of Otto and East Otto, Cattaraugus county.

Where a teacher and the trustee of a school district enter into an oral contract by which the teacher is employed to teach the school in a school district for the then school year, to be divided into three school terms, namely, fall term of ten weeks, winter term of fifteen weeks and the spring term, to be thereafter fixed, at a compensation of $7 per week for the fall and spring terms, and $8 per week for the winter term, said contract being for services to be performed within the year, was legal and binding upon the parties thereto and upon the school district; that the dismissal of the teacher and refusal by the trustee to allow her to teach the school for the spring term, no sufficient cause being shown, was without authority of law; that the teacher is entitled to pay for the spring term at the rate of compensation agreed upon in said contract.

Decided May 1, 1894

C. Z. Lincoln, attorney for appellant

D. E. Powell, attorney for respondent

Crooker, *Superintendent*

The appellant in the above-entitled matter appeals from the action and decision of the respondent as trustee of school district no 6, towns of Otto and East Otto, Cattaraugus county, in dismissing her as a teacher in the school of said district in the course of a term of employment. The respondent has answered the appeal.

It appears, from the papers presented, that on or about August 25, 1893, contract was made between the appellant and respondent that the appellant was to teach the school in said district no. 6 for the present school year; that the fall term was to continue for ten weeks and the winter term sixteen weeks, and the spring term was left to be fixed thereafter; that the appellant was to be paid $7 per week for the fall and spring terms and $8 per week for the winter term. This contract was not reduced to writing nor was there any memorandum thereof made, signed and delivered, as required by chapter 335 of the Laws of 1887. The respondent avers that it was agreed that the appellant should not teach said school any longer than she gave satisfaction. To sustain this allegation he produces an affidavit of Eliza Meyer who avers that the appellant was not hired to teach said school for the term of one year absolutely, and there was no talk of her teaching said school for the term of one year, except upon the ground that she gave satisfaction. On the part of the appellant two affidavits are presented, one by Jennie Cyener and the other by John Cyener, in each of which is given, with some detail, the conversation that took place at the time the contract was made. Jennie Cyener, who is clerk of the district, swears that the respondent asked if Edna (the appellant) wanted the school, to which she (the deponent) replied that she did if they could agree upon wages; that the respondent asked what she (the appellant) wanted, and the deponent replied that she thought she could earn as much as other teachers there had been getting, and respondent asked what the others had been getting and deponent said $7 for fall and spring terms and $8 for winter term; deponent then asked respondent how he wanted to hire her (the appellant), whether *as long as she gave satisfaction, or how,* and respondent said he knew her (the appellant) reputation and he wanted to hire her for a year, and asked deponent how much school there must be in a year, and deponent replied that she understood that there must be at least thirty-two weeks and there might be more; respondent then asked if she (deponent) would see to making out the taxes and look after the business of the district, and deponent replied she would; that respondent then said to Edna (the appellant) "do you want the school," and appellant replied, "yes, sir," and he then said he would give her $7 for the fall and spring terms and $8 for the winter term, and asked her if that suited her, to which she replied that it did, and respondent then said, "then it's a bargain." Respondent then talked about the time for commencing school and said he thought they had better have a long winter term and ten weeks in the fall, and as to the spring term, he said, "we'll fix that all right."

John Cyener swears in his affidavit that a conversation was had with

respondent relative to hiring appellant, and states the terms of the bargain or contract as stated in the affidavit of Jennie Cyener.

The respondent admits he had a conversation with Jennie Cyener about hiring the appellant, but does not state what that conversation was and does not deny the statements as to the conversation as stated by Jennie Cyener, except that he states that it was expressly agreed that appellant should not teach the school any longer than she gave satisfaction; that Eliza Meyer does not state the conversation had relative to hiring appellant, nor deny the said statements contained in said affidavit of Jennie Cyener, except she avers that there was no talk of hiring the appellant for a year except upon the ground that she gave satisfaction.

The appellant states in her appeal, which is duly verified, that at the time of the conversation and agreement, in August 1893, there were no limitations or restrictions in said agreement, but was an absolute agreement for the school year. In her affidavit, verified March 24, 1894, in reply to the answer of respondent, she states that at the time of her employment, in August 1893, nothing was said about her teaching as long as she gave satisfaction, but that she was employed for the school year.

It also appears that the appellant commenced teaching the school in said district in September 1893, and taught during the fall term of ten weeks; that she also taught the winter term of said school, consisting of sixteen weeks, which ended on March 9, 1894; that on or about January 17, 1894, the appellant directed a pupil in the school, one Rennie Meyer, a son of the respondent, in an exercise in language on the blackboard, to write out the parts of speech in a sentence written upon said blackboard, when said pupil replied he would not write them out and repeated such statement several times, whereupon the appellant went to the seat of such pupil and took up a book, and the pupil took hold of the hair of appellant and kept such hold some time, when he released it; that appellant went to her desk and again asked the pupil if he would write out the lesson, and when he replied "no" the appellant then took her ruler and went to the pupil and struck him under the left arm, when he rose up and moved toward the appellant and the appellant struck at or struck the pupil, and the pupil then drew up his arm to strike the appellant, when another pupil took hold of his arm and prevented him from striking her and the affair ended; the pupil's nose was bleeding, and after washing off the blood he took his books and left the school; that just prior to closing the school for the day the respondent came to the schoolhouse and inquired as to what had occurred, when the appellant and a pupil, one Walter, stated what had occurred as hereinbefore stated; that the said son of the respondent returned to the school on the next day and continued to attend the school until about February 19, 1894, when he left the school for that term.

It does not affirmatively appear that the respondent, during the time the appellant taught the school, visited the school except twice — once when it was to inquire as to the punishment of his son and the other on the close of the spring term on March 9, 1894. It does affirmatively appear that the respondent, aside

from the affair of his son, never at any time stated to the appellant that he was dissatisfied with her conduct of the school or made any complaint in relation thereto; that the respondent, in an interview about February 20, 1894, with one Bartlett, the only complaint he made in relation to appellant was that she had punished his son, and stated that the appellant could not have the school for the next term and that he had hired another teacher; that in an interview of the respondent with Jennie Cyener, the mother of appellant, he said to her that he did not like appellant to punish his boy, and that appellant could not have the school for the next term and he had hired another teacher.

The respondent hired one Frank Smallman to teach the school for the spring term, which commenced on March 12, 1894.

The respondent has filed sundry affidavits in support of the allegations in his answer that the appellant did not teach the school in a satisfactory manner.

That of these affidavits, nine are by pupils attending the school whose ages are between that of 10 and 17 years and three are children of the respondent. This kind of evidence is not satisfactory nor can it have effect in determining the condition of the school. The children of some of the affiants attended the school but a small portion of the fall and winter terms, and of seven persons who join in an affidavit, five of them have no children of school age. Not one of the affiants who were patrons of the school avers that he or she ever visited the school during the time appellant taught therein. The appellant denies specifically the allegations contained in the affidavits filed by the respondent.

It appears in proof that the appellant holds a second grade certificate issued to her by Stanley N. Wheaton, school commissioner of the second commissioner district of Cattaraugus county, bearing date February 11, 1893, and has taught school one term in East Otto, and three consecutive terms in the town of Mansfield.

By subdivision 9, of section 49, of title 7, of the Consolidated School Law it is provided, "nor shall any teacher be dismissed in the course of a term of employment, except for reasons which, if appealed to the Superintendent of Public Instruction, shall be held to be sufficient cause for such dismissal." The appellant was hired by the respondent in August 1893, for the school year, as admitted by respondent, although he qualifies the admission by stating that he hired appellant for the year, "if she gave satisfaction." The trustee of any school district has the power to dismiss a teacher hired by him for a specific term, before the expiration of said term, whether such hiring was upon the condition that he or she gave satisfaction or not; but he must take care that his reasons for such dismissal shall be held to be sufficient cause by the Superintendent of Public Instruction in the event the teacher shall appeal from the action of the trustee in such dismissal. In the event of an appeal the burthen is upon the trustee to show by preponderance of proof that he had sufficient cause for such dismissal. Admitting for the sake of argument, that the contract between the appellant and respondent was a hiring for the school year "if the appellant gave satisfaction," the respondent must do more than set up a plea that he was

"not satisfied." The courts of this State have held for years "that a simple allegation of dissatisfaction, without some good reason assigned for it, might be a mere protest and can not be regarded." The respondent has failed to establish any good reason for his allegation, that he was "not satisfied." I am of the opinion, upon the papers presented, that no sufficient cause for the dismissal of the appellant as such teacher has been established.

I do find and decide:

That on or about August 25, 1893, a contract was entered into between the appellant and the respondent, as trustee of school district no. 6, towns of Otto and East Otto, Cattaraugus county, for the hiring of the appellant as teacher in the school in said district for the present school year, to be divided into three school terms, namely: the fall term of ten weeks, the winter term of sixteen weeks, and the spring term, the length of which was to be thereafter fixed, at a compensation of $7 per week for the fall and spring terms, and $8 per week for the winter term; that said contract was an oral one; but being for services to be performed within the year, was valid and legal and binding upon the parties thereto and on said school district; that the appellant taught said school for the fall and winter terms and had been paid therefor; that the appellant was dismissed as such teacher by the respondent at the end of the winter term, on or about March 9, 1894, and the respondent refused to permit the appellant to teach said school for the spring term pursuant to the aforesaid contract, although the appellant was ready and willing to do so; that no sufficient cause for the dismissal of the appellant, as such teacher during the course of her employment, by the respondent, has been shown or established, and such dismissal was invalid and without authority of law; that the appellant is entitled, under said contract, to be paid by, and to have and receive from said school district, pay for each week of school held and maintained in said district during the spring term for the present school year, commencing March 12, 1894, at the rate of $7 per week, she having been prevented from teaching said school for and during said spring term by the wrongful acts of the respondent as hereinbefore stated.

The appeal herein is sustained.

It is ordered, That the trustee of school district no. 6, towns of Otto and East Otto, Cattaraugus county, if the spring term of the school in said district for the present school year has been completed, forthwith pay to Edna Cyener, the appellant herein, under the aforesaid contract, the money due and owing to her by and from said school district, being the aggregate sum produced by multiplying the number of weeks of school during said spring term by said weekly compensation of 7 per week; that if said spring term be not completed, then that said trustee pay her the amount due and owing by the district as aforesaid as soon as such spring term shall be completed.

It is further ordered, That if there shall be no moneys belonging to said district applicable to the payment of teachers' wages, in the hands of the collector of said district, or the supervisor or supervisors of said town or towns, sufficient to pay the appellant herein, as herein ordered, or if there shall not be a sufficient

sum in the hands of said officers to make such payment, then in either event, the said trustee of said district shall forthwith levy and assess upon said district a tax in such an amount as shall be sufficient to pay the appellant herein as aforesaid, and cause said tax to be collected, and the proceeds thereof, when collected, to be applied as aforesaid.

4221

In the matter of the appeal of Jennie L. Patterson v. George N. Paff, T. B. Bayles and Andrew Vandewater, trustees of school district no. 2, town of Hempstead, Queens county.

Since May 16, 1887, all officers or boards of officers, who shall employ any teacher to teach in the public schools of the State shall, at the time of such employment, make and deliver to such teacher a memorandum in writing, signed by said officer, in which the details of the agreement between the parties shall be clearly and definitely set forth; that under a contract to teach, such person can not be required, without his or her consent, to perform janitor work in the school; that any teacher can not be dismissed in the course of a term of employment except for reasons which, if appealed to the Superintendent of Public Instruction, shall be held to be sufficient cause for such dismissal; that a refusal to perform janitor work by a teacher is not sufficient cause for dismissal; that a contract to teach in a school for a term not exceeding one year is valid although not in writing.

Decided February 14, 1894

Crooker, *Superintendent*

This is an appeal from the action and decision of the respondents, as trustees of school district no. 2, town of Hempstead, Queens county, in refusing to pay the appellant as a teacher in the school in said district for her services for the months of September and October 1893; for suspending her as such teacher, and for dismissing or discharging her as such teacher, on or about November 10, 1893. An answer was interposed by the respondents, to which the appellant served and filed a reply. On or about December 5, 1893, upon request of respondents and others, I directed School Commissioner Merrill to visit the school district, take testimony and report to me. On February 9, 1894, I received his report, stating that the appeal herein was true.

The following facts are established in the proceedings herein: That the appellant was employed and performed services as a teacher in said school district for the school year ending in July 1893; that some time in the month of July 1893, the members of the board of trustees of said district, verbally agreed to and with the appellant, to retain her as a teacher in said district for the then ensuing school year at a salary of $400, payable in ten equal monthly instalments of $40; that on September 5, 1893, the school in said district was opened and the appellant duly entered upon her said employment as teacher therein; that on September 8, 1893, the appellant was informed by her associate teacher that the appellant would be required to perform one-half of the janitor work of said

school, to which the appellant demurred; that on or about September 15, 1893, the respondents Paff and Bayles tendered to the appellant a memorandum of hiring signed by them and dated September 5, 1893, stating therein that they had engaged the appellant to teach in the school in said district for the term of ten months, commencing September 5, 1893, at a salary of $400, payable monthly, and to which memorandum was added "and she to do all the janitor work in the room in which she teaches"; that the appellant declined to accept said memorandum so tendered to her; that on September 27, 1893, the appellant received from the respondent, Paff, the following memorandum: "Uniondale, Sept. 27, 1893. This is to certify that I accept the contract drawn up by the trustees of school district no. 2, Uniondale, town of Hempstead, and consent to the terms and payment therein contained." That the appellant declined to sign said memorandum and sent to the respondent, Paff, the following: "I hereby agree to teach as assistant teacher in Uniondale school district no. 2 for one year at a salary of $400 per year. Jennie L. Patterson." To which the respondent Paff sent word to appellant, calling her attention to the fact that she had not referred to the janitor work; that on October 18, 1893, the appellant received by hands of the respondent, Paff, a letter from School Commissioner Merrill, containing the following: "The trustees propose that you suspend your services as teacher without prejudice to any of your rights or your compensation, until the matter can be decided by the State Superintendent, they, in the meantime, to supply a substitute without cost to you. This seems a fair proposition, for you can not be prejudiced in any way. They will give you a memorandum to this effect." That on October 20, 1893, the appellant addressed to the respondents a notice in writing, demanding her pay as teacher for the month of September, and that they deliver to her a memorandum of hiring, exclusive of janitor service; that on October 22, 1893, the respondents served upon the appellant a written order of her suspension as a teacher and appointed his daughter as a substitute; that a meeting of respondents was held on October 23, 1893, at which the appellant was present, when the following resolution was adopted, and a copy thereof given to appellant. "At a meeting of a board of trustees of school district no. 2, Uniondale, town of Hempstead. Present Geo. N. Paff, T. B. Bayles and —— Vandewater, it was voted upon and agreed between said trustees that we hire Jennie L. Patterson to be assistant teacher in said school district at a salary not to exceed the sum of (350) three hundred and fifty dollars, payable monthly, and the district to furnish a janitor at an expense not to exceed (50) fifty dollars"; that the appellant declined to accept a contract upon the terms of said resolution; that on November 9, 1893, the appellant presented to the respondents for their signature the following order: "Uniondale, L. I., Nov. 9, 1893. Mr Valentine Vandewater, School Tax Collector. Please pay to the order of Jennie L. Patterson, the salary for September and October 1893, amounting to eighty dollars, for services rendered as assistant teacher in Uniondale school district no. 2." That said order was thereafter signed by the respondents and delivered to said school district collector, who

handed to the appellant a sum of money and said original order, which sum of money she found to be but $70 and that the word "eighty" had been erased in said order and the word "seventy" inserted, and the words "as assistant teacher" had also been erased; that the appellant at once returned said money; that on November 10, 1893, the appellant received the following notice from the respondents: "Uniondale, L. I. Miss Jennie L. Patterson. Your services as teacher and for other services rendered in school district no. 2, Uniondale, town of Hempstead, are no longer required. You are, therefore, at liberty to seek other employment. You are discharged. Mr Valentine Vandewater, the treasurer of the district, will settle the amount due you for teaching in the months of September and October of the present year. T. B. Bayles, George N. Paff, A. Vandewater, trustees of district no. 2, Hempstead." That after the meeting of the respondents, held October 23, 1893, one Miss Abbott was employed as teacher in said school in place of the appellant. That the appellant, from the opening of the school on September 5, 1893, up to the time of her suspension, as aforesaid, faithfully performed services therein as a teacher under her contract of employment, and ever since such suspension has, at all times, been ready and willing to perform said work and services as such teacher, under said contract. That the appellant herein has never been paid any sum whatever for her services as teacher in said school, nor upon her contract to teach, as aforesaid, by the respondents herein, nor by anyone for them or on their behalf. That at the annual meeting held in said school district in August, 1893, said Paff stated to the meeting that Miss Patterson (the appellant) had been engaged at a salary of $400 as assistant teacher; that Miss Bates was to receive $500 as principal, and that $100 was appropriated for janitor service; that no statement was made by any of the respondents at said meeting, nor any intimation, that the appellant was to perform any janitor work. That the respondents did not, nor did either of them, ever say to the appellant anything about janitor work, or request her to perform janitor work, or state to her that they would require her to perform janitor work prior to September 8, 1893, nor was the subject of janitor work ever mentioned in any interview between the appellant and the respondents prior to said date. That the appellant never promised or consented to perform janitor work.

Under the Consolidated School Act it is the duty of the trustees of school districts to provide for janitor work being performed by some person or persons in their respective districts, and any expenditure made or liability incurred therefor is a charge upon the district. Trustees may, under the law, make an arrangement with the teacher or teachers to perform said work, providing the teacher or teachers consent. There is no provision under the school law which requires any teacher under his or her contract to teach school in a school district to perform any janitor work whatever, nor is there any provision of the school law which gives trustees any power or authority to compel any teacher employed under a contract to teach, to perform janitor work, nor to suspend,

dismiss or discharge a teacher, under a contract to teach, for refusing to perform janitor work. By subdivision 9 of section 49 of title 7 of the Consolidated School Act, it is provided that any trustee or trustees shall not dismiss a teacher in the course of a term of employment except for reasons which, if appealed to the Superintendent of Public Instruction, shall be held to be sufficient cause for such dismissal.

I find and decide that a contract was entered into between the respondents, as trustees of school district no. 2, town of Hempstead, Queens county, and the appellant herein, hiring and employing the appellant as assistant teacher in said school district, for the term of ten months, commencing on September 5, 1893, at a salary or compensation of $400, payable monthly, and that such contract is legal and valid, and binding upon the parties thereto. That under said contract the appellant could not be required, without her consent, to perform janitor work in said school, and that she never consented to perform said janitor work. That the reasons alleged by the respondents for dismissing and discharging the appellant as teacher in the course of a term of employment, are not held by me to be sufficient cause for such dismissal and discharge, and the action of the respondents in attempting to dismiss and discharge the appellant, without cause, was unlawful and invalid. That the appellant herein is entitled, under chapter 335 of the Laws of 1887, to have and receive from the respondents herein a memorandum in writing, signed by them, stating the employment by them of the appellant as assistant teacher in said school district for the term of ten months, commencing on September 5, 1893, at a salary or compensation of $400, payable monthly; and the appellant is entitled to have and receive from the respondents the sum of $40 each for the months of September, October, November, December 1893, and January 1894, with interest upon said $40 monthly, from the date when each of said monthly payments of $40 became due; and also the payment of $40 monthly for the months of February, March, April, May and June 1894, as such monthly payments respectively become due.

The appeal herein is sustained.

It is ordered, That the trustees of school district no. 2, town of Hempstead, Queens county, forthwith deliver to Jennie L. Patterson, the appellant herein, a memorandum in writing, signed by them, stating the employment of Miss Patterson as assistant teacher in said school district for the term of ten months, commencing on September 5, 1893, at a salary of $400, payable monthly.

It is further ordered, That the trustees of said district forthwith pay or cause to be paid to the said Jennie L. Patterson, under said contract of hiring, the sum of $40 for each of the months of September, October, November and December 1893, and January 1894, with interest upon each of said $40 from the date when each of said monthly payments became due to the date of the payment thereof.

It is further ordered, That the trustees of said district pay or cause to be paid to said Jennie L. Patterson, the sum of $40, under said contract, at the end of each of the months of February, March, April, May and June 1894.

NOTE.— Under section 50, article 6, title 7 of the Consolidated School Law of 1894, it is mandatory upon trustees of school districts to provide for building fires and cleaning the schoolroom or rooms, and for janitor work generally in and about the schoolhouse or houses, and pay for such service such reasonable sum as may be agreed upon therefor.

4774

In the matter of the appeal of Charles E. Fairman, president of board of education of Lyndonville union school, from action of said board of education in re Miss Ella Morgan.

Where a board of education of a union school district, in May 1899, adopted a resolution, offering to a teacher in the schools under its charge, the position then held by such teacher for the ensuing school year, and such action was communicated to such teacher who asked for, and obtained from the board, time to consider said offer, and subsequently accepted such offer in writing, which acceptance was read at a meeting of the board held on July 6, 1899; *held,* that a motion adopted at said meeting of the board, withdrawing such offer, was inoperative and void.

Decided August 4, 1899

Skinner, *Superintendent*

This is an appeal from the action of the board of education of the Lyndonville union school, on July 6, 1899, in the adoption of a resolution that the board withdrew the offer made by it May 12, 1899, to Miss Ella Morgan, to employ her as a teacher in said school for the ensuing school year at the like compensation paid to her as a teacher in such school during the school year of 1898–99.

From the papers filed in this appeal the following facts are established:

The following persons constituted the members of the board of education of the Lyndonville union school during the school year of 1898–99, namely, C. E. Fairman, president, R. B. Wright, secretary, and Messrs Walter A. Tuttle, H. M. Hard and D. S. Fraser; that Miss Ella Morgan was a teacher in such school for the school year 1898–99 and had been such teacher for several previous school years; that at a meeting of such board, held on May 12, 1899, the following motion was adopted, namely, "that R. B. Wright be appointed to wait upon Prof. Filer and Miss Ella Morgan and offer them their present positions for the ensuing school year, at the same wages"; that said Wright immediately notify Miss Morgan of said action of the board, and she requested time to consider such offer which was granted by said Wright; that on June 24, 1899, upon the request of President Fairman, said Wright asked Miss Morgan for her decision upon said proposition to employ her, and she inquired of Wright if all of the board were agreeable, and Wright told her the action of the board was unanimous, and thereupon Miss Morgan requested ten days further extension

of time before giving her decision which was granted by Wright. In a letter addressed to said Wright, dated June 28, 1899, Miss Morgan accepted the said offer of the board of education of the position as teacher in the school for the then ensuing year; that at a meeting of said board held July 6, 1899, the said letter of acceptance from Miss Morgan was read to the board; that at such meeting of July 6, 1899, a motion was adopted that the board withdraw the offer made to Miss Morgan May 12, 1899.

Upon the foregoing facts I decide that by the offer of the board of education, at its meeting May 12, 1899, to be, and which was, communicated to her by the secretary of the board, of the position of teacher in said school, then held by her, for the ensuing school year, at the like compensation paid to her, and her acceptance of said offer in her letter, dated June 28, 1899, addressed to said Wright, a contract was entered into between said board of education and Miss Morgan by which said board employed Miss Morgan as a teacher in said Lyndonville union school for the school year commencing August 1, 1899, at the like compensation paid to her as a teacher during the school year of 1898–99, and Miss Morgan contracted to teach in said school for the school year 1899–1900 for the like compensation paid to her as a teacher therein for the school year of 1898–99; that said contract is binding upon said board of education and upon Miss Ella Morgan, and that the action of the said board of education on July 6, 1899, withdrawing said offer of May 12, 1899, after the acceptance, in writing, by Miss Morgan of such offer, on June 28, 1899, was inoperative and void.

The appeal herein is sustained.

5000

In the matter of the appeal of Celia Roberts v. board of education of union free school district no. 9, Turin and West Turin, Lewis county.

In a contract made between the board of education of a union free school district and a teacher, employing such teacher for thirteen consecutive weeks, in which it is stated that if at the end of the thirteen weeks both parties to the contract are satisfied, it shall become a contract for thirty-seven consecutive weeks, and at the end of the thirteen weeks neither of the parties having given notice of any dissatisfaction, and the teacher having taught an additional week; *held,* that such contract became a valid contract for the term of thirty-seven consecutive weeks.

Decided April 9, 1902

F. J. De La Fleur, attorney for appellant
Capron & Bateman, attorneys for respondent

Skinner, *Superintendent*

This is an appeal from the action of the board of education of union free school district 9, Turin and West Turin, Lewis county, in dismissing the appel-

lant herein as a teacher in the school in such district during a term of employment, and, as she alleges, without sufficient cause.

The appeal herein was filed January 18, 1902. On February 7, 1902, an answer was filed, and on February 19, 1902, the appellant filed a reply.

The following facts are established:

On July 13, 1901, S. Hart, clerk of school district 9, Turin and West Turin, wrote a letter to the appellant at Port Leyden, stating that the board of education of said district had decided to offer her the primary department of the school at $7 per week for *thirteen weeks,* and if both parties were satisfied for the year of thirty-seven weeks. On August 14, 1901, a contract was entered into and signed by the appellant and Messrs Crofoot, Hart, Capron, Allen, Doud, Rutan and Robert, members of the board of education of such district, and S. Hart as clerk, in which the appellant agreed to teach in the school in the district for the term of *thirteen weeks,* commencing September 16, 1901, at a weekly compensation of $7, payable at the end of each thirty days during the term of such employment, and if both parties are satisfied, for the year of thirty-seven weeks; and the members of said board agreed to employ the appellant for said period at said rate of compensation, payable at the times therein stated. In accordance with the terms of said contract the appellant on September 16, 1901, commenced teaching in the primary department in the school in such district, and continued to teach therein for the thirteen weeks, and until the afternoon session of the school on Friday, December 20, 1901, an additional week, making in all a period of *fourteen weeks.* When the appellant went to her boarding place at noon on Friday, December 20, 1901, she found a letter which had been left for her, dated December 19, 1901, signed by S. Hart, clerk of the board of education, stating in substance that owing to many complaints of lack of discipline and general dissatisfaction, said board of education had decided that a change of teachers was desirable, and that her services would not be required "after this term."

"Where a written contract is complete on its face, and clear and unambiguous in its terms, oral evidence is not admissible to vary or contradict the writing." House v. Walch, 144 N. Y. 418.

"A written instrument supersedes all oral negotiations or stipulations which preceded or accompanied its execution, except where the instrument has been procured through mistake, menace, duress, fraud or under influence." Altman v. Hecker, 38 State Reporter 724.

"Evidence which is in conflict with a written contract and which will nullify its provisions, is not admissible." Gordon v. Neeman, 118 N. Y. 152.

The respondents claim that at the time of hiring the appellant she was informed that if her services were not satisfactory *at the end of the first term of school* she would then be excused from further service, and in such arrangement she concurred; that such first term of school was a fourteen weeks' term.

This contention on the part of the respondents is denied by the appellant, and she alleges that nothing was said relating to the first term of school. The

proofs herein fail to establish such contention on the part of the respondents, or that there was any mutual mistake in the execution of said contract of employment between the parties thereto. It is in proof that during the thirteen weeks in which the appellant taught in such school no member of the board of education visited such school while in session, nor did the principal of the school, and hence the respondents had no personal knowledge as to whether the services of the appellant as such teacher were satisfactory to said board.

It is claimed by the respondents that the services of the appellant were not satisfactory to some of the patrons of the school. The contract of August 19, 1901, was not that the services of the appellant during the thirteen weeks of employment should be satisfactory to the patrons of the school, but was that if both parties to the contract are satisfied, the contract was one for thirty-seven weeks of employment.

I decide: 1 That said contract entered into between the appellant and respondents was not entered into through a mutual mistake of the parties thereto.

2 That such contract was one for the employment of the appellant as teacher in the school in district 9, Turin and West Turin, Lewis county, for thirteen consecutive weeks, commencing on September 16, 1901, at a compensation of $7 per week, payable at the end of each thirty days of employment; that if at the end of the thirteen weeks both parties to the contract were satisfied, it became a contract for the term of thirty-seven consecutive weeks from September 16, 1901; that at the end of said thirteen weeks, namely, December 13, 1901, the appellant not having informed the respondents that she was dissatisfied, and the respondents not having notified the appellant that they were not satisfied with the services performed by the appellant under such contract, but permitted the appellant to teach for an additional week, such contract became a valid contract between the parties thereto for the term of thirty-seven consecutive weeks commencing on September 16, 1901.

3 That the dismissal by the respondents, on December 19, 1901, of the appellant as a teacher in such school was a breach of the contract entered into between the parties, and without authority of law.

The appeal herein is sustained.

It is ordered that the respondents herein, the board of education of school district 9, Turin and West Turin, Lewis county, without unnecessary delay, pay to Celia Roberts, the appellant herein, the sum of $7 per week for each week commencing on December 22, 1901, to the time of payment, with interest on so much of such sum as under said contract became payable at the end of each thirty days. That after such payment the said board pay at the end of each thirty days to said appellant the sum of $7 for each week until such appellant shall have been paid the sum of $161, being the balance due and payable to her under said contract for the period of thirty-seven weeks at $7 per week.

3838

In the matter of the appeal of Florence H. Thorn v. Edward B. Odell, trustee of school district no. 2, of the town of Yorktown, county of Westchester.

A teacher brings an appeal to enforce the payment of wages for time which is a matter of dispute. The teacher neglected to verify and file her register. *Held,* that until the statute in this respect is complied with, the appeal will not be entertained.

Decided December 9, 1889

Draper, *Superintendent*

The appellant was employed as a teacher of the district school in school district no. 2, of the town of Yorktown, Westchester county, by the respondent for a term of seven months, to begin November 19, 1888.

She was paid for five months and up to April 19, 1889, at the contract price, less six days' time which she had lost. The appellant taught until June 18, 1889, and claimed the right to make up the lost time at the close of the term, by an alleged agreement with the trustee, which is denied.

The pleadings contain much of no relevancy to the real issue. It appears that the trustee would not permit the appellant to make up the lost days at the end of the term, but was willing to pay the teacher for the closing two months of the term, and $5 for caring for the fires.

The appellant, it seems to me, has been more contentious than discreet. She has not yet placed herself in a position to legally demand her pay; has not verified her register and filed the same so as to entitle her to her wages. The trustee on June 24th last gave the teacher an opportunity to get the register from the school desk, to which she had the key, and she neglected, and I think, in a captious manner, to do so.

Until the register is properly made up, verified or sworn evidence given of its correctness and appellant's inability to obtain the register, the appeal can not be entertained.

I dismiss the appeal, but without prejudice to appellant's right to enforce her claim by an action against the district, or by an appeal, when she shall have complied with the statute and verified her school register.

3717

In the matter of the appeal of Aurelia M. Loveland v. school district no. 6, town of Windsor, Broome county.

A teacher was to be paid at the rate of $5 per week if she provided her own board and $3.50 per week if the district provided her with board.

The teacher agreed to board around a portion of the time, provided her mother, who was ill, should so far recover as to permit the teacher to remain away from home.

The mother failed to improve and the district did not board the teacher.

Held, That the teacher is entitled to compensation at the rate of $5 per week.

Decided October 15, 1888

Draper, *Superintendent*

It appears that the appellant was engaged by Isaac McMinn, trustee of the district above named, to teach school in said district for a term of fourteen weeks and that she has completed the service as she agreed. She states that the trustee agreed to pay her $5 per week for the service, provided she boarded herself, and $3.50 per week if she boarded around in the district. She states also that she agreed to board around a portion of the term, provided her mother, who was ill, should so far recover as to enable her to be away from home, but that she did not improve in health and she was unable to board away from home. She has been paid $61, leaving a balance due her of $9. At the time of the employment, the trustee filled out the memorandum of employment required by the statute and the same was left in the register and was returned to the trustee with the register at the close of the term of employment. Subsequently the teacher demanded this memorandum from the trustee, but he refused to give it to her. The trustee makes no answer, and I therefore assume the statements of the appellant are true in fact.

The appeal must be sustained. The trustee of the district is hereby directed to draw his order upon the proper officer for the sum of $9 in favor of the appellant, provided that amount of money is in the hands either of the supervisor or collector to the credit of the district. If such is not the case, he will include the amount in the next tax levy, and when raised, pay it to the appellant.

3696

In the matter of the appeal of N. L. Miller v. the trustees of school district no. 39, town of Hector, Schuyler county.

It was agreed between a board of trustees and a teacher that at some time during a term, a vacation should be ordered by the board, and that the time of vacation should not be a part of the term of employment.

Held, That the teacher was not entitled to pay for the time of vacation.

Decided June 19, 1888

Draper, *Superintendent*

It seems that the appellant was engaged by the respondent to act as principal of the school in the above named district for a term of sixteen weeks, commencing on the 26th of September 1887, and ending on the 27th of January 1888, at $3 per day. In December the board entered into a further agreement with the teacher, by which he was to be retained for the balance of the school year, a further period of sixteen weeks. The resolution of reemployment by the board was as follows:

"*Resolved*, That we retain Mr Miller as principal teacher for the balance of the school year, sixteen weeks, at the same wages."

At the time of the reemployment there was some talk between the board and the teacher as to a vacation, but I am not able to satisfy my mind that there was

any definite agreement about the time of vacation. The action of the board seems clearly to imply that it was agreed that the teacher should teach during another term of sixteen weeks, and should receive $3 per day for his services, and that there should be a vacation at some time during the term of employment, which time should be fixed by the board, and that this vacation was not to be a part of the term of employment. As a matter of fact, the board subsequently resolved to close the school for the two weeks between the 10th and the 26th of March 1888, and it was so closed. It transpires that, during the time of this vacation, the teachers institute for the county of Schuyler was held, and the teacher attended the same. The teacher now claims pay for the two weeks covered by the vacation. The board has paid him for the week of the institute, but he demands pay for the other week as well. The board refuses, and from such refusal this appeal is taken.

I do not think the appeal can be sustained. From the statement of the terms of the agreement as above set forth, it necessarily follows that the teacher can not recover pay for the time for which he claims. All of the proofs submitted lead to the conclusion that the understanding between the parties was that there should be a spring term of sixteen weeks of school, and that the board was to declare a vacation of reasonable length at such time as it thought proper. The fact that the board has paid the teacher for the week during which he attended the teachers institute is creditable to it, and indicates that the school was not closed at the particular time for the purpose of avoiding the payment of the teacher's wages during institute week. It seems to me that the board has done all which it was bound to do in the premises.

The appeal is dismissed.

3917

In the matter of the appeal of Edwin R. Voorhies v. the board of trustees of school district no. 17, town of Friendship, county of Allegany.

Teacher employed for a stated term at a stipulated price, who has held himself ready to perform on his part; *held,* entitled to the compensation provided for by the contract, although before completion of term, the building in which school was taught was destroyed.

Decided October 30, 1890

Draper, *Superintendent*

On or about September 1, 1889, the appellant was employed by the trustees of school district no. 17, town of Friendship, county of Allegany, to teach the public school in said district for the year, which was to consist of thirty-six weeks. Before completing the term, the school building was destroyed by fire, and in consequence thereof, school was discontinued. To complete the term for which the teacher was employed, would require nine weeks and two days. The appellant was paid in full at the contract price, $1.75 per day, up to the date of the destruction

of the schoolhouse. The appellant alleges that he held himself in readiness to fulfil the contract upon his part, and that the trustees have neglected to pay him at the stipulated price, for nine weeks and two days.

No answer has been interposed by the board of trustees. Assuming the facts as alleged by the appellant to be true, which I am bound to do, I must sustain the appeal. The trustees of the district above named are hereby directed to forthwith provide for and pay the appellant the sum of $82.25, being the balance due upon said contract.

3840

In the matter of the appeal of Charles H. Ver Nooy v. John H. Slater, trustee of school district no. 8, town of Rochester, Ulster county.

Teacher claimed pay for the time a school was closed by the trustee's direction, to prevent the spread of a contagious disease; *held,* that the teacher having resumed the school when directed by the trustee, and having held himself in readiness to teach while school was closed, is entitled to pay.

Decided December 9, 1889

L. B. Haskins, attorney for appellant

Draper, *Superintendent*

This is an appeal by a person who was employed to teach the public school in district no. 8, of the town of Rochester, Ulster county, from the refusal of the trustee of said district to compensate him for seventeen days in February and March of the present year, when the school was closed by the proper direction of the trustee, to prevent the spread of a contagious disease then prevalent among the children of the district.

The trustee has refused to pay, upon the ground that the teacher was hired by the day. There is some dispute in relation to the understanding at the time of hiring, but it is undisputed that the usual term of the school after the winter holidays continued until June, in fact, this very term was continued by the same teacher until June. Some days after school was closed in February as above stated, the trustee directed appellant to open the school, but a few children were allowed to attend, the teacher by direction of the trustee, again closed it and it remained closed seventeen days. During this time the teacher was in readiness to open the school when directed to do so, and I hold that he was then in the employ of the district and entitled to pay the same as if school had been taught.

The trustee did not, in words or action, discharge the teacher; on the contrary, he recognized him as in the employ of the district.

The appeal is sustained. The trustee will give an order to the teacher for his wages including the seventeen days in difference.

3803

In the matter of the appeal of Lydia Hunt v. Martin Vanderzee, trustee of district no. 14, town of New Baltimore, Greene county.

A teacher who has not been paid as often as once each month during the term of employment as required by statute is entitled to interest on the several monthly payments which have been withheld from the time when payable.

A trustee has ample authority to levy a tax to meet the wages of teachers when due.

It is no defense for a trustee, therefore, that he had no funds with which to pay the teacher monthly.

A teacher is entitled to pay for the time a school is closed during the time of employment because of the prevalence of an epidemic in the district.

Decided August 1, 1889

Barlow & Greene, attorneys for appellant
E. C. Hallenbeck, attorney for respondent

Draper, *Superintendent*

The appellant has taught the school in the above-mentioned district during the past year under an agreement to teach thirty-five weeks at $7 per week. She has been paid $104.92. She claims a balance of $140.08 with interest from the time when the several payments became due. The trustee admits there is due her only $134.38. All the trouble is about the difference between these sums.

The ground upon which the respondent insists that the teacher is not entitled to what she claims is that there existed in the district for several weeks during the term of employment an epidemic of measles, in consequence of which the school was closed; that the teacher did not open the school upon the day when directed by him, and failed to do so for a period of four days thereafter. But it appears that this failure was due to a previous instruction of the trustee, and that the last direction was not delivered in person, and was not received until too late to enable her to comply with it. I am of the opinion that she fairly fulfilled the agreement on her part, and is entitled to the full amount agreed to be paid her. She also claims interest on the several monthly payments from the time they became due. The trustee resists this and says she relinquished her right to the monthly payment of her wages, and that he had no money with which to pay, and could not levy a tax because of insufficient data.

The statute specifically provides that teachers' wages shall be due and payable as often as at the end of each calendar month of the term of employment. This is mandatory upon a public officer. No agreement of hers could alter the terms of the statute or relieve the officer from the discharge of his statutory duty. If the trustee had no money, the law provided a way for him to get it.

The appeal is sustained and the district is directed to settle with the appellant by paying her the sum of $140.08, with interest on the several monthly payments from the times when they became due, at the end of each calendar month of the term of employment.

3679

In the matter of the appeal of Annie E. Robinson, Elizabeth A. Cowan and Margaret McAuliffe v. the board of education of union free school district no. 1, town of Westchester.

Teachers employed in the usual way, by a board of education, are entitled to their pay for time they are prevented from fulfilling their contract because of wrangling among the members of the board, and a consequent failure to open the schoolhouse for school purposes.

Decided April 7, 1888

Baker & Risley, attorneys for respondent

Draper, *Superintendent*

This is an appeal brought by certain teachers in the district above named, from the refusal of the board of education to pay their salaries for the months of September, October, November and December 1887. Miss Robinson has been a teacher in the district for fifteen years, Miss McAuliffe for five years, and Miss Cowan for two years last past. At a meeting of the board of education, held on the 27th day of August 1887, the following resolution was adopted, namely:

Resolved, That our present principal, M. E. Devlin, be reemployed as principal of union free school district no. 1 for the ensuing year, commencing August 21, 1887, and ending August 20, 1888, at his present salary, $2100 per year; also the present teachers at their respective salaries.

The appellants show that they held themselves in readiness to continue work at all times since reemployment, but that they were prevented from teaching until January 9, 1888, by reason of the fact that the school was not opened until that time, in consequence of disagreements in the board of education. Since January 9, 1888, when the school was again opened, they have been teaching, as they claim, under no other employment than that of August 27, 1887.

A portion of the board of education answer the appeal, and say that the applicants ought not to be paid for the time claimed, for the following reasons, namely: (*a*) That the resolution of employment, August 27, 1887, would not have been adopted but for the affirmative vote of Bernard Lavin, who had not attended a meeting of the board for eight months, and was corruptly procured to do so at that time for the purpose of voting for said resolution. (*b*) That the resolution was adopted just prior to the annual school meeting, at which five members of the board were to be chosen. (*c*) That no notice of the resolution was given by the clerk to the appellant. (*d*) That no application was made by the appellants to the board for reemployment, and that no notice of the acceptance of reemployment was given to the board. (*e*) That at the time of adopting said resolution, the board well knew that a new schoolhouse would not be in readiness for occupancy for several months, and that the old building had been disposed of. (*f*) That one of the appellants taught a private school during a portion of the time for which pay is claimed from the board. (*g*) That the sum which would be required to pay the salaries of all the teachers during the time when the

school was not running would exceed $1800, and be paid for no corresponding service. (*h*) That the salaries heretofore paid to the different teachers are not relatively just, some being greater and some less than they ought to be. (*i*) That the board has not the money on hand with which to pay the claims.

It seems to me that several of these objections have too little force to justify their separate or lengthy discussion. In general, it may be said that, neither the right of a member of the board, with a prima facie title to his seat, to appear and vote at a meeting of the board, nor the reasons which may have induced him to come at all or to vote in any particular way, can be denied, nor investigated, collaterally, in this proceeding. The board had the legal power on the 27th of August 1887, to employ teachers for the ensuing year. It was not necessary that the appellants should make application for reemployment in order to enable the board to reemploy them. They had been employed again and again, year after year, and prior to the annual school meeting. They had never made application nor accepted employment in writing. It is not denied that they have held themselves in readiness to go on with their usual work from the time of reemployment, as in all preceding years. It did not belong to the appellants to provide a place in which to conduct the school. That was the business of the board, and if it failed to do so it was not their fault. It appears that for five weeks Miss Robinson, one of the appellants, taught a private school at her home, at the request of parents who were deprived of school facilities by reason of the failure of the board to open the public school. She was right in doing this. She was not bound to remain idle. The law placed upon her the obligation of earning whatever she reasonably could in the meantime. Proof upon this matter, taken before the school commissioner of the first commissioner district of Westchester county, shows that the receipts from such private school were $39.25, and the expenses, which appear to be reasonable, were $37.10, leaving a profit of $2.15. If no service was rendered to the board during the four months, by the appellants, it does not seem to have been through any fault of the teachers. The fact that salaries may be inequitable, is no reason why the appellants should not be paid what was agreed to be paid them. There is no pretense that the salaries of appellants are excessive. If the board has no money with which to pay teachers' wages, the law provides a way in which to get it. It also provides that the compensation of a teacher shall be due and payable as often as at the end of each calendar month of the term of employment. (Chapter 335 of the Laws of 1887).

Other appeals which have been before the Department from this school district, as well as the papers in this case, have given abundant evidence of a most unseemly and disgraceful controversy between the members of the board of education, which has been so violent as almost to overthrow the local school system, and which unnecessarily prevented the opening of the district school for a period of four months after the usual time. I can see no good reason why these teachers, who have been in the employment of the board for a long time, and are now teaching in the school, and who were reemployed at the usual time and under the usual and ordinary circumstances, so far as they were concerned, by a board

possessing the lawful power to do so, should be compelled to suffer the loss of four months' pay, by reason of circumstances for which the board appears to be solely and only responsible. The right is clearly upon their side, and I have no doubt that the law is also.

The appeal is sustained. The board of education is hereby directed forthwith to pay to each of the appellants her salary for the months of September, October, November and December 1887, at the rate which they were respectively receiving at the close of the last school year, after deducting from the account of Miss Robinson the sum of $2.15.

3623

In the matter of the appeal of James S. Carr v. Henry B. Taylor, Charles L. Knapp and Lucius L. Shedden, as trustees of school district no. 3 of the town of Mooers, Clinton county.

Teachers will be entitled to pay for a week during which school was closed in consequence of a teachers institute having been designated for that week, but not held because of storms and floods which rendered it impossible. Also, to the week to which the institute was adjourned and held, school having been closed.

A teacher can not charge for services in receiving nonresident tuition fees without an agreement with the trustees to that effect.

Decided July 21, 1887

Draper, *Superintendent*

The appellant has been principal of the high school in district no. 3 of the town of Mooers during the last year, under a written contract made with the board of trustees on the 2d day of June 1886. He was to teach for ten months, having twenty school days in each month, at the rate of fifty-five ($55) dollars per month. The parties fail to agree upon terms of settlement. One of the matters in difference seems to be a claim, on the part of the teacher, for two weeks' time, during which no school was held because of teachers institutes having been appointed to be held in the school commissioner district, one week of which is refused by the trustees. Another is a claim by the teacher for extra compensation for collecting the tuition of nonresident pupils, which is resisted by the trustees.

I am of opinion that the board ought to pay the teacher for the two weeks during which institutes were appointed to be held in the commissioner district. It is true that during one such week there was no institute held in consequence of severe storms and floods which rendered it impossible, but this was not the fault of the teacher, and he ought not to suffer in consequence of it. An adjournment of the institute was taken to a time in the future, at which it was held, and it was probably impossible for the teachers to resume school during the week for which the institute was appointed, but, in fact, not held. The law contemplates that institutes may be held for a period of time not exceeding three weeks in any one year, and provides that during such time the schools

shall be closed and the teachers be allowed their wages if they attend the institute. So it seems entirely clear to me that the board ought not to deduct from the teacher's wages any amount for time lost when institutes were appointed to be held.

The teacher claims that he should be allowed the sum of twenty dollars ($20) for collecting two hundred dollars and eighty-five cents ($200.85) during the last two years for the tuition of nonresident pupils. I think the board is justified in resisting this claim. The service was trivial, and may fairly have been considered as within the scope of the teacher's general employment. I notice that the $200.85 for nonresident tuition fees was collected during a period of two years' employment. If the teacher expected to exact extra compensation for attending to this small matter, it certainly should have been done at the end of a preceding year in which he occupied the same position and rendered the same service. He should not have entered upon his second year without bringing the matter to the attention of the board and securing an agreement upon it. The fact that he failed to do this is a strong reason for its disallowance now.

I notice that the board refused to pay for one day's service upon which it is alleged the teacher was absent from school without supplying his place. Such absence is not denied, and the board is therefore probably justified in withholding the day's compensation. It was agreed between the parties that the teacher should be allowed $15 extra for assistance in building fires.

In view of the foregoing, it is directed that a settlement be effected between the parties as follows:

Ten months' services, at $55 per month	$550 00
Assistance in building fires	15 00
	$565 00
Deduct one day lost by teacher	2 75
	$562 25
Amount shown to have been paid	422 50
Amount due the appellant	$139 75

3892

In the matter of the appeal of Frank V. Hinman v. William Caywood, trustee of school district no. 2, town of Erin, county of Chemung.

Arranging a period of vacation by a trustee so as to avoid the payment of wages to a teacher during the week of a teachers institute, and which the teacher duly attended is contrary to the statute. *Held,* that the trustee shall allow the teacher the week and pay accordingly.

Decided July 24, 1890

Draper, *Superintendent*

The appellant, a duly qualified teacher, alleges that he was employed by the respondent to fill out an unexpired term of ten weeks, as teacher in school district no. 2, of the town of Erin, Chemung county.

The respondent alleges that the contract was for eight weeks and that a vacation of two weeks was to occur during such time.

The only point at issue is whether the appellant is entitled to pay for the week the institute was held in the commissioner district of which this district forms a part, and the sessions of which institute the appellant attended.

The undisputed facts are that appellant commenced to teach November 11, 1889, and taught seven weeks, closing December 27th, when the trustee ordered a vacation of two weeks, and school was closed accordingly. The second week of the vacation the institute was held, commencing January 6th. Subsequently the appellant taught two weeks commencing January 20th, having been prevented from resuming school one week earlier by illness.

The claim of the respondent is that the institute having been held during the two weeks of vacation, the teacher is not entitled to pay for the same.

Whether or not the vacation period was fixed by the trustee to avoid the law which gives to teachers pay for institute week when it occurs in their time, I can not determine, but I am impressed with the idea that it was.

Any such subterfuge is contrary to the policy and spirit of the law. The holiday vacation is usual in many districts, and allowing the holiday week, the week of the institute commencing January 6, 1890, would be within the eight weeks the trustee claims the contract was for. Inasmuch as the district is allowed the same aggregate attendance for the week the school is closed during an institute, as was the average aggregate attendance of pupils during the remainder of the term, upon which public money is apportioned to school districts, I am of the opinion that, upon the facts before me, the teacher should be allowed the week commencing January 6th, in which he attended the institute, and receive pay therefor at the stipulated sum.

The appeal is sustained, and the trustee is hereby directed to issue an order for the amount so due to the appellant.

3829

In the matter of the appeal of John B. Flett v. the board of education of union free school district no. 2, of the town of Springport, county of Cayuga.

A teacher of a district school neglected to attend the session of a teachers institute, although the school was closed during the week, by the trustees' direction, because of a report which prevailed that a contagious disease was prevalent in the vicinity where the institute was held. *Held,* that the teacher was not entitled to recover pay for the week of the institute.

Decided November 16, 1889

Draper, *Superintendent*

During the school year 1887–88, the appellant was a teacher in the above-named district. In the month of November, that year, a teachers institute was held at the village of Moravia, which it was the duty of the appellant to attend. His school was closed to permit him to do so. He did not attend because of reports of the prevalence of diphtheria at Moravia. The board of education refused to pay his wages, and he brings this appeal to compel payment.

The records of this Department throw some light upon the cause which the appellant assigns for his nonattendance at the Moravia institute, for the attention of the Superintendent was called to the matter at that time. He caused an investigation to be made, and learned that there was no substantial reason why the institute should not be held there, as arranged, and directed the commissioner to advise teachers accordingly. The commissioner advised the appellant to this effect. The greatest care was exercised in the matter, and the appellant was not only generally advised in the same way that all teachers were, but he was specifically advised by letter from the school commissioner upon the authority of the health authorities of the town that there was no danger involved in his attending the institute. If, after this, he remained away, it should be at the loss of pay for the week, unless there were some other considerations to control his action. He says that he was advised by two of the three members of the board of education not to attend the institute. Two of the members of the board for that year deny this. But whatever there is of that is not very material. The board closed the school during institute week to enable the teachers to attend the institute. This is the important fact in the case as indicating the purpose of the board. The street talk of individual members would count but little as against the formal action of the board.

The law provides that teachers shall be paid for time spent at an institute, as it does for time spent in teaching. If prevented from teaching during any portion of the term of employment by the action of the trustees, and for reasons with which the teacher is not chargeable, he is to be paid the same as though he had taught. It is quite possible that, although the school was closed during the institute week, a teacher might be entitled to pay who did not attend the institute, if his absence was due to the official action of the trustees, or was for a cause which met the approval of the trustees. But this case does not come within that rule. The board has closed the school to permit attendance at the institute. The board afterward did nothing to prevent the appellant attending the institute. In remaining away he assumed the responsibility. The board does not now think he had sufficient justification for his absence. In this I must agree with them, and I do not therefore think they should be compelled to pay the appellant his wages for the week.

It follows that the appeal must be dismissed.

3524

In the matter of the appeal of Sarah M. Peckham v. the board of education of school district no. 5, of the town of Oyster Bay, Queens county.

A rule of a board of education which provided that all contracts made with teachers should be subject to termination by either party on one week's written notice to the other party, *held*, not to apply to a teacher's contract, unless it is clearly shown that the teacher had notice of the rule at the time the contract to teach was entered into.

Decided April 18, 1887

Benjamin W. Downing, attorney for appellant
J. B. C. Tappan, attorney for respondent

Draper, *Superintendent*

This is an appeal from the action of the respondent in dismissing the appellant from her position as a teacher in the public school in the district and in refusing to pay her wages claimed to be due under a contract or agreement entered into between the parties.

The appellant showed in her papers on appeal that she had been employed as a teacher in the district for about seven years, when in June 1885, she was reengaged for the ensuing school year, to commence on the 31st day of August 1885, with pay at the rate of $15 per week; that she accepted such reengagement and entered upon her duties pursuant thereto; that on the 22d day of March 1886, she received notice in writing from the board reducing her pay to $12 per week from the 1st day of April following; that she replied that she should decline to accept pay at the reduced rate; that she was subsequently dismissed by the board and forcibly prevented from teaching the remainder of the year; that she at all times held herself in readiness to fulfil the agreement, but that the board had refused to pay her her wages from the 26th day of April 1886, to the close of the year.

No answer having been interposed by the respondent, the facts set forth by her were assumed to be true and a decision rendered in her favor on the 16th day of November 1886. Subsequently, upon the application of the respondent, the case was reopened and the respondent allowed to interpose an answer.

The respondent, now answering the appeal, admits that the appellant was a teacher in the school for several years, and was reengaged in June 1885, but alleges that such engagement was "subject to the rules of the board," and that, in 1879, a rule had been adopted providing that all contracts made with teachers should be subject to termination by either party on one week's written notice to the other party. The respondent states, on information and belief, that said rule "was fully made known to the teachers, including the appellant, at about the time of the enacting thereof, and also upon the occasion of the subsequent engagements of some of the same teachers, including the appellant." It is

insisted that this rule was well known to the teachers, and the affidavits of several of them, which are submitted, certainly show that it was known to them.

No copy of the rule is submitted by the board. It is not shown to have ever been printed. The appellant denies that she ever was made aware of the enactment of such a rule, and even challenges the board to produce the record of its enactment, and they do not produce it. In any event, the board ought not to expect to bind teachers by a rule, said to have been adopted in 1879, in so important a matter as a contract of employment, without bringing such rule clearly and distinctly and undeniably to the attention of the teacher with whom it is contracting. Its proof comes short of showing that it did this, and, in the face of her sworn and unimpeached statements to the contrary I can not find that the contract was subject to such a limitation.

Moreover, it appears clearly, from the statements of all the parties, that the alleged rule was invoked in the appellant's case only to compel her to accept less pay than the board had, at the beginning of the school year, agreed to pay her. No allegation was made against the character or the qualifications of the teacher. Indeed, the board, in writing, proposed to allow her to continue, provided she would accept the reduced pay. I am convinced from the correspondence between the parties, as set forth in the pleadings, that the understanding on both sides was that the engagement was for the school year, and that the board removed the teacher only because she insisted upon the board carrying out its original agreement. It seems to me that the equities are strongly with the appellant in the controversy, and I am confident that the law is also.

It is too late to reinstate the teacher in her position, but the board should pay her to the end of the school year.

It is ordered that the respondent pay the appellant for nine weeks at the rate of $15 per week, amounting to the sum of $135, together with interest thereon, at 6 per cent per annum, from the 1st day of July 1886.

4521

In the matter of the appeal of Charles W. Townsend v. Peter J. Turck and Martin Lasher, trustees, school district no. 9, town of Saugerties, Ulster county.

In contracts made between trustees and teachers, the compensation agreed upon may be a fixed sum per diem, per week, per month or per calendar month; and such compensation may be payable at the time or times agreed upon by the parties. When in such contracts the compensation is to be paid monthly, it means at the end of each school month, consisting of four school weeks of five school days in each week; when the compensation is to be paid at the end of each calendar month it means at the end of each thirty days of employment; when no time of payment is stated in the contract such compensation must be paid as often as at the end of each calendar month.

Decided December 4, 1896

Brinnier & Newcomb, attorney for respondents

Skinner, *Superintendent*

On or about June 26, 1896, the respondents in the above-entitled appeal, as trustees of school district no. 9, town of Saugerties, Ulster county, contracted with the appellant herein to teach the school in such district for the term of one year, commencing September 1st, at a monthly compensation of $55, payable monthly. The respondents refuse to pay the appellant such monthly compensation for each school month of four weeks of five days each, of service by him, and refuse to pay such monthly compensation except at the end of each calendar month.

From such refusal of the respondents the appellant takes an appeal to me.

The respondents have answered the appeal in which they admit the employment of the appellant for the term of time, and at the rate of compensation monthly, and that the compensation is payable monthly, as hereinbefore stated; but allege that under the provisions of subdivision 10 of section 47, article 6, title 7, of the Consolidated School Law of 1894, as amended by section 8 of chapter 264 of the Laws of 1896, the monthly compensation of $55 means a calendar month, and that such compensation is payable at the end of each calendar month.

The contention of the respondents is not well taken.

Subdivision 10 of section 47, article 6, title 7 of the Consolidated School Law of 1894, as amended by section 8 of chapter 264 of the Laws of 1896, enacts that all trustees of school districts who shall employ teachers in any of said districts shall, at the time of such employment, make and deliver to such teacher, or cause to be made and delivered, a contract in writing, in which the details of the agreement between the parties, and particularly the length of the term of employment, the amount of compensation and the time or times when such compensation shall be due and payable, shall be clearly and definitely set forth. Such subdivision went into effect on April 15, 1896, and this Department prepared a form of contract which will be found in the school register for the school year of 1896–97.

Under section 6, title 2 of the Consolidated School Law, to entitle any school district to a district quota or quotas of the public money, a school must be maintained in such district in each school year for at least one hundred and sixty days of school, inclusive of legal holidays that may occur during the term of said school, and exclusive of Saturdays, and no Saturday shall be counted as part of said one hundred and sixty days of school. A school week consists of five school days, as no school can be legally held on Saturday and Sunday. A school month consists of four school weeks of five school days in each week.

The appellant and respondents had the power to contract that the compensation of the appellant should be the sum of $55 for each calendar month of school, but they did not do so, but did contract that the appellant should be paid a monthly compensation of $55, that is, the sum of $55 for services rendered for each school month.

This Department has uniformly held that when in a contract of employment of a teacher no time of payment of compensation is stated therein, that such

teacher is entitled to be paid at least as often as at the end of each calendar month of the term of employment; that when in said contract it is agreed that the payment shall be made monthly, such payment shall be made at the end of each school month of service.

I decide, that under the contract of employment made between the appellant and respondents herein, on June 26, 1896, the appellant herein is entitled to be paid by the respondent, for each school month of four school weeks of five school days, of services rendered by him as a teacher the sum of $55; that the said sum of $55 should be paid to the appellant by the respondents, at the end of each school month of service rendered.

The appeal herein is sustained.

It is ordered, That Peter J. Turck and Martin Lasher, trustees of school district no. 9, town of Saugerties, Ulster county, be, and they are hereby, ordered and directed to pay to Charles W. Townsend, a teacher employed by them, the sum of $55 for each and every school month of service rendered by him; and that said sum of $55 be paid to him at the end of each school month of services performed by him during his term of employment as such teacher.

3965

In the matter of the appeal of Nelson P. Lasher v. the trustees of school district no. 7, town of Red Hook, county of Dutchess.

A teacher's contract reads "employment for one year at a weekly compensation of fifteen dollars, payable monthly."

It is claimed by the teacher that the year was to consist of forty-four weeks, if he could teach that time outside of usual vacations. The teacher taught forty-four weeks, the last four of which in spite of the protest of the board of trustees. The board insists that the year was to consist of forty weeks at fifteen dollars, and that the teacher was so informed, and that his salary would be $600.

Held, as the proof greatly preponderates in favor of the trustees' position, that the school year intended was one of but forty weeks.

Decided March 14, 1891

Draper, *Superintendent*

The only question presented by this appeal is as to the effect of the contract of employment, by which the appellant was employed to teach the school in said district. The contract reads that the employment of the appellant was for one year, at a weekly compensation of $15, payable monthly. The appellant does not claim that by this contract, he was either to teach forty-two weeks, or be paid for that time. He does claim, however, that he was to teach forty-four weeks, if they could be made within the year outside of the usual vacations.

The trustees, on the other hand, insist, and with much unanimity swear, that it was expressly stated to the appellant that he was to teach but forty weeks, and that his compensation, therefore, at the rate mentioned, would be the sum of $600.

The school year consists of thirty-two weeks, but districts are not limited to this time, and may employ teachers and continue school for a longer period. There seems to be no dispute but that the appellant taught forty-four weeks, but the last four weeks he taught against the express directions of the board of trustees, who notified him to close the school at the end of forty weeks. The teacher should have obeyed the directions of the trustees and closed the school at the end of forty weeks. He would have forfeited no right by doing so, to his claim for compensation for forty weeks, nor has he strengthened his position by arbitrarily continuing the school contrary to the action of the board of trustees.

The evidence on the issue preponderates in favor of the respondents, and I feel constrained to hold that the contract was for the forty weeks, and that the appellant is entitled to pay for that time only.

It appears that the district is indebted to the appellant in the sum of $2.25, a balance remaining due for teaching forty weeks of school. This the respondents admit, and express their willingness to pay, and they are hereby directed to do so.

The appeal is overruled.

3961

In the matter of the appeal of Romane Saltsman v. Washington Fox, trustee of school district no. 8, town of St Johnsville, county of Montgomery.

A school trustee holding over beyond his term because of the adjournment of the annual meeting, entered into a contract with a teacher to teach a term of twenty-five weeks, to commence more than one month after the date of the adjourned annual meeting. The adjournment of the meeting was at the suggestion of the teacher so employed, and for the convenience of the trustee holding over. The contract was entered into as alleged by the teacher, five days after the date of the annual meeting, at which an adjournment had been taken.

At the adjourned annual meeting, a successor to the trustee holding over was chosen, whereupon the retiring trustee advised his successor of the contract he had entered into with the teacher.

Upon appeal, the validity of this act is brought in question.

Held, to be in violation of subdivision 9, of section 49, of title 7, of the Consolidated School Act (set forth in the opinion), and void as to the district.

Held, also, that the proofs and evidence in the case show that the teacher was conversant with school law, and forces the impression that there was collusion between the teacher and former trustee in entering into the contract.

Decided February 9, 1891

G. E. Phillips, attorney for appellant

Draper, *Superintendent*

Appellant, a duly licensed teacher, appeals from the action of Washington Fox, sole trustee of school district no. 8, town of St Johnsville, county of Montgomery, in refusing to issue to him a trustee's order for one month's salary as a teacher, under a contract entered into August 11, 1890, between appellant and one

Isaiah Failing who was the respondent's predecessor in the office of trustee. The contract provided that appellant should, on September 15, 1890, begin teaching a term of twenty-five weeks. The facts disclosed by the evidence, and which appear to be conceded, are that Isaiah Failing was the trustee of the district for the year ending August 6, 1890; that at the annual meeting held on the evening of August 6, 1890, an adjournment was had until the 9th instant, without electing a trustee, and that on the 9th instant, a further adjournment was had until the 13th instant. At the last mentioned date the respondent was chosen trustee.

It is alleged by the respondent that the adjournments were taken in order to enable the outgoing trustee to present reports to the inhabitants, the second adjournment being suggested by appellant who stated that the trustee was ill. Immediately after the election of respondent, and on the 13th day of August, he was notified by the outgoing trustee that appellant had been employed as a teacher for twenty-five weeks. The only question, therefore, upon the appeal is as to the effect of the contract of August 11, 1890, between the trustee holding over and the appellant. Subdivision 9 of section 49 of title 7 of the Consolidated School Act, provides that a sole trustee shall not make a contract for the employment of a teacher beyond the close of the school term commencing next preceding the expiration of his term of office and continuing not longer than sixteen weeks, except with the approval of a majority of the voters of the district. Any person employed in disregard of the foregoing provisions shall have no claim for wages against the district.

It is not claimed that any approval of a district meeting was asked for or given to this contract, and its legality, so far as the district's liability is concerned, must depend upon the power of the trustee in the premises. Failing's term, for which he was selected, expired with the annual meeting, but he was holding over lawfully because his successor had not been chosen. Had a term then commenced during this period I should not question the right of the officer holding over, and it would have been his duty to employ a teacher for the term, but not for more than sixteen weeks. But this was not the case. On August 11th, five days after the date of the annual meeting and two days after the first adjourned meeting, this contract is alleged by appellant to have been made for a term to commence September 15th (more than one month after the adjourned meeting at which the respondent was elected trustee) to continue not sixteen weeks but twenty-five weeks. This was clearly in violation of the provisions of the statute above referred to.

I can not, therefore, sustain this appeal and uphold the contract. The trustee had no authority to enter into it, and it was an attempt to take an undue and unfair advantage of the district and of the person to be chosen trustee.

Contracts to extend beyond the term of a trustee are only permitted when the term has been entered into before such expiration, and to avoid embarrassment which a change of teachers during a term might occasion. The appellant was fairly cognizant of the proceedings in the district and of the several adjournments of the annual meeting. His examination before the school commissioner,

the result of which appears with appellant's proofs, shows he was conversant with school law, and the impression is carried to my mind that the appellant and the former trustee colluded to secure an unfair advantage.

The appeal is overruled.

3603

In the matter of the appeal of Charles W. Hurlbut and Iona Haskins v. Marvin Phillips, sole trustee of district no. 16, town of Harmony, Chautauqua county.

A contract between a trustee and a teacher for "one day only," and to "terminate every night" is without the sanction of law or good usage, and is against sound policy. It is in conflict with the spirit of the school laws, and will not be upheld by the Department.

Decided July 21, 1887

F. A. Brightman, attorney for appellants
A. C. Picard, attorney for respondents

Draper, *Superintendent*

On or about the 31st day of August 1886, the respondent, above-named, employed the two appellants to teach in the school in his district, and agreed to pay them at the rate of four ($4) dollars per week.

The appellants taught one term of nine weeks, when they were notified by the principal of the school, under the direction of the trustee, that there would be a vacation for one week. School was accordingly closed for a week. At the end of that time they returned, and had been teaching an hour or more, when they were discharged from employment by the trustee, in person, who appeared in the schoolroom and notified them that they must discontinue teaching. Each of the appellants insisted that the term of employment was for a year, and asserted a purpose to go on and fulfil the agreement, unless prevented from doing so, but the trustee refused to permit them to continue.

The main issue is as to the terms of the contract of employment. The appellants each swear that the employment was for "the term of one year, or so long as said Phillips was trustee of said district." The respondent swears "that he informed said teachers, when he employed them, that he hired them *for one day only, and that their time would close every night,* but that if they gave satisfaction, he would keep them as long as he remained trustee."

Several affidavits by different persons are offered by the appellants and the respondent, in corroboration of their statements, which are no less contradictory than the affidavits of the parties themselves. So conflicting is the evidence that it is difficult to conclude with any degree of confidence what the real terms of the agreement were.

The burden of proof is, however, on the appellants. Before I can overrule the trustee and hold the agreement to be what the appellants say it was, they must prove it by a clear preponderance of evidence. This they fail to do to my satisfaction.

But if I assume that the agreement was as the trustee alleges, which I am obliged to do because it is not clearly proved otherwise, I find myself unable to uphold such a contract, because I think it was an unconscionable contract, without sanction of law or good usage and against sound policy. I am of the opinion that a contract of employment between a trustee and teacher "for one day only and to close every night" is void as being in conflict with the spirit of the school laws and against sound public policy. Teachers are compelled to have a license issued pursuant to law before they can contract to teach. This license carries with it an assurance of qualifications and fitness. The law provides for revoking any license where sufficient cause is shown for such a step. The revocation of a license works a dissolution of any contract which may have been based upon it. This is the ordinary course of procedure for getting rid of an unworthy or unfit teacher in the middle of a term of employment. Trustees may, undoubtedly, at times summarily dismiss a teacher for a palpable breach of contract or gross and open immorality, but such action must be taken, if at all, upon the personal responsibility of the officer. But these are exceptional cases, outside of the general rule. There can be no pretense that the case under consideration is one of that nature. Moreover, trustees ought not to be permitted to absolve themselves from the responsibility of making investigations and of exercising proper precautionary care and good judgment when employing teachers by reserving the right to discharge them at any moment. A duly licensed and employed teacher ought to have security of position for a reasonable length of time, which should be long enough to prove himself successful or to demonstrate his inability to do so. It is humiliating to self-respecting teachers to be at all times liable to discharge from employment because others may want their places, or because of the antagonisms which a vigorous and wholesome performance of their duties in the schoolroom may engender. To adopt this doctrine is only to drive the most self-respecting and the best qualified persons from teachers' work. This is unquestionably against wise policy. Furthermore, if the trustee could discontinue these teachers at any time, they could abandon their places at any time. But the school must continue without interruption. Teachers must be under a legal and honorable obligation to so continue it. An agreement between trustee and teacher which does not involve this is manifestly against the interests of the public school system.

What is a reasonable length of time for which a trustee and teacher may properly enter into a contract of employment, depends upon the circumstances and custom in each district, and must be determined upon the fact of each case as it arises. It appears in the papers in this case that the appellants had taught one term of nine weeks, and that they had commenced teaching another term when dismissed. I am, therefore, led to hold that their employment must have been for terms of at least that length of time, and that having taught one such term and entered upon another, they were entitled to employment for at least another term of the same length if they were ready and able to fairly discharge the duties of the places in which they were employed.

It only remains to consider whether the trustee was justified in discharging them in the middle of a term of employment. As already suggested, there may be exceptional cases in which a trustee would be justified in summarily dismissing a teacher for gross immorality, or for utter failure to fill the position properly, resulting in a palpable breach of contract. In such a case he would act upon his own responsibility, relying upon the clearness of the case and the exigency of the occasion for his justification. Was this such a case? I think not.

The trustee alleges as the reason for discharging the appellants that their work was not satisfactory. He says they failed in discipline and did not produce desirable results. This is strenuously contradicted by a large number of reputable patrons of the school. In any event, the trustee could hardly expect the highest professional talent for $4 per week. The trustee also alleges certain improprieties between the appellants, such as being out together late at night and kissing each other in the presence of pupils in the school. Such allegations as these should not be set up unless capable of unquestioned proof. Character ought not to be attacked by anyone, much less a public officer, wantonly or carelessly. There is no proof whatever to sustain these allegations, so far as I can see. Making such allegations, without following them with competent proof, ought to weigh against the party responsible for it. I am unable to sustain the respondent in dismissing the appellants in the summary manner he did. It is shown that they stood ready to continue their service, and I am of the opinion that they have a legal claim against the district for nine weeks' pay, at the rate of $4 per week.

The appeal is, therefore, sustained, and it is ordered that the respondent forthwith draw his order upon the supervisor of his town in favor of, and deliver the same to each of the appellants, for the sum of $36, if there should be such sum in the hands of the supervisor to the credit of the district. If there is not, then it is ordered that the respondent forthwith levy a tax upon the district for such amount, and that he make and deliver to each of the appellants orders upon the collector for the sums due them.

3735

In the matter of the appeal of Gertie L. Devoe v. the board of trustees of district no. 7, town of Rochester, county of Ulster.

The school law does not contemplate the employment of a teacher "for such time as she suited."

The employment must be for at least a reasonable length of time.

In the absence of statutory regulations, a reasonable length of time would depend upon the custom in each district.

It should be for a term of school at least.

Nine weeks held to be as short a term as a teacher should be employed for in a common school district.

Lincoln B. Haskin, attorney for the appellant

Draper, *Superintendent*

The appellant alleges that, being a duly certified and qualified teacher, she was, on the 30th day of August 1888, employed by the respondents to teach the school in their district at the rate of seventy-five cents per day, boarding herself, as long as she suited the trustees; that she commenced teaching on Monday the 17th of September 1888; that after she had been teaching about ten days, Henry De Witt, one of the trustees, called at the schoolhouse and informed her that her service would terminate the next night. She says that the reason the trustee assigned for discharging her was that she was too strict in her discipline, although no one of the trustees had visited the school during her service, and that during such time she in no case inflicted corporal punishment. She alleges that the real reason of the action of the trustee was because she had inflicted a slight punishment upon his daughter; that no complaints were made to her in reference to her course in the school, but on the contrary the same was generally commended by the residents of the district; that the action of De Witt was his own action alone and had not been determined upon at any meeting of the board of trustees of the district; that she denied the right of De Witt to discharge her and claimed possession of the school on Monday morning, October 1, 1888, and that she has held herself in readiness to fulfil the agreement on her part, but that she has been prevented from so doing by the action of said trustee. She therefore brings this appeal against the action of the trustees and demands that she be reinstated in the school.

The trustees in answering the appeal say that they employed the appellant as she states, so long as she suited the trustees, and that they discharged her for incompetency and specify that she could not do certain examples in arithmetic. They allege that the school dwindled from twenty-two scholars to four scholars during the two weeks in which she was teaching. They say also that she was discharged by the consent of a majority of said trustees.

There is no doubt in my mind but that the appellant was discharged without any good and sufficient reason. The trustees set forth two reasons for their action. One is that she could not perform certain problems in arithmetic, the other that the attendance in the school had fallen off during the two weeks in which she had charge of it. The proofs indicate that the first reason assigned is frivolous and the last untrue. She held a certificate from the proper officer to her qualifications as a teacher. There is no proof whatever submitted by the respondents to show that she was not qualified. The trustee who undertook to discharge her, in an answer which it is almost impossible to decipher because of its illiteracy, sets up this lame reason, but he advances nothing whatever in proof of his assertion. The school register shows that the attendance upon the school continued at about the same number up to the time when the trustee notified her of her dismissal and removed his own child from the school and exerted his influence to disparage it while she should remain.

Equally clear is it that the appellant was not discharged by any lawful action of the board of trustees. One of them, Henry De Witt, assumed to do all of

the business. Another presents affidavit, in which he swears that he has given his associates authority to hire and discharge teachers. He can do nothing of the kind, and his attempt to do so is sufficient ground for his removal from office. The third presents an affidavit in which he swears that he acquiesced in the discharge of the appellant. There is no pretense that the course of De Witt in preventing the teacher from continuing in the school was the result of action taken at a meeting of the board. It was, therefore, without authority and unlawful.

It is clear, however, that a majority of the board would have proceeded to take the action appealed from, if they had understood the necessity for doing so, and there is no occasion for resting the decision of the case upon a technicality alone. The agreement between the teacher and the board was not of such a character as this Department can sanction. In employing the teacher for such time as she suited, the trustees intended to reserve the right to do just what has been done — discharge her at any moment without cause. The school law does not contemplate any such procedure on the part of the trustees. All of the provisions of the statutes clearly indicate that it is the duty of trustees to exercise proper caution in employing teachers and to employ them for a reasonable length of time. The law does not permit trustees to assume dictatorial powers. It will not allow them to exact agreements of teachers into which a self-respecting person can not enter; nor will it allow them to turn a teacher out of a schoolhouse in the midst of employment only because of pique or spite, or in order to put someone else in.

The employment must be at least for a reasonable length of time. What is a reasonable length of time would, in the absence of statutory regulations, depend upon the custom in each district. It should be for a term of school at least — a time sufficient to enable a teacher to show proficiency or make so complete a failure that no district will employ him again.

In the absence of any evidence upon which to determine the least time for which a teacher should be employed in the district under consideration, I have concluded to follow the time fixed upon in the case of Hurlbert v. district no. 6, town of Harmony (decided July 21, 1887), as the circumstances are not widely different, and I know that the time there fixed upon can not be unjust to the district. If it is unjust to the teacher, it can be nothing more than she ought to suffer for assuming to enter into so unbusiness like an agreement. The term there fixed upon was nine weeks.

The appeal is sustained and the respondents are hereby directed to settle with the appellant according to the terms of their agreement with her, for a period of nine weeks, deducting any payments which may already have been made to her. If there are moneys to the credit of the district now in the hands of the collector or supervisor, they will draw their draft upon the proper officer to her order forthwith. In case there are no moneys now standing to the credit of the district, they will raise the requisite amount by tax.

3678

In the matter of the appeal of Fanchie C. Groom v. James Hough, sole trustee of school district no. 13, town of Venice, Cayuga county.

Agreements between teachers and trustees that either party may terminate the employment at any time are against public policy. Employment should be for a specific length of time.

It is a duty of a trustee to aid a female teacher, when appealed to, in reducing to subjection a vicious and disturbing pupil, and, if necessary, to remove such a pupil from the school.

The fact that one disorderly pupil 18 years of age would not obey the teacher, is not sufficient reason for dismissing a teacher as incompetent to manage a school.

Decided April 6, 1888

Draper, *Superintendent*

The appellant above named was employed on or about the 1st day of September 1887, by the respondent to teach the school in the above-named district, for the term of fourteen weeks during the fall and winter following. After having taught for nine weeks and two days, the trustee discharged the teacher and forbade her continuance.

The parties agree relative to the terms of the employment, except that the trustee insists that he was to have the right to discharge the teacher at any time, unless she gave satisfaction and properly governed and managed the school. The ground which the trustee alleges as the reason for discharging the teacher is, that she failed in government. No proof of this is offered. The teacher swears that she had no trouble in the school, except with one young man 18 years of age, who was vicious, profane and exceedingly troublesome. It can hardly be expected that a lady teacher should undertake to put her physical strength against that of a vicious boy 18 years of age, and it was the duty of the trustee in that case, to have aided the teacher in reducing such pupil to subjection, or he should have removed him from the school. She says that she called upon the trustee to aid her in this particular case, without avail. She says furthermore, that she protested against being discharged and has always held herself in readiness to fulfil the terms of the agreement.

There is no evidence in this case aside from the statements of the parties. It appears that the teacher has taught several terms before, and successfully. I feel it my duty to discountenance agreements between trustees and teachers of the character such as the trustee in this case alleges that he made. He says that he employed this teacher with the right to discharge her at any time that she did not give satisfaction. She denies this. Whether or not it was a fact, it ought not to have been so. A trustee should employ a teacher only after being satisfied of her ability to conduct the school properly and successfully. When he employs her he should do it for a reasonable length of time and he should live up to his agreement. It is against sound policy to permit trustees to discharge a teacher at any moment for some imaginary cause or for any cause at all, when they feel inclined to do so. It hardly looks reasonable that the teacher in this

case, after having taught more than nine weeks in a term of fourteen, could not, with safety to the interests of the district be permitted to finish her term. Her certificate of qualification and her previous experience, ought to count somewhat in her favor. I have, therefore, come to the conclusion that the appeal ought to be sustained, and the trustee of the district is hereby directed to settle with the appellant according to the terms of his agreement with her.

3850

In the matter of the appeal of Moses N. Roe v. Benjamin Snyder as trustee of school district no. 5, of the town of Candor, county of Tioga.

The statute provides that teachers shall be employed for at least sixteen weeks. Any employment of a teacher, unless to fill out an unexpired term, will be held to be for at least sixteen weeks. An employment for less than one year is not invalid because verbally made. A trustee who neglects to give a teacher a written memorandum of hiring is guilty of laches.

Dismissal of a teacher in the midst of a term for incompetency and lax discipline in the school, which clearly appears, will be sustained.

Decided January 3, 1890

Stephen S. Wallis, attorney for respondent

Draper, *Superintendent*

About the first of October last, the trustee above named employed the appellant to teach the school in his district. No written memorandum of employment was given. The appellant began service on the 14th of October, and was dismissed by the trustee on or about the 4th day of November for alleged incompetency. The teacher insists that the dismissal was without cause, and brings his appeal to determine his rights in the premises. The trustee insists that the employment was for no specified length of time, and that he took the teacher only upon trial.

The law does not recognize employments of such a character as that insisted upon by the trustee. The statute provides that no teacher shall be employed for a shorter term than sixteen weeks, and therefore, if the teacher in this case was employed by the trustee at all, it was for at least that length of time. The trustee insists also that the employment was invalid for the reason that no written contract was executed. He is clearly in error in this. An agreement between a trustee and teacher stands upon the same footing as any other agreement and may be verbal for a less period than one year. It is true that the statute requires the trustee to make and deliver to the teacher a memorandum stating the terms of the employment, but the fact that no such memorandum was given in a particular case would not invalidate the employment. It was the purpose of the statute to require the making and delivering of the memorandum as a protection to the teacher. The trustee in this case was clearly guilty of laches for refusing

to make such memorandum when requested to do so by the teacher, as he admits he was.

The statute provides that no teacher shall be dismissed in the midst of a term of employment except for cause which would be sustained by the State Superintendent upon appeal. I have therefore read with care what the parties have to say touching the reason alleged for dismissal. I am of the opinion that the trustee makes out a sufficient cause for dismissing the appellant in the midst of a term of employment. He shows clearly that the discipline in the school, while under the appellant's charge, was lax in the extreme. No teacher can expect employment for any length of time or expect to be upheld by the State Department who is unable to command the respect and the unqualified obedience of pupils. I am satisfied that such respect and obedience were lacking in the present case.

I therefore arrive at the conclusion that it is my duty to dismiss the appeal.

3864

In the matter of the appeal of A. Hall Burdick v. the board of education of Long Island City.

A teacher having been employed by a board of education for several years, was reemployed, as he understood, for the ensuing year. In February following he was dismissed without cause. *Held,* that all the circumstances justified the teacher in thinking the employment was for a year, and that it was such in law. *Held,* also that he could not be dismissed in the course of the year, except for cause.

Decided March 29, 1890

W. T. B. Milliken, attorney for appellant
W. J. Foster, city attorney, for respondent

Draper, *Superintendent*

The appellant having been employed for two preceding years as principal of one of the public schools of Long Island City, was reemployed in September 1889, in the same position. He contends that the last reemployment was for the term of a school year. The board of education insists that it was for no specified length of time, but entirely at the pleasure of the board. The appellant was dismissed from his position by the board of education on the 14th day of February 1890. No reason is alleged for the dismissal. The board insists that it had the power to dismiss him at any moment, and without assigning a cause. The appellant brings this appeal from the action of the board in dismissing him, for the purpose of determining his rights.

It is clear at the outset that the broad claims of the board of education can not be upheld. An individual may manage his individual affairs in any capricious way he likes, so long as he does not interfere with the rights of others; but officers in managing the affairs of the public schools can not go as far as this.

They are not only bound to respect the rights of others, but in addition to this they stand in a representative capacity, and must transact their official business in a way which will best promote the interests of the public for whom they act. The schools are continuous, and their substantial character and efficiency depend not only upon the character and competency of teachers, but also upon teachers who have these qualifications, being secure against the piques and caprices, the selfish and political interests of individuals. The relations between school trustees and school teachers are reciprocal, and obligations are mutual. Trustees fail in their duty if they employ persons who are not competent and adapted to the employment. To uphold the claim that such persons may be employed only from day to day, and may be dismissed at any moment without warning and without reason, would be to drive qualified and self-respecting persons out of the teaching service. It is an unconscionable doctrine, so far as individual rights and interests are concerned; it is destructive of the efficiency of the schools, and subversive of the interests of the public. This principle has been previously maintained, notably in the case of DeVoe v. district no. 7, of the town of Rochester (appeal no. 3735). That case arose in a small and unstable school in a rural community. The principle has even much greater force in a large school regularly in operation during definite terms, as in the present case.

But we are not left to reasoning alone in this matter. There is no difference between the legal powers and duties of school trustees in cities, and like officers in all other parts of the State, except as such differences have been created by statutes having special application to a particular city. It does not appear that there is any special statute conferring any greater or different powers upon the board of education of Long Island City, so far as the dismissal of teachers is concerned, than trustees of schools have in general. Subdivision 9, section 48, title 7, of the Consolidated School Act, as it existed at the time of the employment in the present case, provided as follows: "Nor shall any trustee or trustees employ any teacher for a shorter term than sixteen weeks, unless for the purpose of filling out an unexpired term of school; nor shall any teacher be dismissed in the course of a term of employment except for reasons which, if appealed to the Superintendent of Public Instruction, shall be held to be sufficient cause for such dismissal."

The matter here in issue is then brought within narrower compass, for it is manifest that the employment could not have been merely from day to day, as respondents claim, but must have been in legal contemplation for some reasonable length of time, and that within such time, whatever it was, the appellant could not have been dismissed except for a reason which would be deemed sufficient by the State Superintendent on appeal. As no reason whatever is given for the attempted dismissal, either at the time thereof or now, the only question is, what was the length of the term for which the appellant was employed?

I have read all that has been said by the respective parties upon this point, in their pleadings and affidavits, and by their able counsel on the oral argument. The appellant was first employed in September 1887, for the school year 1887–88.

In the summer of 1888, he was reemployed for another school year. On the 25th of July 1889, he addressed a communication to the board of education in which, after speaking of the condition of the school under his charge, and suggesting that his salary ($1500) was less than had formerly been paid, he said: "I respectfully ask to be continued in my present position for the coming year with such increase of salary as my services have shown me to merit." He swears that on the 7th day of September 1889, he was verbally notified by the clerk of the board that at a meeting of the board his application had been accepted, and his salary increased to $1800, and that he reentered upon his position and continued to act in that capacity, and was paid at the increased rate up to the time of the attempted dismissal. This is not disputed.

But the board of education refers to certain resolutions as a justification for their action, which resolutions were adopted in July 1888, and were in the following words:

Resolved, That any and all existing by-laws, rules and regulations, resolutions, orders etc., respecting appointments of teachers be and the same hereby are revoked, rescinded, made null and void; and all contracts therefore, if any, terminated and canceled.

Resolved, That all future appointments of teachers shall be for term, subject to the pleasure of the board.

The board insists that these resolutions were known to the appellant, and that they governed the terms of his reemployment of 1889. He admits a general knowledge thereof, derived from newspaper reports, but says that he inquired of the member of the board having charge of his school whether there was anything in these resolutions affecting his position, and was informed that they were not intended to apply to him. It is true that one member of the board could not, independently of his associates, bind the board, but it is also true, it seems to me, that the appellant was justified in giving much weight to the construction which the commissioner in charge of his school placed upon the action of the board. But I can not adopt the view that these resolutions in any event were binding upon the appellant, except so far as they were lawful, and so far he must be deemed to have agreed to them. The resolutions relied upon by the board are of a most novel character, and seem to be almost, if not quite, devoid of legal life and effect. That part of the resolutions touching the employment of teachers could certainly not be carried out unless it was "the pleasure of the board" to employ for a reasonable term of service any more than that other part of the same resolution which purported to cancel and annul all existing contracts without the assent of the other contracting parties.

Moreover, the resolutions were intended only for the guidance of the board. Subsequent action could modify them or change their effect. The application of the teacher and the acceptance constituted an agreement upon which he had the right to rely, unless specially notified that the board had resolved to employ him on other lawful terms, which he was at liberty to accept or reject. There is no pretense of this. On the contrary, it appears that he was notified

by the clerk of the board and superintendent of schools that his application had been accepted, and no conditions or modifications were suggested. No doubt he reasoned as he was advised by his commissioner, that it was the pleasure of the board to employ him according to the terms of his application, and that the resolutions adopted more than a year previously were not intended to affect his position.

More than this, there is no pretense anywhere that if the employment was for a term, as it seems clear it must have been, that that term was for any other time than a school year. That was at least the natural term of employment in a city, and it was evidently the term in the minds of the parties at the time of the agreement.

I therefore conclude that the legal term for which the appellant was employed in September 1889, was for the school year. This being so, the action of the board in attempting to dismiss the appellant in February, without cause, was unlawful.

The appeal is sustained, and the action of the board in dismissing the appellant is held to be unlawful and invalid.

3748

In the matter of the appeal of Clarence Edwards v. the board of education of union free school district no. 1, town of Sharon, Schoharie county.

A written contract to teach for a period of forty weeks, during which time a holiday vacation of one week occurred, would not entitle a teacher to pay for that week, when it was known by the teacher to be a custom observed in the district to require teachers to teach forty weeks exclusive of such holiday week.

Decided January 9, 1888

Draper, *Superintendent*

This appeal is brought by a person who was employed by the respondent to teach, to recover a balance of wages claimed to be due him. The appellant alleges that in May 1887, he was employed under a written contract, signed by the board of education, to teach the school in said district for the term of forty weeks, to commence in September 1887, the exact time of opening the school to be designated by the board of education, for the sum of $1000; that school, in fact, was commenced September 19, 1887, and the appellant continued to teach until June 22, 1888, a period of forty weeks including institute week and legal holidays allowed by law; that he has been paid $975 and that there remains due him upon said contract $25.

The respondents answer and admit the contract of hiring, and that the school was taught by appellant as alleged, excepting during the holiday week, when a vacation occurred by the board's direction; that school was continued for a week after June 22d, and that appellant neglected to teach that week. This

statement reveals the only question in the case. The teacher claims that he is entitled to the holiday week vacation, as part of the forty weeks, and this the respondent denies.

It appears from the pleadings that it is customary in this district, and, in fact, it is in nearly all of the schools in the State, to take the holiday week vacation. It appears that soon after the appellant entered upon his work, he inquired, or at least was informed that the term would be divided as usual, so as to allow the vacation of one week. The appellant did not dissent. All other teachers continued to teach the school until June 29, 1888, in order to complete the term.

While it is true the written contract does not specify this vacation, I must hold that it was unnecessary, as the teacher must have known the custom which had been uniformly observed in the district.

The appeal is, therefore, overruled.

3791

In the matter of the appeal of Edwin J. Bennett v. school district no. 14, towns of Norfolk and Louisville, county of St Lawrence.

A person was employed to teach for a term of sixteen weeks to commence at a stated time. After teaching about four weeks, the schoolhouse was burned, and seven weeks elapsed before a new one was erected. In the meantime, the teacher held himself in readiness to teach, and offered to do so, if temporary accommodations should be provided. The trustee of the district made an effort to secure temporary accommodations, and claims he was unable to do so. The teacher finished out the remainder of the term, and claimed pay for sixteen weeks inclusive of seven weeks no school was taught because of the destruction of the school building. The trustee declined to pay for said seven weeks; *held,* that the loss of time being occasioned through no fault of the teacher, the teacher was entitled to pay the same as if school were taught.

Decided April 27, 1889

Charles M. Hall, attorney for respondent

Draper, *Superintendent*

This appeal is brought by the appellant, who was duly employed as a teacher in district no. 14, towns of Norfolk and Louisville, county of St Lawrence, on or before October 15, 1888, for a term of sixteen weeks, to commence October 15, 1888, at a weekly compensation of $7. It is alleged by the appellant, and admitted by the respondent, that on Friday night, November 16, 1888, the schoolhouse was burned, together with the school furniture and books, and that a new schoolhouse was constructed and ready for occupancy seven weeks thereafter. In the meantime, the appellant alleges that he offered to teach if the district would provide temporary accommodations which he very much desired, and the respondent alleges that he made an effort to do so, but was unable to secure a suitable place, and one that was satisfactory to the school commissioner and the district.

The appellant finished out a term of sixteen weeks, including the seven weeks that no school was held, and, at the expiration thereof, demanded pay pursuant to the terms of the contract. The amount has not been paid. The evidence of the respondent shows that an effort was made to induce the teacher to teach additional weeks in order to make up for the time lost which was occasioned by the fire, and to pay him an increased rate for so doing, but this offer the appellant declined.

The respondent rather insinuates that the appellant may have been the cause of the loss of the school building through his own carelessness, he having been the last person in attendance at the schoolhouse, but there is no sufficient evidence upon which I can find any such fact.

My decision is that the appeal is sustained, and that the district is liable to the teacher for the term of sixteen weeks at $7 per week, according to the terms of the written contract, and the trustee of said district is hereby ordered and directed to issue to the appellant his order for the amount so found due.

3854

In the matter of the charges against Andrew J. Mulligan, sole trustee of school district no. 4, of the town of Greece, county of Monroe.

It is against sound policy for a trustee to continue an unlicensed teacher in school, even though she teaches without compensation.

Decided January 18, 1890

Draper, *Superintendent*

Charges are made against the respondent to the effect that he has employed one Sarah E. Kinsella, as a teacher in the school under his charge, while she has no certificate authorizing her to teach.

Both by affidavit, as well as upon a personal appearance before the Superintendent, the respondent has admitted the charges to be substantially true. In extenuation he has urged that he did not pay the unlicensed teacher anything for her services and this seems to be true. The fact undoubtedly is that the trustee has been continuing Miss Kinsella in the school in the hope that she would in the meantime procure a teacher's certificate. In this course he is clearly in error. The district is credited with four teachers' quotas in the last annual apportionment. There are but three licensed teachers employed. It follows, therefore, that one quota is being drawn for this unlicensed teacher; moreover, it is manifestly against sound policy for a trustee to continue a person as a teacher in a school under his charge who is not duly licensed, even without compensation. Again, the patrons of the school are entitled, as a right, to have the school taught by a teacher certified by a public officer, and in the manner provided by statute, to be competent for that service. Upon the assurance of the trustee to the Superintendent at the time of the hearing that he would at once discontinue the services of Miss Kinsella and employ a duly certified teacher, the proceedings were dismissed.

3670

In the matter of the appeal of Richard H. Ryder v. William H. Warts, Christian Quaritious and William H. Taylor, members of the board of education of union free school district no. 3, town of Flatlands, county of Kings.

A board of education can not enter into a legal contract with persons to teach who do not possess certificates authorizing them to teach.

An agreement between a school commissioner and trustees touching the issuance of certificates to persons whom the trustees desire to employ, is void.

The certificate is to be based upon moral character and capability alone.

Decided February 28, 1888

Draper, *Superintendent*

The parties to this appeal are members of the board of education of union free school district no. 3, of the town of Flatlands, Kings county. The board consists of five members. The grounds of the appeal which are alleged, are that the board of education at a meeting held July 15, 1887, adopted a resolution to engage as teachers for the ensuing year, among others, Mrs Lizzie A. Ryder, Mrs Anna E. Bogart, and Miss Carrie N. Jansen, subject to their receiving their licenses to teach from the school commissioner of the commissioner district of which said school district formed a part; that previous to said meeting the school commissioner had agreed to license said persons as teachers, and send their respective certificates to the clerk of said board; that the respondents conspired with said commissioner and he was induced to withhold his certificates and refuse to license said persons as teachers.

The respondents admit the adoption of said resolution to employ said teachers and aver that the said persons so named as teachers in the resolution failed to pass the examination on two occasions, and that, consequently, other teachers were employed in their stead.

Although the appellant, who is not necessarily an aggrieved party asks as relief that the school commissioner be required to issue said licenses to Mrs Lizzie A. Ryder, Mrs Anna E. Bogart and Miss Carrie N. Jansen he has not made the said commissioner a party or caused him to be served with a copy of this appeal. The commissioner has therefore had no opportunity to be heard in the matter.

The board of education could not enter into a legal contract with persons to teach who were not duly licensed and the possessors of certificates authorizing them to teach. It is not alleged that the persons named for teachers in the resolutions adopted by the board July 15, 1887, were qualified as aforesaid, or that subsequent thereto they secured the necessary certificates.

The action of a commissioner in granting licenses can not be made dependent upon the wishes of a school district, and there is no proof that the school commissioner was so influenced. The aim of the examinations by school commissioners would be lost by any such arrangement, and such an unjust, unfair and illegal agreement would not be upheld by the Department. If it is claimed that the ladies mentioned attained the standard required in the commissioner's exam-

ination for licenses, and the school commissioner collusively refused to grant them, an appeal should have been taken by the aggrieved persons themselves from the action of the commissioner in refusing to grant certificates, and service of the paper should have been made upon that officer.

The appeal is dismissed.

4744

In the matter of the appeal of Julia Moynihan v. George Phelps as trustee of school district no. 17, Darien, Genesee county.

Where a teacher, under an alleged contract of employment to teach the school in a district, was not permitted by the trustee to enter upon her duties of teacher; *held,* that the alleged contract not having been fulfilled, the claim of the teacher would be for damages upon a breach of contract; that it is not the policy of the law to require a State Superintendent of Public Instruction to measure damages for a breach of contract when the extent thereof is altogether indefinite and uncertain. The remedy of the teacher is by an action in the courts.

Decided February 17, 1899

Tyrrell & Ballard, attorneys for appellant
Watson & Watson, attorneys for respondent

Skinner, *Superintendent*

This is an appeal from the action of George Phelps as trustee of school district 17, Darien, Genesee county, in refusing to permit the appellant, Julia Moynihan, to enter upon the performance or to perform, on her part, a certain contract made by her to teach the school in said district for the term of forty consecutive weeks, commencing September 6, 1898.

The appellant alleges that on July 28, 1898, she entered into a contract, a copy of which is annexed to her appeal, with James J. McManis as sole trustee of school district 17, Darien, Genesee county, to teach the public school in such district for the term of forty consecutive weeks, commencing September 6, 1898, at a weekly compensation of $11.25, payable at the end of each thirty days during the term of such employment; that Trustee McManis contracted to employ the appellant as teacher for said period, at the aforesaid rate of compensation, payable at the times above stated, and reserving the right to said trustee to provide for a vacation or vacations of not more than one week in the aggregate during such term of employment; that on September 6, 1898, the appellant went to the residence of George Phelps, the then acting trustee of such district, and the successor in office of Trustee McManis, and asked Phelps for the key to the schoolhouse of the district, informing him that she was ready to commence teaching the school therein, in accordance with the terms of said contract; that said Phelps refused to deliver to the appellant such key, and informed her that her services as teacher in the schools in the district, were not needed, and refused to allow her to commence to teach such school, according to the terms of such contract; that she has ever since been denied admission by said Phelps into such schoolhouse, and by

reason thereof she has been unable to teach in the school in said district, or to perform her part of said contract.

Annexed to the appeal herein is an affidavit of James J. McManis, in which he states that he was the trustee of said district for the school year 1897–98, and as such trustee, entered into the contract with the appellant, as stated in her appeal; that a copy of the contract is contained in the school register of the district, and that said Phelps, who was elected trustee of said district at the annual school meeting held therein on the first Tuesday of August 1898, was informed of such contract after his election as trustee, and that before the election of Phelps, said contract was read at such annual school meeting.

The respondent Phelps has answered the appeal herein, and states among other things, that the appellant taught the school in said district during the school year of 1897–98, under a contract made by her with said McManis, the then acting trustee of the district, and that shortly prior to the expiration of his term of office as trustee, said McManis reengaged the appellant to teach the school for 40 consecutive weeks, commencing September 6, 1898, at a weekly compensation of $11.25; that shortly after a special meeting of the district, held September 2, 1898, at which a resolution was adopted disapproving the said contract made with the appellant to teach the school in the school year of 1898–99, he left at the home of the appellant a copy of the resolution adopted at said meeting, with notice to her that she would not be permitted to teach under the said alleged contract.

The pleadings filed herein, in addition to the appeal and answer, are, a reply, rejoinder, rebutter and surrebutter and, with the papers and affidavits annexed, are exceedingly voluminous. Only a small portion of their contents are relevant to the contract of the appellant and Trustee McManis of July 28, 1898.

It is admitted that the contract, as alleged by the appellant, was made, and that the appellant herein was not permitted by Trustee Phelps, either to enter upon her employment to teach or to teach the school in district 17, Darien, Genesee county, under said contract made by her and McManis, as trustee of the district, on July 26, 1898.

I am of the opinion, however, that the appeal herein must be dismissed. The appellant herein, never having been permitted to enter upon the performance, on her part, of the contract, or to fulfil the contract, and such contract never having been fulfilled by Trustee Phelps, the claim of the appellant would be for damages for the breach of the contract.

This Department has uniformly held that it is not the policy of the law to require the State Department of Public Instruction to measure the damages for a breach of contract when the extent thereof is altogether indefinite and uncertain. The remedy is to be sought by an action in the court. (See decision 3768 made by Superintendent Draper, March 23, 1889, in Tillson v. McNeeley, trustee; and decision 3797 by Superintendent Draper, July 29, 1889, in Hall v. Booth and others; and decision 4784 made by me December 30, 1898, in Fitts v. Sweeny, trustee.)

The appeal herein is dismissed.

3716

In the matter of the appeal of Henry F. Albro v. Daniel L. DeMott, trustee of school district no. 14, town of Hempstead, Queens county.

When a person who claims to have been employed as a teacher, has never entered upon employment, it will be necessary for him to show clearly and distinctly and by a preponderance of proof that he was actually employed and accepted such employment.

The appeal being in the nature of an action for damages for a breach of contract might more properly have been brought in the courts.

Decided October 4, 1888

Draper, *Superintendent*

This is an appeal by Mr Albro against the action of the trustee of school district no. 14, of the town of Hempstead, Queens county, in refusing to pay him wages as a teacher in said district. He claims that he was employed by the trustee to teach a branch school in the district, to commence in January 1888.

The trustee denies the employment, although he admits that there were numerous conversations between himself and the appellant relative to employment, and that he also conversed with two or three other parties touching the employment of the appellant. It seems that a new school building had recently been erected and was nearing completion, but that it was not furnished, and that no funds had been provided for procuring furniture. There seems to have been talk about furnishing the building by voluntary subscription, payment of which was long delayed. The trustee admits that he contemplated employing the appellant, but had no intention of doing so until the building should be in readiness for occupancy, and denies that he did do so. The appellant never entered upon employment, if there was any, although he maintains that he held himself in readiness to do so, and made application from time to time for permission to open school. The only evidence beyond that of the immediate parties to the controversy is by two newspaper reporters, who swear that they ferreted out the fact that Albro had been employed, and published it in their newspapers, and of one other person, who, in conversation with the trustee, says he admitted the employment.

The case has been referred to the school commissioner to take the testimony of the parties and witnesses, and I have read the testimony taken with care. It seems to me that the testimony, outside of that given by the appellant and the respondent, respectively, is not entitled to much weight. In view of the fact that the appellant never entered upon employment, it is necessary for him to show that he was actually employed and accepted such employment, clearly and distinctly, and by such a preponderance of proof as would leave no doubt as to what the fact was. He does not do this to my satisfaction. Furthermore, it may be said that, inasmuch as he never entered upon the employment, his appeal is in the nature of an action for damages for the breach of a contract. Such an action might more properly have been brought in the courts than brought here in the nature of an appeal. But regardless of that fact, there is no testimony whatever in the case upon which I could intelligently measure the damages which the appellant may have suffered.

I am, therefore, compelled to dismiss the appeal. It is proper for me to add, however, that I do so without prejudice to the right of the appellant to bring an action in the courts of his locality.

4724

In the matter of the appeal of Henry J. Fitts v. Amos Severy as trustee of school district no. 7, Dryden, Tompkins county.

A teacher who has taught a public school for two years and who claims he was subsequently reemployed for another school year, but who did not enter upon the duties of teacher under the alleged reemployment, not being allowed to perform such alleged contract by the trustee then in office, the alleged contract never having been fulfilled, the teacher's claim would be for damages for a breach of the contract. The appeal of such teacher can not be entertained, as his damages, if any, are unliquidated, and it is not for the State Superintendent of Public Instruction to measure them. The remedy of the teacher is to be sought by an action in the courts.

Decided December 30, 1898

Skinner, *Superintendent*

This is an appeal from the action and decision of Amos Severy as trustee of school district 7, Dryden, Tompkins county, in refusing to permit the appellant, Fitts, to perform a certain contract made by him to teach the school in said district for the period of forty weeks to commence September 5, 1898.

The appellant alleges as the grounds for bringing his appeal that the action of said trustee was unlawful; that there was no grounds authorizing or justifying said action; that the appellant, a duly licensed teacher, had entered into a written contract of employment with G. W. Gibson, a duly elected trustee of said district, whose term expired the 2d day of August 1898, such contract having been made June 30, 1898, and which contract was in force at the time of the refusal of said trustee Severy to allow the appellant to perform such service.

Trustee Severy has answered the appeal, and to such answer appellant has replied.

It appears that during the school years 1896–97 and 1897–98, one G. W. Gibson was the trustee of said district 7, and during such years the appellant herein taught the school in such district; that annexed to the appeal herein is a contract alleged to have been made June 30, 1898, between the appellant and said Gibson as such trustee, by which the appellant was to teach the school therein for the term of forty consecutive weeks, commencing September 5, 1898, at a weekly compensation of $7, payable at the end of each thirty days during the term of such employment; that Gibson contracted to employ the appellant as teacher for said period at such rate of compensation, payable at the times stated therein, reserving the right to provide for a vacation or vacations of not more than three weeks in the aggregate during such term; that there is also annexed to the appeal the affidavit of Gibson in which he states that he, as trustee of the

district, entered into the contract with the appellant as annexed to the appeal, and that at the annual meeting held August 2, 1898, in said district, said Severy having been elected trustee of the district, he notified Severy, in writing, of such employment of the appellant herein as teacher.

The respondent, Severy, alleges in his answer that the patrons of the school were dissatisfied with the appellant as a teacher and desired that the respondent employ some other person than the appellant to teach the school in the district.

It is admitted that the appellant herein was not allowed to teach, nor did he enter upon the duties of a teacher in the school in district 7, Dryden, Tompkins county, under the contract alleged to have been made by him and Mr Gibson, as trustee of said district for the school year of 1897–98, June 30, 1898.

The appeal herein must be dismissed.

The alleged contract not having been fulfilled, the claim of the appellant would be for damages upon a breach of contract. This Department has held that it is not the policy of the law to require the State Superintendent of Public Instruction to measure damages for a breach of contract when the extent thereof is altogether indefinite and uncertain. The remedy is to be sought by an action in court. (See decision 3768 made by Superintendent Draper, March 23, 1889, in Tillson v. McNeeley, trustee; and decision 3796, also made by Superintendent Draper, July 29, 1889, in the appeal of Hall v. Booth and others.)

The appeal herein is dismissed.

4294

In the matter of the appeal of Analusia Barnard v. the board of education of union free school district no. 3, town of Mount Pleasant, Westchester county.

Boards of education of union free school districts, under the school law of the State in force prior to June 30, 1894, have power to remove teachers employed by them for neglect of duty for immoral conduct; but such teachers should have notice of the charges preferred against them and an opportunity to be heard thereon, especially when such charges affect the moral character or responsibility of the teacher. In prescribing the rules and regulations concerning the order and discipline of the schools under their charge, said boards must act as a board, and copies of the rules and regulations should be given to the teachers, and individual members of the board have no authority to make rules or to give orders to teachers.

The method of imparting instruction is given, under the school law, to teachers, and a visiting committee of a board in visiting a school has no authority to interfere with the methods of instruction pursued by the teachers, nor to give orders to the teacher nor to interfere in the recitations or assume to conduct such recitations, nor to conduct examinations on their own account, without advising with the teacher. No members of such visiting committee of the board should reprimand or criticise the teacher in the presence of the school or any pupil attending the same, as such a course will be

in the highest degree detrimental to the best educational interests of the same. Where a teacher is dismissed by a board during the term of employment without an opportunity to be heard and without sufficient cause, such teacher is entitled to receive pay for the balance of his or her term of employment, and such dismissal is unlawful, invalid and void.

Decided November 20, 1894

James B. Lockwood, attorney for appellant
L. T. Yale, attorney for respondents

Crooker, *Superintendent*

The appellant herein appeals from the action of the respondents herein, taken on December 29, 1893, in dismissing her from her position as a teacher in the union free school in district no. 3, town of Mount Pleasant, Westchester county, without sufficient cause and before the expiration of her term of employment. An answer has been filed to the appeal, a reply to the answer, a rejoinder to the reply; and also additional proofs on the part of the appellant. From the papers filed it appears:

That the appellant, from an early age and until the summer of 1887, attended the public schools in the city of New York, when she graduated at school No. 57 in said city; that in September 1887, she entered the normal college in the city of New York, where she remained until the close of school in the summer of 1890; that on account of the removal of her family to Yonkers she entered the senior class of the Yonkers High School in September 1890, and graduated from said high school in June 1891; that from September 1891, until May 1892, she taught private pupils in the city of Yonkers. That during the school year 1892, beginning in the fall, she taught a graded school of third year pupils in Hackensack, New Jersey, to the approval and satisfaction of the principal and board of trustees of said school, and resigned such situation at the end of the school year on account of the climate at Hackensack; that upon her examination by a board of examiners at Hackensack she received the following credits in the several subjects in which she was examined: Orthography, 93; reading, 84; writing, 95; geography, 87; practical arithmetic, 81; English grammar, 75; arrangement of examination papers, 95; and theory and practice of teaching, 95.

That in August 1893, the appellant applied through a teachers' agency in New York City for employment as a teacher in the schools of this State, and having been put in communication with the respondent herein, she forwarded to the respondent her testimonials as a teacher, and subsequently had, at said teachers' agency, an interview with Mr Law and Mrs Sherwood, two of the respondents; that subsequently she received a letter, dated at Pocantico Hills, August 21, 1893, addressed to her, signed by Mr Law, by which she was informed that the board, at a meeting held on the evening of said date, had decided to engage the appellant as teacher in the union free school at said place for the coming year from September 1893, to and including June 1894, at a salary of $500; that said letter stated that the trustees would want the school to open the

first week in September; that the appellant accepted the terms of employment as stated in the said letter of Mr Law, and commenced teaching the school in the said district under the said contract on September 5, 1893; that during the time the appellant so taught in said school she received her pay for said services, at $50 per month, by orders signed by the clerk of said board of education, to wit, for the months of September, October, November and December 1893; that said school is an ordinary country school, consisting of pupils of the average age of about 11 years, and the average attendance was about forty in number; that the appellant had communicated to her verbally by one or more of the board of education of said district some of the rules of said board.

She was not furnished with any copy of such rules prior to the month of November 1893; that the only members of said board who visited said school while the appellant taught therein were Mrs Rufus T. Weeks and Mrs Elizabeth Sherwood; that said two ladies, prior to November 1893, visited said school at rare intervals, but after said first of November their visits began to increase from once in a week to three times a week, such visits increasing in length from one hour to an entire school day; that sometimes Mrs Weeks visited the school alone, and at other times she was accompanied by Mrs Sherwood; that at the first visits nothing unusual took place, but after the said 1st of November Mrs Weeks assumed to exercise supervisory powers over the methods of teaching by appellant, and on different occasions conducted recitations of various classes; that on different occasions Mrs Weeks criticised the methods of appellant in the presence of the school and assumed to direct the work of the appellant in the presence of the pupils; that on one occasion she took a book from the hands of the appellant with which the appellant was conducting a recitation and proceeded with the same to hear the recitation; that Mrs Weeks also interfered with the arrangement of the appellant as to the seating of the pupils, and directed appellant not to reprimand a pupil in the presence of another; that in the month of December Mrs Weeks took possession of the school and subjected the pupils to a two days' examination, refusing to allow the appellant to have any control over said examination, and that appellant had never seen the examination papers which were given to the pupils or the answers thereto; that on December 22, 1893, said school was closed for the usual holiday vacation; that on said day, in a conversation had by appellant, at the schoolhouse, with the clerk of the board or district, said clerk referred to some dissatisfaction with the conduct of said school by the appellant, and suggested to the appellant that she tender her resignation, which appellant declined to do; that the appellant, after the closing of said school on December 22, 1893, returned to her home in Yonkers to remain until the opening of the said school in January 1894; that on December 30, 1893, the appellant received by mail, at Yonkers, a letter dated at Tarrytown, December 30, 1893, signed by one William H. Crooks, district clerk, containing an extract from the proceedings of a special meeting of the board of education of union free school district no. 3, town of Mount Pleasant, held on Friday evening, December 29, 1893, reciting that, WHEREAS, The appellant, from the observation of the board

and the result of recent examination of the school, was a failure as a teacher; that, WHEREAS, Appellant in many respects and instances neglected her duty as a teacher and violated express instructions of the board; that, WHEREAS, Appellant's deficiencies in moral responsibility are such that it is impossible for her to exert a good influence over the children; and, WHEREAS, The duty of the board to the district and to the children will not allow us to continue them longer under the care of one who is of no benefit to them; therefore, be it *Resolved*, That Miss Analusia Barnard is hereby dismissed from the employ of said board, and that the clerk be instructed to mail a copy of the resolutions by special delivery to her; that after the receipt of said letter the appellant notified the respondents that she was ready to continue her services as teacher in said school, and tendered her services to said board under the contract entered into by respondent in that regard for the balance of the school year; but the respondents refused to allow the appellant to reopen said school in January 1894, or to continue to teach in said school, but, on the contrary, entered into a contract with another person as teacher, and who taught said school for the balance of said school year.

It also appears that Mrs Weeks and Mrs Sherwood were appointed by the respondents as a committee to visit the school in said district, and as such committee made a report in writing to the board, and that upon such report the board acted in the dismissal of the appellant as teacher; that no charges were preferred against the appellant prior to her dismissal, nor was any copy of any charges served upon her, and no opportunity was offered her of being heard before said board on the subject of her dismissal, or of answering any charges against her; that the said report of the visiting committee was not communicated to her, and the first knowledge she had of such report was the copy thereof attached to the answer of the respondent to the appeal herein, a copy of which answer was served upon her on February 2, 1894. The appeal herein has annexed thereto certain papers and affidavits in support thereof; to said appeal an answer has been filed to which are annexed certain affidavits with a copy of the report of the visiting committee to the board of education in support of such answer. A reply to said answer has also been filed and a rejoinder to such reply and also certain other proofs on the part of the appellant. The papers are quite voluminous and have received careful examination and consideration.

Under subdivision 8 of section 13, title 9 of the Consolidated School law of 1864 and the amendments thereto, as the same was in force in 1893 and up to June 30, 1894, boards of education of union free school districts had power to remove teachers at any time for neglect of duty or for immoral conduct. Subdivision 9 of section 47, title 7 of said act of 1864, as amended, provided "nor shall any teacher be dismissed in the course of a term of employment, except for reasons which, if appealed to the Superintendent of Public Instruction, shall be held to be sufficient cause for removal."

The courts of this State have held, and this Department has uniformly held, that the trustees of school districts can not dismiss a teacher during a term of employment without cause and against his or her consent.

In a decision by Superintendent Van Dyck in 1858 in an appeal by a teacher from the action of the trustees of a school district in dismissing such teacher during a term of employment, he says: "The decision as to the propriety of the act and the power to perform it rest with the trustees. For an abuse of their discretion or an unwarranted exercise of their authority, they are, of course, responsible. On the complaint of the party sustaining what he considers a grievance or wrong, the issue becomes one of fact and it devolves upon the trustees to show by evidence that the teacher lacked the character, the ability or the will essential to a proper discharge of his duties, and that he failed thus to fulfil the obviously implied conditions of his contract. The mere fact of dissatisfaction on their part, or that of the inhabitants, is not sufficient to justify the discharge of a teacher employed for a definite period." I concur fully in the views expressed by Superintendent Van Dyck.

The grounds alleged by the respondent for the dismissal of the appellant as teacher are substantially as follows: (1) failure of the appellant as teacher; (2) neglect of duty and violation of instructions of the board; (3) deficiency in moral responsibility.

Admitting, for the sake of argument only, that the respondent had the jurisdiction and authority to act without any notice whatever to the appellant of the charges preferred against her or any opportunity for her to be heard before such board and especially relative to the charge of "deficiency in moral responsibility," has the respondent *shown by evidence* that the appellant was a failure as teacher, or that she had neglected her duty as such teacher, or was guilty of a violation of the instructions of the board, or was deficient in moral responsibility, or of all or either? In the reply of the appellant to the answer of respondent to her appeal herein, she has met specifically every one of the charges made against her and controverts the statements in that regard in said answer; gives a full statement of the facts of matters in which in the affidavits on the part of the respondent there is a suppression of the full facts. Take the following affidavits in said answer, namely: One Ferguson swears on information, of course, from his son, that the appellant on one occasion wiped a filthy sponge over the face of his son, to which charge the appellant states that the boy had been detected in a falsehood, and by way of punishment she wiped his mouth with a *moist*, but not filthy, sponge. One Egan swears on information, of course, from his children, that the appellant threw his boy on the floor and struck him on the head with a ruler and used unbecoming language toward all his children, and that he was compelled to take his children from school, to which charge the appellant swears that one of the children of Egan caused a disturbance in the school, and that she suspended the child and reported the matter to the board and the board requested Egan to take the children from school and thereupon he removed all of his children from school. Delany, one of the board, swears that his children did not do well in the school, to which charge the appellant replies that their attendance was very irregular. The appellant is charged with being late in coming to the school, to which appel-

lant answers that it was not until about October first that she was notified that she was expected to be at the schoolhouse at 8.30 in the morning, and she shows that after such notification, by her own affidavit and that of Mrs Ely, her landlady, that she left at an earlier hour. Mrs Weeks calls attention to *one* occasion when she visited the school and the appellant did not arrive until a few minutes before 9, which statement the appellant admits; but states that on that day she was suffering with a sprained foot; the appellant is charged with a failure to furnish the board with an inventory of the school property, which charge the appellant denies; and in my opinion such duty was not incumbent upon her under her contract to teach the school, but was a duty of the board. The appellant is charged with a failure to give sewing lessons, to which she answers that under the rules of the board she was allowed to use her discretion in that respect. The appellant is charged with dismissing the school on the last half day of the school term, as sustaining the allegation against her disregard of her duties and the instructions of the board, to which the appellant answers, that it being the last day of the term the ordinary program of the school had been omitted to enable the school to close with appropriate exercises, the preparations for which had been going on for some time without any attempt at concealment. To the charge that appellant was deficient in moral responsibility, but one specification is made, and that is contained in the affidavit of Mrs Weeks relating to a sewing lesson. It appears that on a visit to the school by the visiting committee the appellant was asked if she was *ready* to give a sewing lesson, and the appellant, naturally assuming that the inquiry was as to whether she was then prepared to devote her time and attention to the exercise, replied " yes," and because it transpired that one pupil was without a thimble and another without a needle, etc., the appellant is charged and convicted, without a hearing, as being deficient in moral responsibility, or, in other words, as not being of good moral character.

The appellant produces an affidavit of Elias Bryan, who, for twelve years, was a trustee of the district, and of other persons, patrons of the school, who testify to the competency of the appellant as a teacher and her success in the school.

Without going further into this part of the appeal, sufficient answer to the charges made against the appellant has been shown to warrant the assumption that, had the appellant been informed of the charges against her and been allowed an opportunity to be heard in relation thereto before said board, that said board, or at least a majority thereof, acting fairly, impartially and without prejudice or influence, would have dismissed the charges, and not the teacher.

The ex parte action of the respondent in the dismissal of the appellant as teacher is not approved. It is not claimed that the appellant was a fully equipped teacher, as her age and limited experience do not warrant such an assumption; but it is clearly established in proof herein that she was a young lady of good education, refinement and culture, and that had she been permitted to pursue her methods of instruction in the school in said district without interference the

results would have been beneficial to the pupils attending the school. Where charges are preferred against a teacher, and affecting especially his or her moral character or responsibility, it is the duty of the trustees or boards of education to give the teacher notice thereof and an opportunity to be heard thereon. The principles of equity, justice and of fairness in dealings between employers and employees require this and forbid that anyone should be condemned without a hearing, and summarily discharged from employment before the expiration of the term of employment, and branded as incompetent, and deficient in moral responsibility.

The respondent herein has failed to show that the appellant failed as a teacher in the school in said school district, or that she neglected her duty as such teacher and violated the express instructions of said respondent, or that she is deficient in moral responsibility; and has failed to show sufficient cause for the dismissal of the appellant as such teacher.

Many of the acts and proceedings of the members of the visiting committee in the school in said district, taught by the appellant, as established in the proofs herein, are disapproved as being wholly unauthorized under the school law and contrary to the uniform rulings of this Department in relation to the power and duty of teachers and the methods adopted by them of imparting instruction to the scholars in the schools taught by them. Boards of education of union free school districts are bodies corporate, and must act as a board in making rules and regulations relative to the discipline and government of the schools under their charge; in prescribing the studies to be taught; in grading and classifying the schools and regulating the admission of pupils therein, and in the general management and superintendence of said schools. The rules and regulations of the board relative to the matters upon which, under the school law, they are authorized to act should be adopted by the board at sessions of the board, and copies of the rules and regulations should be given to the teachers. Individual members of the board have no authority to make rules, nor to give orders to teachers. Under the school law, the method of imparting instruction belongs exclusively to the teachers. The teachers assign seats to the scholars, regulate the order in which recitations of classes, pursuing the different studies taught in the school, are to be held, and conduct such recitations. A visiting committee of a board, visiting a school, has no authority to interfere with the methods of instruction pursued by the teachers, nor to give orders to the teacher, nor to interfere in the recitations or assume to conduct such recitations, nor to conduct examinations on their own account, without advising with the teachers, nor to interfere with the seating of the pupils. Such committee should visit the school at such times as it shall deem necessary and proper, and watch carefully the methods pursued by the teacher, the government and discipline of the school, whether or not the teacher maintains good order and discipline, etc., etc., and report the facts relative to such matters to the board. If, in the opinion of the board, the condition of the school is such that, in its judgment, is not for the best educational interests of the school, then it should call the attention of the teachers

thereto. No members of a visiting committee or the board should criticize or reprimand a teacher in the presence of the school or any pupil attending the same, as such a course will be in the highest degree detrimental to the best educational interests of the same.

In a rejoinder of the respondent, filed in this Department on April 4, 1894, to the reply of the appellant, it is alleged, upon information and belief, that at the time the appellant entered into the contract with said board of education and at the time appellant entered upon the alleged performance of her duties, and for several weeks thereafter, the appellant was without due license or certificate of any grade qualifying and enabling her to lawfully teach any of the public schools of the State. The foregoing allegations in said rejoinder are not in answer to anything contained in any of the pleadings on the part of the appellant, but are set up by respondent as grounds for sustaining its action in dismissing the appellant as teacher "if none of the several other reasons set forth in this proceeding were valid and sufficient grounds for the dismissal of the appeal," as stated in the brief of the attorney of respondent.

From the proofs herein, it appears that prior to September 1893, the appellant had never taught a common school in this State, and was ignorant of the provisions of the school law of this State requiring teachers employed in said schools to have a diploma, certificate or license issued by competent authority, in order to receive for wages any of the public money raised for payment of such wages of teachers, or to have a claim against the district in which such teachers were employed to teach, for their wages as such teacher. That after appellant had commenced to teach she was informed by the then school commissioner of the commissioner district in which such school is situate, that it was necessary that she have a certificate; that at the time of such examinations before said commissioner the appellant was unable, by reason of her illness, to attend such examination; that subsequently the appellant was examined by the school commissioner, and on December 2, 1893, received from him a third grade certificate. It clearly appears that with the exception of a few weeks after the appellant commenced to teach the school, she was in possession of a license or certificate as a qualified teacher under the school law, and was such qualified teacher at the time of her dismissal by the respondent on December 29, 1893. A contract of employment was made in August 1893, between the respondent and appellant for teaching the school in said district to commence early in September 1893, for the school year to consist of ten months, at a salary of $500, payable in ten equal payments of $50 at the end of each month; but whether under said contract the respondents as individuals, or the school district of which they constitute the board of education, were liable it is not necessary in this appeal to decide. It is clear, however, that the appellant, having subsequently obtained a license and certificate which made her a qualified teacher under the school law, and being continued by the respondent in the school, the contract made in August 1893, became a contract between the appellant and the district. It appears that the respondent, at the end of each month, commencing in September 1893, paid

the appellant for her services as such teacher, by orders upon the fund of teachers' wages in the hands of the treasurer of the district, and unless the appellant was a qualified teacher when such payments were made, then each member of said board of education was guilty of a misdemeanor under the school law.

Each member of said board of education had knowledge that the appellant was not licensed when they employed her. It is a well-settled principle of law that no person will be permitted to benefit by his wrongful acts. The position taken by the respondent in the rejoinder is, "we dismiss the appellant for certain specified reasons, but if we did wrong, in any event, we had no right to employ her because she had no license or certificate entitling her to teach." This contention is not tenable. The counsel for the respondent contends in his brief that there was no contract made with appellant except by letter from the president of the board of education. The proofs show that said president addressed a letter, under date of August 21, 1893, to the appellant, stating that the board of trustees had decided to engage her as teacher in the school in the district for the coming year, from September 1893, to and including June 1894, at a salary of $500, and wished to have the school open on the first week in September. This letter contained a written offer of employment on the part of the board of education, and the appellant unconditionally accepted the offer and entered upon the employment, and hence such offer and its acceptance constituted a binding contract under the school law in force at the time of the aforesaid contract, and the board of education was required to make and deliver to the appellant, or cause to be made and delivered to her, a memorandum in writing, signed by the members of the board, in which the details of the agreement between the parties should be clearly stated and definitely set forth; but the board failed to comply with such provision of law.

The counsel for the respondent also contends that as the appellant was an infant she was disqualified by reason of her infancy to make a contract. This contention is not tenable, for the courts of this State have held that the contracts of infants are *not void,* but *voidable at their election.*

I find and decide, That in 1893 a contract was entered into between the respondent herein, the board of education of union free school district no. 3, town of Mount Pleasant, Westchester county, and the appellant herein, Analusia Barnard, employing the said appellant as a teacher in said school for the term of ten months, commencing in September 1893, and including June 1894, at a salary of $500, payable monthly, to wit, $50 at the end of each calendar month of said employment. The said appellant has been paid for services under said employment for the months of September, October, November and December 1893. That on December 29, 1893, while said appellant was a qualified teacher under the school law then in force, and in and during the course of a term of employment as such teacher in said school district, that said board of education, the respondent herein, dismissed and discharged her as such teacher in said school district. That the reasons alleged by said board of education for the dismissal and discharge of the said appellant as such teacher during the course of a

term of employment, are not held by me to be sufficient cause for such dismissal and discharge, and the action of said board of education in such dismissal and discharge of the appellant without sufficient cause, was unlawful, invalid and void. That the appellant is entitled to be paid by, and to have and receive from, said school district the sum of $300, with interest upon the sum of $50 from the end of each of the months of January, February, March, April, May and June 1894, until paid by said district, this Department having uniformly held that where a teacher is not paid her wages as often as at the end of each calendar month, such teacher is entitled to be paid interest upon such monthly payments.

The appeal herein is sustained.

It is ordered, That the board of education of union free school district no. 3, town of Mount Pleasant, Westchester county, without unnecessary delay, pay to the appellant, Analusia Barnard, out of any funds belonging to said school district, applicable to the payment of teachers' wages, said sum of $300, with interest upon each of said monthly payments of $50 from the respective dates when each of said monthly payments became due to the date of the payment thereof.

It is further ordered, That should there not be any sum of money belonging to said school district applicable to the payment of teachers' wages, or not a sufficient sum of money of said fund to pay to the said Analusia Barnard said sum of $300, with interest, as aforesaid, the said board of education is hereby ordered, without unnecessary delay, to raise by tax upon the real and personal property within said school district, liable to assessment and taxation for school purposes, a sum sufficient to pay to said Analusia Barnard said sum of $300, with interest as aforesaid.

3493

In a contract leasing a school building from the trustees of St Raphael's church, by the board of education of a union free school district, the provision that three teachers from the class commonly called "sisters" shall be kept employed, is contrary to the spirit of the school law and against public policy.

The local school authorities have no right to limit the class of persons, who have reached the required standing of learning and ability to teach, from which the teachers of the school may be selected.

Decided April 1, 1886

Morrison, *Acting Superintendent*

This is a proceeding by Leander Colt, appealing from the action of the board of education of union free school district no. 7, in the village of Suspension Bridge, town of Niagara, county of Niagara, in making a lease of St Raphael's Catholic school building, situated in said village, for the term of one year from November 10, 1885, and the making of covenants and agreements in said instrument of lease, by the said board of education, "with the trustees of the Roman Catholic school, wherein said board of education undertakes, in substance, to support a Roman Catholic school out of the school moneys appropriated to such

free school district no. 7, or realized from school taxes levied upon the inhabitants of said district." (Several grounds of appeal are stated.)

It is unnecessary to review these grounds of appeal, further than to examine and ascertain the effect of the lease itself. It can not, of course, be assumed that the board of education has no power to lease the premises belonging to a sectarian body for school purposes, for it must be presumed that when these premises come into the possession of the school authorities, the laws of the State, prohibiting sectarian instruction, will be observed. But this agreement, entered into by Felix Nassory and his associate trustees of the St Raphael's school, together with the Right Reverend Bishop Ryan of the city of Buffalo, parties of the first part, and the board of education of union free school district no. 7, party of the second part, is open to this fatal objection: namely, the board of education agrees in said instrument, during the term of the lease, to cause one of the schools of the district to be kept in operation in said schoolhouse building, and to keep employed as teachers therein for such school, three competent teachers "of the class commonly called 'sisters,' provided such teachers shall make application in the due form to be so employed, and shall be found to be duly qualified according to law to act in the capacity of teachers, and should any of these teachers be withdrawn from the school, others may be employed in their stead 'of the same class,' provided, 'three such teachers of the class called sisters be so employed during the term of the lease.'" This provision is contrary to the spirit of the school law and against public policy. The board of education, doubtless, has a right to employ as teacher, any person of the requisite age and possessed of the qualifications recognized by the statute. But the local school authorities have no right to limit the class of persons, who have reached the required standing of learning and ability to teach, from whom the teachers for the school may be selected. As this provision seems to be the controlling condition of the lease, the action of the board of education must be set aside.

4488

In the matter of the appeal of Eugene G. Putnam v. the board of trustees of union free school district no. 6, Port Richmond, Richmond county.

Under the school laws and rules and regulations prescribed by this Department governing uniform examinations of persons proposing to teach common schools and for commissioners' certificates, a first grade certificate received by any such person so examined legally, entitles the holder thereof to teach in any school commissioner district in the State; and such right can only be defeated by the refusal of the school commissioner, having a valid reason, to indorse such certificate. The first grade certificate granted to appellant in March 1896 entitled him to teach in Richmond county at any time after the date thereof during the term of time stated therein, subject to such right being defeated by the refusal of the school commissioner of such county, for a valid reason, to indorse the same. The contract entered into between the appellant and the then trustees of the district was a legal contract binding upon the parties

thereto and upon the succeeding trustees of the district and upon the district. It was the duty of the trustees of the district, for the school year of 1896–97 to recognize the legality of the contract and to have permitted the appellant to teach in the school of the district when the school therein was opened on September 8, 1896, the appellant then holding such first grade certificate, indorsed by the school commissioner for Richmond county.

Decided October 14, 1896

Thomas W. Fitzgerald, attorney for appellant

Skinner, *Superintendent*

The appellant in the above-entitled matter appeals from the action of the respondents therein in refusing to recognize the appellant as qualified to teach in the school in union free school district no. 6, Port Richmond, Richmond county, and refusing to permit the appellant to perform, on his part, a certain contract entered into on June 8, 1896, between the then trustees of said district and the appellant, in and by which contract the appellant was employed to teach in said district for the school year of 1896–97 at the annual compensation of $1600, payable in ten monthly instalments of $160 on the first day of each month, the first instalment payable on the 1st of October 1896.

The respondents have answered said appeal.

The following facts are established by the papers filed herein:

That in the month of March 1896, the appellant herein received a first grade certificate to teach in the public schools of this State, pursuant to the provisions of the school laws and the rules and regulations prescribed by the State Superintendent of Public Instruction, pursuant to the authority given him by said school laws for the examination of persons proposing to teach in said public schools, not possessing said Superintendent's certificate of qualification, or a diploma of a State normal school, and governing uniform examinations for certificates of school commissioners, which certificate covered a period at least as long as the contract of service hereinafter stated; that during the school year of 1895–96, prior to July 8, 1896, Charles H. Ingalls, Charles H. Vail and George H. Janneman were the trustees or members of the board of education of said school district; that Messrs Vail and Janneman, as such trustees, under date of April 6, 1896, sent to the appellant herein a letter, signed by them as such trustees, stating that " we having considered your (appellant's) letters of recommendation, and having from other sources satisfied ourselves concerning your (appellant's) qualifications to fill the position of principal and teacher of our school, agree to employ you at a salary of $1600 per year, for the coming school year, commencing about September 1, 1896," and that they would ratify this action at a subsequent meeting of the board; that the foregoing negotiations relative to the employment of the appellant as such teacher were opposed by Mr Ingalls, the third member of said board; that on June 8, 1896, a contract was entered into between the said Vail and Janneman, as such trustees, and the appellant herein, of which the following is a copy:

Memorandum of hiring required by the Consolidated School Law

This is to certify that we have engaged Mr E. G. Putnam (a duly licensed teacher), whose certificate does not expire prior to July 1, 1897, to teach in the union free school, district no. 6, town of Northfield, county of Richmond, for the term of (1) year, commencing on this date, at a yearly compensation of $1600, payable in ten monthly instalments of $160, payable on the first day of each month, the first instalment payable on the 1st day of October 1896; this hiring and employment to be subject to the rules and regulations of the board of education of said district now in force and such other rules and regulations as may hereafter be made and promulgated by the board.

Dated, Port Richmond, this 8th day of June 1896.

C. H. VAIL
G. H. JANNEMAN
Trustees

I accept the foregoing employment, subject to the conditions named therein.

E. G. PUTNAM
Teacher

That on July 8, 1896, the State Superintendent of Public Instruction, in a decision made by him, upon proceedings on a petition to him for the removal of said Vail and Janneman as trustees of said district, duly removed them; that at the annual school meeting held in said district on August 4, 1896, it is claimed that a proposition to increase the number of the members of the board of education of said district from three to five was adopted, and that the respondents herein were at such meeting elected as trustees or members of the board of education of said district; that on August 21, 1896, Mrs Julia K. West, school commissioner of Richmond county, indorsed the said first grade certificate held by the appellant herein; that the respondents herein decided to open the school in said district on September 8, 1896; that the respondents herein refused to recognize the aforesaid contract, dated June 8, 1896, between said Vail and Janneman, as trustees of said school district, and the appellant, and refused permission to the appellant to teach in said school under said contract or to allow the appellant to perform his part of said contract.

It further appears, from the records in this Department, that on July 24, 1896, C. H. Ingalls, a member of the board of trustees of said district, was informed by me that before the appellant herein was permitted to enter upon the service of teaching in said district that he (Ingalls), as such member of said board, would have the right to demand that he (appellant) present his certificate of qualifications entitling him to teach in said district; that in the month of August 1896, the question of the legality of said contract employing the appellant herein to teach, was submitted to me upon certain papers and letters by the board of trustees of said district, and that on or about August 29, 1896, I informed said board through J. W. Wortz, its president, both by letter and telegram, and also the appellant herein, that I sustained said contract.

The respondents herein, in their answer, allege, upon information and belief, that the said Vail and Janneman, in making said contract with the appellant herein against the protest of their cotrustee, Ingalls, did so with the purpose of forestalling my decision in the proceedings then pending before me for their removal from office and forcing upon the district a teacher of their selection; that such facts were known to appellant at the time he made the contract. Such allegations are not established by proof.

While it may be that, as a matter of taste, said Vail and Janneman should have, pending the appeal against them, abstained from acting in the matter of employing teachers for the school year commencing on August 1, 1896, it not appearing that any order was made restraining them from performing any act which the school laws of this State permitted them to do, as two of the trusetes of said district they had the legal authority to act, until removed from office, in the employment of a teacher or teachers.

It is the custom in school districts, where a large number of teachers are employed, for the school authorities, before the schools of the districts are closed, to contract for teachers in the schools of their respective districts for the ensuing school year, and the school law authorizes such school authorities to make such contracts, provided the services are to be performed within the school year next following the date of the contracts. Negotiations relative to such employment are often entered into as early as was the one with appellant, namely, April 6th, which ripen into contracts concluded at different dates in May, June and July following.

The respondents herein allege that the term of service of said appellant, being for one year from June 8, 1896, would expire seven weeks before the end of the school year, and that there was no vacancy in the office of principal or teacher in the school, the contracts with the teachers then teaching not expiring until June 30, 1896. Neither of these contentions is tenable. The communication in writing to the appellant, under date of April 6, 1896, stated that the trustees agreed to employ the appellant for the coming school year commencing about September 1, 1896. It was clearly understood between the appellant and Vail and Janneman that the appellant was not employed to teach any part of the school year of 1895–96, but was employed for the term of time during which the schools of the district were held during the school year of 1896–97.

The main ground alleged by the respondents for their refusal to recognize the contract, made between the appellant and Vail and Janneman, is that at the time of the making of said contract the appellant did not possess an unannulled diploma of a State normal school, or an unrevoked or unannulled certificate given by the State Superintendent of Public Instruction, or an unexpired certificate of qualification given by a school commissioner within the district in which the said union free school district no. 6 of Northfield is situated, and that therefore the appellant was not eligible to make a valid and binding contract according to the statute; that the respondents obtained the opinion of counsel and were advised that said contract was not binding upon said district under the

statutes as repeatedly interpreted by the Supreme Court of the State; that the appellant did not have the certificate to teach held by him indorsed by the school commissioner of the school commissioner district in which said school district is situate until more than two months after said contract was made, and that his alleged employment was certainly not within the letter of the law, or the decisions of the courts as they are advised and believe.

Annexed to said answer is a copy of the opinion of counsel consulted by the respondents.

Counsel cites section 11, article 4, title 8 (undoubtedly intending to cite subdivision 11 of section 15, article 4, title 8), section 38, article 5, title 7; section 9 of same article (undoubtedly meaning subdivision 9 of section 47, article 6, title 7), of the Consolidated School Law of 1894, chapter 556 of the Laws of 1894; and also the case of Gillis v. Space, 63 Barbour, 177, decided by the Supreme Court in June 1872, and the case of Blandon v. Moses, 29 Hun 606, decided in April 1883.

The decisions of the Supreme Court were made under the Consolidated School Act of 1864 and the amendments thereof, and upon facts before the court in each case respectively.

In Gillis v. Space it appears that the plaintiff and the then trustee of a school district on September 29, 1870, entered into a written agreement whereby the plaintiff was engaged to teach school in said district for the term of one year commencing October 17, 1870; that on October 11, 1870, the defendant Space was elected trustee of the district; that at the time of entering into said contract the plaintiff had no license or certificate as a teacher as required by the school laws then in force; that the plaintiff claimed it was agreed that she should procure a certificate before the commencement of the school, but it did not appear that such condition was embraced in the written contract; that on October 12, 1870, the plaintiff procured, under the laws then existing, a certificate from a district commissioner, that is, a certificate of qualifications of the second grade; that on October 17, 1870, the plaintiff presented herself at the schoolhouse and offered to the defendant, then trustee, to enter upon her said contract to teach, and said defendant refused to permit her to teach and gave her a written notice of such refusal the same day, in which he stated the grounds of his refusal; that the plaintiff gave notice of readiness to teach the school, and that she would remain in readiness to teach for a year, and did for the whole year hold herself in readiness to teach such school; that the plaintiff brought an action against the defendant in the Supreme Court which was tried and the court ordered a verdict in her favor for $480, the contract price for the whole year; that exceptions were taken to the rulings of the court, and appeal was taken to the general term. The general term, in the opinion written by Barker, justice, passed upon the several objections taken and ordered a new trial. In his opinion Justice Barker said: "The trustee of a school district has no power to contract for the services of an unlicensed teacher and bind the district. If he should make a condition of hiring that the teacher should procure a certificate before entering upon the

duties of teaching, such contract would doubtless be valid, for then the services of a licensed teacher are bargained for, citing provisions of the school act of 1864, and page 140 of the Code of Public Instruction of 1868.

In Blandon v. Moses it appears the action was brought in the Onondaga county court to recover damages for the breach of an oral contract by which the defendant employed the plaintiff as a teacher for his school district for the period of twelve weeks; that after the making of the contract the defendant notified the plaintiff that he revoked the contract; that at the time the contract was made the plaintiff had no license to teach, but after the revocation of the contract, and prior to the time the school was to open he passed an examination and procured the requisite certificate; that a judgment was rendered in favor of the plaintiff from which an appeal was taken to the general term of the Supreme Court.

In the memorandum of the court at general term, the court said: "Two questions are presented for our consideration on this appeal; one is, was the contract valid and binding upon the parties thereto, or was it illegal and inoperative for the reason that the defendant, as trustee, had no power and authority to contract for the plaintiff's services as teacher, he at the time having no certificate from the proper officers? In Gillis v. Space, 63 Barb. 177, it was held that a trustee of a school district had no authority to contract for the services of an unlicensed teacher, and that an executory agreement engaging the services of such a person was invalid and not binding upon the school district. This decision was made in this Department and we adhere to the interpretation then given to the statute creating and defining the duties and powers of school trustees as contained in chapter 555, Laws of 1864."

The contract set out in this appeal was made under the provisions of the Consolidated School Law of 1894, chapter 556, of the Laws of 1894, and the rules and regulations made by the State Superintendent of Public Instruction pursuant to the authority given to him by said law, in force at the time said contract was made, and the facts established relative to such contract, and its legality depends on whether it is in accordance with such provisions, rules and regulations.

When said counsel cited in his opinion certain provisions of the Consolidated School Law of 1894, he overlooked, or at least omitted to cite, some other provisions of said law material to be considered in determining the legality of the contract made by the appellant and Vail and Janneman.

Section 14, title 1 of said Consolidated School Law enacts that the State Superintendent of Public Instruction shall prepare suitable registers, blanks, forms and regulations for making all reports and conducting all necessary business under this act, and shall cause the same, with such information and instructions as he shall deem conducive to the proper organization and government of the common schools and the due execution of their duties by school officers, to be transmitted to the officers and persons intrusted with the execution of the same.

In subdivision 5 of section 13, title 3 of said Consolidated School Law, it is enacted that every school commissioner shall have power, and it shall be his duty,

to examine, under such rules and regulations as have been, or may be, prescribed by the Superintendent of Public Instruction, persons proposing to teach common schools within his district, and not possessing the Superintendent's certificate of qualification or a diploma of a State normal school, and to inquire into the moral fitness and capacity; and, if he find them qualified, to grant them certificates of qualification, in the forms which are or may be prescribed by the Superintendent.

In section 15, title 5 of said Consolidated School Law it is enacted that the school commissioners shall be subject to such rules and regulations as the Superintendent of Public Instruction shall, from time to time, prescribe, and appeals from their acts and decisions may be made to him, as hereinafter provided.

The rules and regulations prescribed and adopted by the State Superintendent, under the authority of the provisions of the school law above cited, have upon school officers the binding force of a statute. Among the rules and regulations prescribed by the State Superintendent, in force in the school year 1895–96, governing uniform examinations of persons proposing to teach in the common schools, and the granting of certificates, was the rule that a school commissioner shall indorse for the full period for which they are valid, when presented to him or her for indorsement, first and second grade certificates issued by any other school commissioner in the State, unless a valid reason exists for withholding such indorsement. A valid reason is held to mean, a reason based upon some fact known to the commissioner affecting the moral or mental qualifications of the person to whom the certificate is granted, and must be stated by the commissioner. An appeal from the refusal of a school commissioner to indorse such certificate may be taken to the State Superintendent, and if in his opinion the school commissioner gives no valid reason for his refusal, he may order the school commissioner to make the indorsement, and if such order is not obeyed he may remove from office such commissioner.

As long ago as September 1891, upon the inquiry of a school commissioner, if the rules and regulations governing the uniform examinations for commissioners certificates, issued by the Department of Public Instruction were binding, and if it was within the power of the State Superintendent to make such rules, etc., the Attorney General of the State stated that he found nothing therein which attempts to annul or is in conflict with the statutory provisions then in force, or which is beyond the power granted to the State Superintendent.

By subdivision 5 of section 13, title 5 of the Consolidated School Law of 1894, above quoted, school commissioners have the power to examine under such rules and regulations as have been or may be prescribed by the Department of Public Instruction, persons proposing to teach common schools, etc.

The purpose of the rule that school commissioners shall indorse certificates of the first and second grade when no valid reason exists for a refusal to indorse is given, is that such certificates shall be good in all of the school commissioner districts of the State.

It does not appear when the appellant herein presented his certificate to teach to the school commissioner of Richmond county for indorsement, but it appears that it was indorsed on August 21, 1896, about eighteen days before the schools in the district were open, and his services as a teacher therein were required under his contract. It can not be seriously contended that a person holding a first grade certificate will present his certificate for indorsement to a school commissioner other than the one who signed the certificate, until he has secured employment to teach in a district within the commissioner district of the school commissioner whose indorsement is required.

Upon the first grade certificate, letters and recommendations presented by the appellant herein, on or prior to June 8, 1896, to the then trustees of said district, said trustees had the right to assume that there was no valid reason why the indorsement of said certificate by the school commissioner of Richmond county, should not be promptly made.

As hereinbefore stated, in the month of August 1896, the respondents herein voluntarily submitted to me the question of the legality of the contract employing the appellant, and on or about August 29, 1896, received through the respondent, Wortz, both by letter and telegram, as did also the appellant, notice that I sustained the contract. It appears by a copy of the proceedings of a meeting of said respondents, at which all of the respondents were present, annexed to both the appeal and answer herein, that as the decision by me was adverse to their views, such decision was wholly ignored. Said copy of the minutes of said meeting contains the following: "Telegram and communication from the State Superintendent received, read and ordered placed on file. Mr Ingalls offered, and Mr Wortz seconded, a motion that Mr Putnam be requested to withdraw his claim under his so-called contract. On vote, the president declared it to be a tie vote, Mr Sheridan not voting. On motion (Ingalls and Wortz) it was voted that O. H. Hoag be employed as principal for three months. On motion (Ingalls and Wortz) it was voted that Mr Putnam be requested to withdraw his claim under his so-called contract."

In the copy of said minutes of said meeting, annexed to the appeal herein, the following appears: Mr Ingalls moved, seconded by Mr Wortz, that O. H. Hoag be employed as principal for three months; Mr Ingalls and Mr Wortz voting 'yes' and balance of board not voting; president declared motion carried."

It clearly appears that the respondents herein, by their action at said meeting, not only wholly disregarded their submission to me by them of the question of the validity of the contract with appellant, but wholly ignored my decision by adopting a resolution requesting the appellant to withdraw his claim under the contract which I had decided to be valid. Not only did the respondents by the aforesaid action on their part ignore and refuse to accept my decision upon a question submitted by them to me, and request the appellant to withdraw his claim under a contract decided by me to be valid; but they went further and employed, or attempted to employ, another person to perform the services, which

the appellant, under a legal contract of employment was ready and willing to perform, but which the respondents refused to permit him to perform.

There is a conflict as to how many of the persons present at said meeting voted to employ Hoag. Assuming, for the purpose of argument only, that the five respondents present at the meeting constitute the members of the board of education either de facto or de jure, it required the vote of a majority of them, namely, three, to legally authorize the employment of Hoag.

The respondents herein claim to be acting in the matter of the contract with appellant impartially, without malice, prejudice or bias either for or against the appellant, and with the sole desire to do what is right and legal. Their action, as set out in the minutes of the proceedings of their meeting of August 31, 1896, has caused me to entertain grave doubts whether their claim is true.

I decide: 1 That under the school laws and the rules and regulations prescribed by this Department governing uniform examinations of persons proposing to teach common schools and for commissioners certificates, that a first grade certificate received by any person so examined legally entitles the holder thereof to teach in any school commissioner district in the State; and that such right can only be defeated by the refusal of school commissioners, having a valid reason, to indorse such certificate.

2 That the first grade certificate granted to appellant in March 1896, and held by him, entitled the appellant to teach in Richmond county at any time after the date thereof during the term of time stated therein, subject to that right being defeated by the refusal of the school commissioner of said county, for a valid reason, to indorse the same.

3 That the contract entered into on June 8, 1896, between the appellant herein and said Vail and Janneman, as trustees of said district, was a legal contract binding upon the parties thereto, and upon the succeeding trustees of said district, and upon said district.

4 That it was the duty of the trustees of said district, for the school year of 1896-97, to recognize the legality of said contract, and to have permitted the appellant to teach in the schools in said district under said contract, when the school for said school year was opened, commencing on September 8, 1896, the said appellant then holding said first grade certificate, indorsed by the school commissioner of Richmond county.

The appeal herein is sustained.

It is ordered, That the trustees or members of the board of education of union free school district no. 6, Port Richmond, Richmond county, be, and they are hereby directed, without unnecessary delay, to recognize the appellant herein, Eugene G. Putnam, as a teacher in the school or schools of said district, under the contract entered into between the trustees of said district and said appellant, dated June 8, 1896, and to permit the said appellant to teach in said school or schools, and to perform, on his part, the terms of said contract.

5172

In the matter of the application of the board of education of union free school district no. 12, town of Warwick, Orange county, for the revocation of the certificate of S. Jennie Townsend.

A teacher did wrong in accepting a more desirable offer before being released from a prior engagement which she made. The Commissioner of Education must decline going to the length of revoking her certificate under the circumstances of this case and putting a dark mark upon her life.

Decided February 17, 1905

Draper, *Commissioner*

The respondent herein was employed as teacher of music and oratory in the school of the above named district during the school year ending July 31, 1904. During the month of April the board of education offered to retain her in the same position for the ensuing year at a salary of $600 per year. On April 25, 1904, she accepted the offer. A memorandum of agreement was signed by the board of education and delivered to Miss Townsend about April 29th and one bearing the same date was signed by Miss Townsend and filed with the board of education.

On July 13, 1904, Miss Townsend forwarded to Doctor Wood, a member of the board of education, a telegram tendering her resignation and requesting an answer in relation to its acceptance on that day. Doctor Wood wired that he had no authority to accept the resignation; that only three members of the board were in town and that he would write her.

Miss Townsend had been offered the position of teacher of music and oratory in the State Normal College of Plymouth, New Hampshire, at a salary of $900 per year and the prospect of an increase if her work was satisfactory. She was required to give an answer within two days. Assuming that the board would accept her resignation she notified the New Hampshire Normal College that she would accept the position. She then wrote Doctor Wood of her acceptance of the position. The board of education at a meeting held July 28th directed its clerk to notify Miss Townsend that as she had broken her contract with them the board conceived it their duty to notify the State authorities of her action. The board of education filed a petition for the revocation of her certificate with this Department January 13, 1905, having made due service thereof on Miss Townsend January 9, 1905, or nearly six months after the act complained of took place. The respondent has not filed an answer to the petition but has filed a request for the dismissal of the petition on the ground that rule 5 regulating the practice of appeals in this Department requires an appeal to be brought within thirty days after the act complained of took place or a valid reason must be assigned for failing to do so. The petitioners claim that this proceeding is not an appeal and not subject, therefore, to the rule. In this they are doubtless right.

The teacher did wrong in accepting a more desirable offer before being

released from a prior engagement which she had made. But the temptation was too much for her. She made the effort to secure release. She was not met with immediate refusal, or with decisive action of any kind, and she presumed upon a very common usage of trustees to grant release in such cases rather than to endure the consequences of disappointment. Doubtless teachers ought to be required to abide business contracts as sharply as other people, and women teachers as much as men teachers. It is difficult to do it, but if it was a question of enforcing or assuring the results of a contract the Commissioner would try to do it. But that is not it. He is asked to punish a woman teacher for a frailty. He will do it to the extent of telling her she did wrong and must not repeat the offense, but he must decline going to the length of revoking her certificate and putting a dark mark upon her life.

The petition herein is dismissed.

TEXTBOOKS

3583

In the matter of the appeal of Newton W. Edson v. the board of education of the city of Binghamton.

The jurisdiction of the State Superintendent to hear and determine appeals is conferred by the general school laws, and extends to localities subject to local and special acts, unless such acts take it away, as to such localities, in language so clear as to admit of no doubt of such intent of the Legislature.

An appeal will lie from acts of the board of education of the city of Binghamton.

Where a textbook is in use for more than five years, without any designation and adoption of the same as a textbook, and the board of education by a majority vote decides that such book shall be continued in use for the remainder of the school year, *held,* not a designation and adoption of a textbook within the meaning of chapter 413, Laws of 1887.

The board of education may, under such circumstances, by a majority vote, designate a textbook to be used in the schools under their charge, the same to go into effect at a stated time in the future, not unreasonably distant.

Decided April 4, 1887

Arms & Curtiss, attorneys for appellant
Chapin & Lyon, attorneys for respondent

Draper, *Superintendent*

The facts upon which this appeal arises are undisputed, and are as follows: Three textbooks, entitled respectively, "Our World," "Guyot's Grammar School Geography" and "Guyot's New Intermediate Geography," had been in use in the schools of the city of Binghamton for at least six years prior to the 18th day of October 1886, within which time there had been no action of the board adopting the same as textbooks in the schools of the city. Upon the 18th day of October 1886, the board of education held a meeting, at which it was unanimously resolved that no change should be made in the geographies in use in the schools during the present school year. At the next meeting of the board, held on the 1st day of November 1886, a motion or resolution was adopted, by a vote of seven to three, that the resolution of October 18th be reconsidered, pursuant to a standing rule or by-law of the board allowing such reconsideration at the same or next regular meeting.

At a meeting held on the 6th of December following, the board, by a vote of seven to six, adopted the following resolution, namely:

Resolved, That the use of the primary geography entitled "Our World," be discontinued as a textbook in our schools, and that Barnes's Elementary Geography be adopted in its place, and that Barnes's Complete Geography be adopted as a textbook in our schools; its use, however, to be postponed until the beginning of the next school year.

At a meeting of the board held on the 3d of January 1887, the following resolution was offered, namely:

Resolved, That Guyot's geographies be discontinued as textbooks in our common schools at the close of the present year.

As objection was made to this resolution, its consideration was postponed until the next meeting, pursuant to the rules of the board, but at such meeting, held on the 17th day of January, the resolution was adopted by a vote of seven to five. It was admitted upon the argument of the case before me, that the term "present year" at the end of this resolution, meant the present "school year."

The appellant alleges that, after the passage of the resolution of October 18th, providing that no change should be made in the geographies during the present school year, and relying upon it, he purchased two of Guyot's grammar school geographies for the use of his children, and that others did the same. It is claimed, on behalf of the appellant and these others, that the resolution of October 18th was, in purpose and effect, a designation of the Guyot's geographies as textbooks in the schools of Binghamton, within the provisions of chapter 413 of the Laws of 1877, and that, consequently, no other textbook could displace them for the period of at least five years thereafter, as provided by that act, except by a three-fourths vote of the board of education. It is accordingly insisted that the resolutions of November 1st, December 6th and January 17th are in contravention of the "act to prevent frequent changes in textbooks in schools" and are, therefore, void.

The appellant has brought two separate appeals, but they may more easily than otherwise be disposed of together.

The respondent denies that the State Superintendent has any jurisdiction to hear and decide these appeals. It is said that the school system of the city of Binghamton is governed by a special act of the Legislature (chapter 322, Laws of 1861) and its amendments, and that there is nothing in this special act conferring upon the State Superintendent the authority to determine appeals from the acts of the board of education of that city. It is also insisted that the provisions of the Consolidated School Act (chapter 555, Laws of 1864), concerning appeals to the State Superintendent from the acts of local school officers, do not extend jurisdiction to the act of a board of education in a city having a special school act. It is accordingly argued that there is no jurisdiction at all in the present case.

The question is an important one, and I have endeavored to give it that examination which its gravity demands.

I have examined the statutes specially referring to the supervision of the schools of the city of Binghamton with considerable care, and am of the opinion that, if jurisdiction in this case depended alone upon these statutes, it would not be difficult, reading the several successive acts together, to discern an intention to confer it on the part of the Legislature.

But in my opinion it does not depend upon the provisions of the special acts, having reference only to a particular locality. Title 12, section 1, chapter 555, Laws of 1864, is as follows:

Section 1 Any person conceiving himself aggrieved in consequence of any decision made:

1 By any school district meeting.

2 By any school commissioner or school commissioners and other officers, in forming or altering, or refusing to form or alter, any school district, or in refusing to apportion any school moneys to any such district or part of a district.

3 By a supervisor in refusing to pay such moneys to any such district.

4 By the trustees of any district in paying or refusing to pay any teacher, or in refusing to admit any scholar gratuitously into any school.

5 By any trustees of any school district library concerning such library, or the books therein, or the use of such books.

6 By any district meeting in relation to the library.

7 By any other official act or decision concerning any other matter under this act, or any other act pertaining to common schools. may appeal to the Superintendent of Public Instruction, who is hereby authorized and required to examine and decide the same; and his decision shall be final and conclusive. and not subject to question or review in any place or court whatever.

The seventh subdivision of this section contains language as comprehensive as could well be employed. It authorizes any person aggrieved at "any other official act or decision concerning any other matter under this act or any other act pertaining to common schools," to appeal to the State Superintendent. The contention of the respondent's counsel that the phrase "any other official act" refers only to acts by the same body or of the same nature as though specified in the first six subdivisions of the section, can not be adopted. It is an official act concerning "any other matter *under this act or under any other act* pertaining to common schools," which is the subject of appeal. It was the obvious intent of the Legislature to provide an easy, inexpensive, speedy and conclusive way for procuring a determination of complaints against any official act of any local school official. Both the language of the law and the different steps taken by the Legislature to bring it to its present state, sustain this construction. Enacted in the early days of the school system, it has from time to time been added to with the evident purpose of making it clear that the jurisdiction of the Superintendent is intended to be statewide and is to cover all controversies touching any official act of local school officials.

These provisions of the general law were, in substance, in force long before the passage of the special laws referring only to the city of Binghamton. If the Legislature had intended to cut off the right of appeal, as to that city, it would have so provided in the laws particularly applicable to it. It not only did not do this, but it is worthy of note that it expressly preserved the right in the first instance and omitted to do this only upon a reenactment of the Binghamton school laws consequent upon the granting of a city charter to the place. It is fair to assume that the omission at that time was either because of inadvertence or because an express reservation was deemed unnecessary. In any event, the State Superintendent does not get jurisdiction from local school acts, but from the general school law. The authority must be held to be general unless taken away by a special act, in language so clear as to leave no doubt of its intent, and there is no such taking away in the statutes applicable only to the city of Binghamton.

There is another consideration which has not been suggested by the able and alert counsel who appeared upon the argument of this appeal and which, in view of the foregoing, is perhaps not material to the determination of the question of jurisdiction, and yet it has sufficient bearing upon it to justify me in mentioning it. The appellant claims that the action of the respondent is in violation of chapter 413 of the Laws of 1877, entitled "An act to prevent frequent changes of textbooks in schools." This is "an act pertaining to common schools." The question brought here is one arising under it. The determination of this question may involve the construction of the provisions of this general law, rather than of the special laws relating to Binghamton. It will hardly be contended that the Legislature meant to leave it to the board of education or trustees in each city or district having a special school act, to place such construction as it should see fit upon this general law and to suit its acts to its views of the meaning of the law, without affording a means of redress to persons differing with it in opinions and aggrieved by its acts. Such a view would result in as many different constructions of the meaning of this statute as there are different localities having special acts, and would defeat the purpose and intent of this general law.

In view of these considerations, it seems clear to me that the grievance of the appellant is properly brought before the Department by means of an appeal, and that, under the laws, it is the duty of the Superintendent to determine the matter.

Passing, then, to the consideration of the merits of the case, several questions present themselves. Has the appellant been aggrieved? Was the resolution of October 18th, providing that no change should be made in the geographies in use in the schools during the present school year, an adoption and designation of a textbook within the meaning of chapter 413 of the Laws of 1877, entitled "An act to prevent frequent changes of textbooks in the schools?" If so, had the board a right to reconsider such action at the same or next regular meeting, as provided by its by-laws? If it was an adoption of a textbook within the meaning of the act to prevent frequent changes of textbooks, was the subsequent action of the board in violation of that statute? If the action of October 18th was not an adoption and designation of a textbook, and if the subsequent action of the board was not in violation of the law to prevent frequent changes of books, still had the board power to provide by resolution that Barnes's geographies should go into use at the beginning of the next school year, when it is admitted that the board may be differently constituted prior to that time?

It should be borne in mind that chapter 413 of the Laws of 1877, entitled "An act to prevent frequent changes of textbooks in schools," was not enacted for the benefit of book publishers, nor for the purpose of preventing progress in the schools. It is intended to prevent changes in textbooks upon the same subject oftener than once in five years, unless the sentiment in favor of such change should be so strong that a three-fourths vote of the board of education in cities, villages and union free school districts, or of the legal voters at the annual school meeting in the other districts of the State should be cast in favor of the change. When a book has been adopted and designated as provided in the act, it can not

be changed for the period of five years, except by a three-fourths vote. After the expiration of such period, another book may be adopted in place of it by a majority vote of the board of education, or a two-thirds vote of the electors, as the case may be.

It is conceded that Guyot's geographies had, at the time of the action of the board in question, been in use in the schools of Binghamton for more than five years. There had at no time been any formal action of the board designating them as textbooks, under the provisions of chapter 413 of the Laws of 1877, when the resolution of October 18th was adopted. That resolution simply provided that no change should be made in the geographies in use in the schools *during the present school year*. It is impossible to hold that this was an adoption or designation of Guyot's geographies as textbooks under the provisions of the law to prevent frequent changes of textbooks, and that, consequently, they could not be superseded for the period of five years, except by a three-fourths vote of the board. If it was, why should the board have resolved to make no change during "the present school year." It was manifestly the expression of an intention not to supersede the book during the school year and nothing more. If the action of October 18th was not a designation of a textbook under the law, then there was certainly no *statutory* impediment to the reconsideration of that action within the time provided by the rules of the board. Moreover, the resolutions passed subsequently by the board adopting Barnes's geographies, did not contravene or infringe upon the resolution of October 18th in the least. The last named resolution only provided that no change should be made during the present school year. The resolutions adopting Barnes's geographies provides that their use should not be commenced until the beginning of the next school year. The resolution of January 17th, providing that the use of Guyot's geographies should be discontinued after the present school year, was only in completion of the purpose of the board. I do not see its materiality in any event. If the resolution adopting Barnes's geographies was lawful and it was regularly adopted, then it very effectually discontinued Guyot's geographies when it went into operation.

If the resolution of October 18th was not an adoption of Guyot's geographies for the period of five years, and as already observed, it seems clear that it was not, then there would seem to be no reason why the board could not adopt another series of geographies at any time by a majority vote.

But the board has provided that the Barnes's geographies should go into use at the beginning of the next school year, and the appellant says that, by reason of an intervening election or otherwise, there might be changes in the board before that time, and that the board as now constituted can not legislate for a board which may be differently constituted when its action is to go into operation. It is not improper to say that I have considered this question as more serious than any other which has been suggested in the case. But it is not well to anticipate difficulties. From the observations already made, it seems clear to me that the board had the power, by a majority vote, to adopt Barnes's geographies or any other and to direct that their use should begin immediately. This being so, there

would seem to be no good reason outside of the law, and I can see no provision in the law to prevent them directing that the use of the new books should commence at a fixed time in the future. Indeed, the fact that they had once resolved that Guyot's geographies should not be displaced during the present school year, and that patrons of the schools had purchased accordingly, bound the board in honor, if not in law, not to put the new books in use prior to the beginning of the next school year. Moreover, the beginning of a school year would seem to be the proper and appropriate time for taking such a step. Whether the board, as now constituted, could change its mind, or whether the board, after changes in its membership, could overthrow this action by less than a three-fourths vote prior to the time when the new books are to go into use, or prior to the time when it had become necessary for patrons to supply their children with books, are questions which it is not necessary to consider before such action should be taken.

The appeals must be dismissed and it is so ordered.

3631

In the matter of the appeal of Joseph H. Chittendon v. the board of education of the city of Binghamton.

A board of education adopted and designated a textbook under the provisions of chapter 413, Laws of 1877, and fixed a time in the future when the same should go into use. Before that time arrived, and before patrons were required to supply themselves with the book, rescinded and overthrew the action by less than a three-fourths vote.

Held, That the board had the right to do so, notwithstanding the provision of chapter 413 of the Laws of 1877. That act is prohibitive in character and must be so construed as to leave with the board power not expressly taken away by it.

The board had a rule of order that a question once decided could be reconsidered only at the next regular meeting. The action appealed from is alleged to have been taken in contravention of this rule.

Held, That the body which makes a rule of order is the highest authority for construing it. Again the rule could have been suspended by a majority vote, the same which adopted the action complained of. Furthermore, the board can not at one time take action which will prevent the board at another time from taking any lawful action it may deem best, and if the rule of order is antagonistic to this principle, it is opposed to the law and can not be upheld.

Decided August 16, 1887

Chapman & Lyon, attorneys for appellant
Arms & Curtiss, attorneys for respondent

Draper, *Superintendent*

Three textbooks entitled, respectively, "Our World," "Guyot's Grammar School Geography" and "Guyot's Intermediate Geography" had been in use in the schools of the city of Binghamton for at least the period of six years,

during which time there had been no action of the board of education of that city adopting and designating the same as textbooks in said schools, when, upon the 18th of October 1886, said board unanimously resolved that there should be no change in geographies in use during the present school year. Upon the 6th day of December 1886, the board, by a vote of seven to six, adopted the following, namely:

Resolved, That the use of the primary geography entitled "Our World," be discontinued as a textbook in our schools, and that Barnes's Elementary Geography be adopted in its place, and that Barnes's Complete Geography be adopted as a textbook in our schools, its use, however, to be postponed until the beginning of the next school year.

On the 17th day of January 1887, said board, by a vote of seven to five, adopted the following resolution:

Resolved, That Guyot's geographies be discontinued as textbooks in our schools at the close of the present year.

Following this action by the board Mr Newton W. Edson appealed therefrom to this Department, claiming that the action of October 18th was an adoption and designation of geographies within the meaning of chapter 413 of the Laws of 1877, and that, consequently, no change could be made within five years, except as provided in that act. Beyond this, it was urged that the action of the board could not be upheld for the reason that it provided that the newly adopted books should go into use at a time in the future, before which time the board, by expiration of term or otherwise, might be differently constituted. The decision of that appeal was adverse to the position of the appellant. It was held that the action of October 18th was not an adoption and designation of a textbook within the meaning of the five-year act, and that the board had the lawful right to adopt a book to go into use in the future. The question as to whether, between the time of adoption and the time of going into use, the board could change its mind, or, being differently constituted, could reverse or change its action with less than a three-fourths vote was expressly reserved until circumstances should make its consideration necessary. That time has now arrived.

On the 16th day of May 1887, the board by a vote of seven to six adopted the following, namely:

Resolved, That Guyot's Intermediate and Grammar School Geographies be and the same hereby are continued in use in our schools in the grades where they now are, and that no change of geographies be made. This to take effect immediately.

On the 5th day of July 1887, the board by a vote of seven to five, adopted the following, namely:

Resolved, That Barnes's Complete Geography be and the same hereby is dropped from the list of textbooks of the city of Binghamton.

The appellant herein brings separate appeals, from the action of the board in adopting these respective resolutions, which, for the sake of expedition, will be considered and determined together.

Preliminarily, it is objected by the respondent that the appellant is not an "aggrieved" person within the meaning of the statute, and so not competent to bring the appeal. It appears that he is a resident and taxpayer of Binghamton, and has children who attend the schools of that city and who use the textbooks involved in this controversy. The statute authorizes any person conceiving himself aggrieved to bring an appeal and it then directs the Superintendent to dismiss such appeals when it shall appear that the appellant has no interest in the matter appealed from. In view of these provisions, it seems to me that this objection of the respondent ought not to be sustained.

A close reading of the several resolves of the board, shows that the only book in controversy is Barnes's Complete Geography. The action of December 6th adopted Barnes's Elementary Geography in the place of Guyot's Primary Geography entitled, "Our World," and the book so adopted went into use immediately. No action since taken purports to overturn this. But that part of the resolution of December 6th adopting Barnes's Complete Geography is sought to be rescinded and nullified by the resolutions of May 16th and July 5th following. The appellant insists that this could only be done by a three-fourths vote. It was conceded upon the argument that there was no claim that patrons of the schools had, subsequent to the action of the board adopting "Barnes's Complete Geography" and before the action rescinding such adoption, purchased copies of that book. The most that was urged in this direction was that pupils passing from one grade to another would be required to change from one series of geographies to the other at added expense to the parents; but, having in view the fact that the city superintendent has unrestricted authority, under the by-laws of the board, to arrange grades and to rearrange them at any time, as well as to classify and promote pupils at will, and that it must be assumed that this authority would be so exercised as to adjust the proper grades of books adopted by the board to the grades of pupils so as best to promote the interests of the schools without unnecessary expense to patrons, it seems to me that this fact lacks sufficient substance and is too remote to be adopted as the foundation upon which to rest a holding that the action of the board contravenes the provisions of the five-year act. The question is then squarely presented whether a board of education, having adopted and designated a textbook to go into use at a fixed time in the future, can, before that time arrives and before patrons have supplied themselves with the book, and notwithstanding the provisions of chapter 413 of the Laws of 1877, rescind and overthrow such action with less than a three-fourths vote?

I have no doubt of the power of the board to adopt a textbook and provide that its use shall commence in future. In the nature of things it must be so. But the board, as now constituted, can not usurp the functions of the board as it may be constituted nine months hence, in such a manner and with such effect as to cut off the succeeding members from the right to exercise their own prerogatives according to their own judgment. If the board could thus forestall action for a period of nine months, when within that time the term of one of

the members was to expire and a single vote would reverse the action, as in the present case, it could likewise do it for the period of five years. There is no difference in principle.

It is to be borne in mind that the purpose of the Legislature in enacting chapter 413 of the Laws of 1877 was to protect patrons from the expense consequent upon frequently superseding one textbook with another upon the same subject and of like grade. The gist and substance of the act is contained in the second section, where it provides that "when a textbook shall have been adopted for use . . . it shall not be lawful to supercede the textbook so adopted by any other book within a period of five years from the time of such adoption except upon a three-fourths vote of the board of education." The book here in controversy is not in use in the schools of Binghamton. It is, therefore, not superseded. No one has, by the action of the board, been obliged to buy it and, so far as is known, no one has bought it. No one, therefore, is injured and no one is in position to invoke the protection of this statute. Independent of this statute the board has unlimited power in the premises The statute is prohibitive in its nature and must be construed strictly and so as to leave with the board all those prerogatives which the law has always conferred upon it, and which are not specifically taken away by its provisions. Following this view I arrive at the conclusion that the resolutions appealed from did not require a three-fourths vote in order to give them force and effect, provided the board was not inhibited by its own by-laws from taking *any* action in the premises at that time.

A rule of order of the respondent in force at the time of the adoption of the resolution appealed from is as follows:

"*Rule* 21. When a question has been once put and decided, it shall be in order for any member of the majority to move a reconsideration thereof at the same or at the next regular meeting."

It is said by the counsel for the appellant that the board of education of the city of Binghamton is a corporate body of continuous life; that the members change, but not the board; that the board must act within its rules; that the resolutions appealed from were in fact and effect, so far as Barnes's Complete Geography is concerned, a reconsideration of the action of December last, and that it was taken after the time had gone by when a reconsideration could be had under the rules of the board.

This view impressed me with considerable force upon the argument, but after full consideration I am led to the following conclusions:

The body which makes a rule is the best authority to construe it. It may be said that the action appealed from is not a reconsideration of the former action, or at least such a reconsideration as the rule refers to. Again, the rule could have been annulled by a majority vote of the board; the same vote which adopted the resolutions appealed from. Furthermore, as has already been said, the board can not today take action which will prevent the board in the future from taking any lawful action which it may deem best. If the rule of order is in contravention of this, it can not be upheld.

It is perhaps well to add that I have given no thought to the question of the merits of the respective textbooks involved, for the reason that I have considered that subject one which should properly be left to the judgment and discretion of the local school authorities.

The appeals are dismissed.

3691

In the matter of the appeal of Daniel W. Hall and another v. David Cordingly, trustee of school district no. 3, town of Scriba, Oswego county.

Where a teacher and trustee have changed a textbook, which had been designated by a district meeting more than five years previous thereto, and it is made to appear that the change has been beneficial, the action will not be disturbed. The spirit of the act chapter 413, Laws of 1877, was not violated by such change.

Decided June 9, 1888

Draper, *Superintendent*

The appellants, taxpayers of district no. 3, town of Scriba, Oswego county, complain of the action of the trustee of said district in consenting to the change of certain textbooks which had for a number of years been in use in the school. It appears from the appellants' papers that, in 1877, the district meeting selected certain textbooks, conformably to the provisions of chapter 413, Laws of 1877. In 1882 certain of the textbooks which had been adopted as above stated, were changed by a vote of the inhabitants and since that time no change has been made by the action of a district meeting. The teacher, with the approval of the trustee, has now made a change in reading books, which he avers was needed and which he did for the benefit of the school.

The question presented is, whether the trustee exceeded his authority in the premises. Before the act of 1877, chapter 413, the power of selecting school textbooks was vested in the trustees of the several districts. The act of 1877 vested certain rights in the inhabitants, which the inhabitants of the district in question exercised in 1877, and again in 1882. The law was intended, as its title indicates, to prevent frequent changes in textbooks, and provides that, when a designation is made by the inhabitants, the same shall be changed within five years only by a three-fourths vote of the legal voters present and voting at an annual school meeting.

In the case presented, over five years have elapsed since any action relative to textbooks has been taken by a district meeting. I think the trustee acted within the scope of his authority. It is not claimed that a beneficial change was not made, and the lapse of time indicates that the spirit of the act has not been violated by frequent changes.

The appeal is overruled.

3743

In the matter of the appeal of Henry W. Ellsworth v. the board of education of the city of Dunkirk.

A textbook which has been adopted for use in a union free school district, pursuant to chapter 413 of the Laws of 1877 can not be changed within five years, except by a three-fourths vote of the board of education.

Writing books held to be textbooks, within the meaning of the statute.

Decided December 29, 1888

Draper, *Superintendent*

This appeal is taken by an author and publisher of a series of school writing books from the action of the board of education of the city of Dunkirk, in adopting a resolution to change the writing books in use, contrary, as it is claimed, to the provisions of chapter 413 of the Laws of 1877.

The appellant shows that the board of education consists of six persons; that said board, in August 1886, adopted as a textbook, for use in the schools under its control, the Ellsworth reversible writing books, and that thereafter and until August 6th last the same were used in the schools under its charge; that on or about August 6, 1888, five of the members of the said board of education met, and, by an affirmative vote of three only, adopted a resolution to supersede the Ellsworth books with another system of writing books. The appellant claims that chapter 413 of the Laws of 1877 has been violated by this action of the board, taken August 6, 1888.

No answer has been interposed by the board. The delay in bringing the appeal has been sufficiently excused.

The allegations of the appellant being undisputed, I must accept the statement of facts made by him.

A textbook which has been adopted for use in a union free school district can not be changed within five years, except by a three-fourths vote of the board of education.

A question as to whether writing books should be considered textbooks, within the meaning of the statute, has addressed itself to my mind. I find upon investigation, however, that my predecessor in office considered that question, and held that they should, and I deem myself justified in following his determination.

The vote by which the resolution of August 6, 1888, was adopted, was less than that required by the statute to effect the purpose of the resolution, and I must, therefore, hold that it was inoperative and of no effect.

The appeal is, therefore, sustained.

TRANSPORTATION

5398

In the matter of the application of Lucy Loomis for an order directing the trustees etc. of union free school district no. 6, town of Hartford, Washington county, to provide conveyance for her children to school.

Transportation of children; duty of parents. An order compelling school authorities to provide transportation for children remotely situated from the school will not be made unless a clear case of hardship is shown. If the petitioner has horses, wagons and sleighs, used by him in his business as a farmer the district will not be compelled to furnish conveyance for his children. The law providing for transportation was not intended to relieve parents of their moral and legal obligations to provide their children with a suitable education.

Decided December 8, 1908

J. B. McCormick, attorney for petitioner
W. W. Norton, attorney for respondent

Draper, *Commissioner*

The appellant, Lucy Loomis, complains of the refusal of the board of education of union free school district no. 6, town of Hartford, county of Washington, to provide conveyance for her two children to and from the union free school in such district. It appears from the papers that the petitioner and her husband are farmers living on their own farm about two and three-tenths miles from the school in the village of Hartford. Their farm is not large and they both state in their affidavits that they are too poor to hire others to carry their children to and from the school. They have two horses and wagons and sleighs. But they assert that if their horses are used for conveying their children the business of their farm will be seriously inconvenienced and that a loss will be sustained which they can ill afford.

It is the theory of the law that where children of school age reside such a distance from the schoolhouse in the district that they are unable to walk and their parents are so poor that they can not take them to and from school, the district may, at a meeting of the qualified electors thereof, vote to provide such conveyance, to the end that children so situated shall not be deprived of school advantages. There is no doubt but that in a proper case an order may be granted directing a trustee or board of education of a district to take measures to provide for such conveyance. Such an order should not, however, be directed against a trustee or board except in a clear case of hardship. It will be presumed that the school authorities have dealt fairly with an application for such assistance.

It has been held that transportation will not be ordered where the petitioner has horses, wagons and sleighs used by him in his business as a farmer. In such a case he should provide conveyance for his children, even if by so doing he suffers financial loss. A claim that he needs his horses for farm work and that he can not spare the time from his farm work will not be considered. Appeal of Turner, no. 5236, 1895. The law was not intended to relieve parents of their moral and legal obligation to provide their children with suitable education. This obligation is coexistent with the duty to provide support and maintenance. While public conveyance to children remotely situated from a school will be frequently afforded where relief would not be granted by poor officers yet it must be clearly shown that such children will be practically deprived of school advantages unless such conveyance be provided, before this Department will interfere. The petitioner herein has not made out such a case. She relies also upon the fact that the respondents are already providing conveyance for two children living a mile beyond her on the same road. She insists that the board shows malice against her in carrying these children without a similar provision for her own. It appears that the mother of the children carried is poor, supporting herself and family by days' labor, and that she lives over 3 miles from the school and has no means of conveyance of her own. This is a very reasonable exercise of discretion on the part of the board, and the petitioner may not be heard to complain thereof.

The petition is dismissed.

5236

In the matter of the appeal of Augustus Turner from the action or proceeding taken by a special meeting held in district no. 11, town of Broome, county of Schoharie, on October 3, 1905.

Subdivision 19, section 14, title 7 of the Consolidated School Law authorizing a district to provide for the conveyance of pupils who reside so remote from the schoolhouse as to practically deprive them of school privileges was not enacted to relieve parents from any of the obligations which they owe their children in providing for their education.

A parent in providing for the education of his children as well as in providing for their other necessities must first discharge his parental duties and obligations before he can ask the community to aid him.

Decided December 26, 1905

M. B. Mann, attorney for appellant
W. H. Albro, attorney for respondent

Draper, *Commissioner*

On July 30, 1902, the school commissioner of the first school commissioner district of Schoharie county made an order dissolving school district no. 4, town of Broome, and annexing the territory thereof to adjoining districts. An appeal

from such order was taken to the State Superintendent of Public Instruction by Augustus Turner the appellant herein. Such appeal was dismissed on the 29th day of December 1902. The term of office of the school commissioner who made such order terminated on December 31, 1902. On January 1, 1903, a new school commissioner, chosen at the preceding general election, assumed the duties of his office. On July 30, 1903, this school commissioner made an order reinstating the old district, no. 4, Broome. This order was made one year from the date on which the previous school commissioner dissolved the district and seven months after the State Superintendent had decided the Turner appeal, sustaining the order of dissolution of said district no. 4, Broome. Certain aggrieved parties under the order by which district no. 4 was reinstated brought an appeal to the State Superintendent of Public Instruction and on March 30, 1904, such appeal was sustained and the order of the school commissioner reinstating said district no. 4, Broome, was vacated.

The appeal herein grows out of the controversy resulting in the two appeals above described. Appellant claims that he lives so far from the schoolhouse of the district in which he resides and that the roads are so hilly and in such poor condition, being even impassable during a portion of the winter, that it is impossible for his children to walk to and from school daily. He also claims that he is unable to convey his children to school and that they are therefore practically deprived of school privileges. He therefore petitioned the trustee to call a special meeting of the district to make provision for the transportation of his children in accordance with the provisions of subdivision 19, section 14, title 7 of the Consolidated School Law. Such special meeting was held and by an almost unanimous vote decided that the children of appellant were not by reason of conditions alleged deprived of school privileges. No other action was taken by the meeting.

Respondent's attorney raises several technical objections on which he requests that this appeal be dismissed. I do not consider these objections of sufficient force to warrant such action and deem it wiser to reach a determination of the appeal upon its merits.

One of the questions determined by the State Superintendent of Public Instruction in the appeal brought by Turner in 1902 was the school privileges which would be afforded Turner's children by annexing his property to the district in which it is now located. The State Superintendent in that appeal specifically held: "It does not appear from the proofs established herein that any of the appellants who have children of school age, are in any considerable degree inconvenienced by the orders made from which this appeal is taken, except the appellant, Augustus Turner. Although the children of Turner will be required to travel a greater distance to attend school than they were required to attend the school in district no. 4, it is not established that they can not, at nearly all times during the school year, and without serious inconvenience, attend the school in district no. 1." One of the principal questions to be determined in this appeal was determined in the appeal of 1902 and should not be raised except under new conditions or supported by new evidence.

Subdivision 19, section 14, title 7 of the Consolidated School Law authorizes a district to provide for the conveyance of pupils to school who may reside so remote from the schoolhouse as to practically deprive them of school privileges. It can not be successfully contended that this provision of law was enacted for the purpose of relieving parents from any of the obligations which they owe their children in the matter of providing for their education. A parent in providing for the education of his children as well as in providing for their other necessities must first discharge his parental duties and obligations before he can ask the community to aid him. It is just as much the duty of appellant to educate his children as it is to feed, shelter or clothe them or to otherwise provide for their health and comfort. In appeal no. 5219, decided by me October 31, 1905, I held as follows: "The moral and legal obligation rests upon every parent to give his child the advantages of the school facilities afforded by our system of public education. He should do this even at great inconvenience and expense if necessary. He should not expect remuneration, nor should it be given, for such trouble as may reasonably be expected of a parent to enable his children to attend school."

The pleadings herein show that during some portions of the year the children of appellant are unable to walk to and from school daily. At such times it is the duty of appellant to convey his children to school. Before he can invoke the aid of the district in providing transportation he must show that he is unable to provide it himself. The pleadings show him to be a successful farmer owning horses, wagons and sleighs and financially able to take his children to and from school when they are unable to walk. It is his duty to do this even if by so doing he suffers financial loss. To claim that he needs his horses to work on his farm and that he can not spare the time from his farm work is not sufficient reason to exempt him from performing this duty nor is it sufficient ground upon which to base a demand upon the district to do that which is clearly his parental duty to do.

It is necessary to a sound administration of public school affairs to hold that parents shall first perform their full duty in getting their children to and from school before they are justified in asking the district to provide transportation. Such transportation is to be provided only in cases where children are unable to walk and parents are not able to take them to and from school.

The appeal herein is dismissed.

TRUSTEES

5355

In the matter of the appeal of William H. Dempsey and Walter F. Jeffers from the proceedings of the annual meeting of union free school district no. 1, town of Eastchester, Westchester county.

The act of deciding to increase the number of trustees is a statutory proceeding and it is essential to the validity of the procedure in such case that each provision of the law shall be satisfied. This Department has uniformly ruled that where the vote upon this question is taken by ballot instead of by taking and recording the ayes and noes the statute is not complied with.

The provision of the statute requiring that notice of the intention to vote upon a proposition to increase the number of trustees in a district shall be given in the notice of the annual meeting is a protection to the right of every voter in the district.

Decided October 4, 1907

Frederick W. Clark, attorney for appellants
Michael J. Tierney, attorney for respondents

Draper, *Commissioner*

School district no. 1, Eastchester, is a union free school district whose boundaries are not the same as the boundaries of an incorporated village. Previous to August 6, 1907, the date of the last annual meeting, the board of education of such district consisted of five members. The annual meeting of August 6th last passed a resolution to increase the number of members on such board from five to nine. Section 31, title 8 of the Consolidated School Law provided previous to 1903 that a union free school district of this class could change the number of its trustees at any annual meeting by a majority vote and that such vote should be by taking and recording the ayes and noes. In 1903 the Legislature amended this section of the Consolidated School Law by specifically providing that a district of this class could not change the number of its trustees unless the notice of the annual meeting given by the board of education contained a notice that the proposition to either increase or decrease the number of trustees or members of the board of education would be presented to the annual meeting for determination (*see* chapter 463, Laws of 1903). The notice of the annual meeting given by the board of education did not contain a reference of any kind to the effect that the question of increasing the number of members of the board of education would be presented to such annual meeting for determination. Without having given this notice as the statutes direct the annual meeting voted to increase the number of trustees from five to nine. The meeting, however, did

not proceed to the election of such additional members but adjourned for three weeks and immediately gave notice that at such adjourned meeting the additional members of the board would be elected. The regularity or the fairness of the election itself is not an issue in this proceeding. Great stress is laid upon these points by the attorney for respondents but the only question in this appeal is, did the action of the annual meeting conform to the statutes in deciding to increase the number of trustees? The act of deciding to increase the number of trustees is a statutory proceeding and it is essential to the validity of the procedure in such cases that each provision of the law shall be fully satisfied. Moreover, courts uniformly hold that in cases involving statutory proceedings the statutes must be strictly construed. This Department has uniformly ruled that even where the vote upon this question was taken by ballot instead of by taking and recording the ayes and noes, and proper notice had been given, such failure to comply with the statutes was fatal to the validity of the action taken. It has also ruled that notice of such intended action is always necessary.

The number of members of which a board of education shall consist is an important question. The Legislature evidently believed that the voters of a district should have knowledge of the fact that the question of deciding to increase the number of members on a board of education would be presented to an annual meeting before such meeting could legally determine that question. It is quite as essential to the rights of the voters of a district that they shall have a right to express their wishes upon enlarging a board of education as it is that they shall have the right to express their wishes upon who the members of such board shall be. Failure to strictly observe the statutes governing this question is sufficient ground for vacating the action of the annual meeting in respect to the matter herein complained of.

It is claimed by respondents that appellants knew the district could not legally vote to increase the number of trustees without having given the required notice and knowing this fact and having joined in giving notice of the adjourned meeting and having participated in all the proceedings and the election they are now estopped from raising the question of regularity of procedure. It is also claimed that respondent Jeffers knew that Mr Bellew had written this Department and received in reply a communication from the Chief of the Law Division, advising him of the illegal procedure at the annual meeting. Appellant Dempsey denies this claim and asserts that he believed the procedure was regular and had he received or possessed knowledge of its irregularity he would have protested against the action taken. The claim of appellant is strengthened by the statement that he consulted the edition of the Consolidated School Law printed in 1903. Through a clerical error the former Department of Public Instruction, in publishing the 1903 edition of the Consolidated School Law, failed to incorporate therein the amendment in question made by the Legislature of 1903 to section 31 of the Consolidated School Law.

The fact that there was a large attendance of the voters of the district at the election held at the adjourned meeting, or that such election was legally and

honestly conducted, does not operate as an excuse of the default of the meeting for failing to observe the statutes in deciding to increase the number of trustees from five to nine. It may be that many voters opposed to having a board of education composed of such a large number, believing the action in increasing the number of trustees had been legally taken, attended and participated in the election. It may be that many of those who were at the election and voted for trustees and who were not at the annual meeting would have attended such annual meeting and opposed the action to increase the number of trustees had they known that such question would be considered. The provision of the statutes requiring such notice was a protection to this right of every voter in the district.

The experience of this Department in the administration of school district affairs shows that much trouble and embarrassment will be avoided if school district officers and school meetings are held strictly to the provisions of the Consolidated School Law which defines their powers.

Since the action of the meeting in increasing the number of trustees was illegal an election legally conducted thereafter could not give validity to the former illegal acts. (*See* decisions of this Department, nos. 4465, 4481, 5017 and 5162.)

The appeal herein is sustained.

It is ordered, That the action of the annual meeting of union free school district no. 1, town of Eastchester, held on the 6th day of August 1907, in voting to increase the number of members of the board of education from five to nine be and the same hereby is vacated.

It is also ordered, That the action of an adjourned meeting of the annual meeting of said union free school district no. 1, Eastchester, held on the 28th day of August 1907, in electing four additional members to the board of education of said district be and the same hereby is vacated.

It is also ordered, That the action of an alleged meeting of the board of education of said union free school district no. 1, town of Eastchester, in organizing said board of education by the election of a president thereof and by the appointment of a clerk and a treasurer be and the same hereby is vacated.

3934

In the matter of the appeal of Charles Palmer from certain proceedings of the annual meeting held August 5, 1890, in district no. 4, town of Bovina, county of Delaware.

A resolution of an annual school meeting to change from one to three trustees, which requires a two-thirds vote, was taken by acclamation and declared adopted. *Held*, to be irregular and inoperative. The vote should have been taken either by ballot, calling the roll, or by a division of the house, in order that the result might have been accurately ascertained and recorded, and not left to mere conjecture.

The person first elected trustee (three having been successively voted for and declared elected); *held*, to be sole trustee.

Decided December 3, 1890

Draper, *Superintendent*

This appeal is taken by a taxpayer and elector of school district no. 4, Bovina, Delaware county from certain proceedings of the annual school meeting of 1890, as follows, namely:

1 From the motion declared carried that the district elect three instead of one trustee, on the ground that the vote was taken by acclamation and without the call for ayes and noes, and no effort was made to ascertain whether the resolution was adopted by a two-thirds vote, as is required by statute, to legally make the change.

2 From the manner in which three trustees were chosen, they being successively chosen without any designation of the term for which they were to serve. The following persons were elected trustees: John W. Bromley, Charles Palmer, Wilson Scott.

The appellant asks that the meeting be declared illegal and that a new meeting be ordered. No answer has been interposed.

The evidence presented would not justify me in declaring the meeting illegal, but some of the proceedings were clearly irregular and inoperative. The vote upon the resolution to change from one to three trustees can not be sustained. Upon a vote of this kind, where two-thirds must vote in favor of the proposition to adopt it, the vote should be by ballot, calling the roll, or at least by such a division of the votes that the result could be accurately ascertained and recorded. It can not be left to mere conjectures, nor by calling for a vote upon one side only of the question.

It follows, therefore, that the district could legally elect only one trustee to serve for the ensuing year. Three persons were, however, chosen, not simultaneously nor on a single ballot, but by successive votes.

John M. Bromley was the first person chosen trustee, and my conclusion is that he is the sole trustee of the district for the ensuing year. The action of the meeting in voting to elect subsequently two other persons as trustees was without authority of law and consequently void.

To the extent above stated the appeal is sustained.

3845

In the matter of the appeal of Peter E. Davis from the proceedings of the annual meeting held August 6, 1889, in district no. 6, of the town of Colchester, county of Delaware.

A resolution to change to the three-trustee system, adopted by less than a two-thirds vote at an annual meeting, is void. An election of three persons as trustees in a district entitled to but one, the one first chosen, if they were separately voted for, is the sole trustee. If all three were simultaneously voted for, the person chosen for the term of one year is the trustee.

Decided December 9, 1889

Draper, *Superintendent*

At the annual meeting held August 6, 1889, in district no. 6, town of Colchester, Delaware county, the meeting, by a vote of four to three, decided to change from one to three trustees, and thereupon elected the appellant trustee for one year, Arthur S. Shafer for two years and A. S. Van Steenburg for three years. The trustees all concur in the above statement of facts.

The resolution to change to three trustees not having been adopted by a two-thirds vote, as required by law, must be declared void and of no effect.

If the trustees were elected separately, the person first chosen trustee (irrespective of the term for which he was voted for) is the sole trustee of the district for one year; but if they were elected simultaneously on a single ballot, then the one designated for a single year is the sole trustee.

The appeal is sustained.

4887

In the matter of the appeal of Charles D. Loucks and others from proceedings of annual meeting, held August 7, 1900, in school district no. 1, Blenheim, Schoharie county.

In a school district, having but one trustee, at any annual meeting therein, if such meeting desires to increase the number of trustees in the district to three, a resolution that the district have three trustees should be presented; and the vote taken thereon should be by ballot or ascertained by the clerk of the meeting recording the name of each person whose vote is received and setting opposite his name whether such person voted aye or no; if such resolution shall receive the affirmative vote of two-thirds of the qualified voters present and voting thereon, the meeting may proceed to elect by ballot three trustees, namely, one for one year, one for two years, and one for three years. The district has no legal authority to elect three trustees for the ensuing year.

Decided September 29, 1900

E. F. Dyckman, attorney for appellants
C. E. Nichols, attorney for respondents

Skinner, *Superintendent*

This is an appeal from the proceedings taken at the annual meeting held August 7, 1900, in school district 1, Blenheim, Schoharie county.

The appellants, *upon information and belief,* allege in substance that at the proper hour on August 7, 1900, the annual meeting of such school district was organized and a chairman and clerk of the meeting elected; a resolution was passed that *three* trustees be elected instead of *one,* and upon a vote being taken one Henry Hollenbeck was declared to be elected; before further action was taken the meeting broke up by disorder, and nearly all the legal voters, including the clerk of the meeting, William H. Duncan, left, supposing no further action

would be taken; some of the voters returned to the meeting and Jackson Decker was elected clerk of the meeting and Frederick Mattice and Willard Hugabone were elected trustees, and Decker was elected district clerk. The appellants also allege that Messrs Hollenbeck, Mattice and Decker are not, nor is either of them, eligible to hold any district office for the reason that each of them is unable to read and write ordinary English.

They also allege that no term of time was designated that the persons claimed to have been elected trustees were to serve.

Messrs Decker, Hollenbeck, Hugabone and Mattice have answered the appeal and deny each allegation of the appeal not expressly admitted or traversed.

They allege that each of them can read and write the English language. They admit that the meeting was organized by the election of Duncan as clerk, the district clerk being absent. They allege that a resolution "that the said district elect three trustees for *the ensuing year*" was introduced and adopted by a unanimous vote; that a vote was taken by ballot and Henry Hollenbeck was elected as trustee, receiving 20 votes out of 21 votes cast; that thereupon Duncan, the clerk of the meeting, with some others left the meeting, and that the persons remaining elected said Decker as clerk of the meeting, and Mattice and Hugabone as trustees and Decker was elected district clerk.

It does not appear that any person was elected as collector of the district.

The proofs herein do not show who was elected as chairman of the meeting or whether such person continued to act as chairman until the final adjournment. It does not appear whether, in the alleged election of the three persons as trustees, and of Decker as district clerk, two inspectors of election were appointed who received the votes cast in each ballot and canvassed the same, and announced the result of such ballot to the chairman, and such results were announced by the chairman to the meeting. It does not appear that Duncan and Decker each while acting as clerk of such meeting kept a poll list containing the name of each person whose vote was received in each of the ballots for the three trustees, and for district clerk. It does not appear how the vote was taken upon the resolution that the district elect three trustees for the ensuing year.

Section 26 of article 3, title 7 of the Consolidated School Law of 1894, enacts that in a school district which has determined to have but one trustee until the electors of such district *shall determine at an annual meeting, by a two-thirds vote* of the legal voters present and voting thereat to have three trustees, but one trustee shall be elected.

It appears that at the annual school meeting, held in August 1899, in such district, but one trustee was elected, namely, Charles D. Loucks. For the annual meeting held therein August 7, 1900, to legally elect three trustees, a resolution that the district have three trustees should have been adopted by the affirmative votes of two-thirds of the qualified voters present and voting thereon, and the vote upon such resolution should have been taken by ballot, or ascertained by the clerk recording the name of each person whose vote was received, and setting opposite each name whether such person voted aye or no. If such resolution had

been legally adopted the meeting should have elected three trustees, one for one year, one for two years and one for three years.

The meeting did not have the legal authority to adopt a resolution to elect three trustees *for the ensuing year.*

I am of the opinion that the proceedings taken at such annual meeting in such school district were not in accordance with the provisions in that regard required by the Consolidated School Law of 1894.

The appeal herein is sustained.

It is ordered:

That all proceedings had and taken at such meeting or meetings held August 7, 1900, at which William H. Duncan or Jackson Decker acted as clerk, be, and the same are, hereby vacated and set aside.

It is further ordered:

That Charles D. Loucks, without unnecessary delay, call a special meeting of the inhabitants of school district 1, Blenheim, Schoharie county, qualified to vote at school meetings therein, for the purpose of electing a trustee, a clerk and collector of such district, and for considering and acting upon the question of appropriating money and the levy of a tax for school purposes for the present school year. That the notice of such special meeting be given in the manner required by sections 2 and 6 of article 1, title 7 of the Consolidated School Law of 1894. That in the election of such district officers the proceedings taken shall conform to the provisions contained in, and the methods prescribed in, subdivision 4 of section 14 of article 1, title 7 of the Consolidated School Law of 1894 relating to the election of school district officers; that the vote appropriating money or authorizing the levy of a tax for school purposes, must be taken or ascertained in the manner required by subdivision 18 of section 14 of article 1, title 7 of the Consolidated School Law of 1894.

3849

John Crofoot, Cornelius Sullivan and William Oakley v. Michael B. O'Hara, sole trustee of school district no. 5, of the town of High Market, county of Lewis.

The question of the ineligibility of a person holding a district office, can not be raised and passed upon collaterally. Legal acts of a de facto officer will be sustained.

An item voted by a district meeting for expenses incurred in defending an action brought against the district, may be included by a trustee in a tax list.

Decided December 31, 1889

Draper, *Superintendent*

This is an appeal against the action of the trustee in issuing a certain tax list and warrant on or about the 1st day of October 1889. Two grounds are alleged: first, that the respondent is not legally the trustee of the district, not being a

taxpayer therein, and not having children who have attended the school; second that there was no authority for collecting certain moneys included in the tax list. This is not the proper way to test the validity of the title of the respondent. That question is not to be tried collaterally. Being in the office, he is presumed to be rightfully in it until the contrary is shown. If he is not eligible to the office, that fact should have been raised earlier. Whether eligible or not, is not material in this connection, for it can not be denied that he is in the office and is exercising the functions thereof. He is certainly a de facto officer and his legal acts as such are to be upheld.

As to the allegation that he has included certain items in his tax list improperly, it is shown in the answer that the items referred to are expenses incurred in defending a suit brought against the district. The respondent alleges that these items have been sumbitted to a special meeting of the district and approved and audited at such meeting. This allegation is not controverted. If it be true, as I am obliged to assume that it is, then the respondent was justified in including the same in his tax list.

After the fullest consideration of the matter, I am obliged to reach the conclusion that it is not possible to sustain the appeal.

The appeal is dismissed.

3576

In the matter of the appeal of Seward Baker and others v. the board of education of union free school district no. 1, of the town of Westchester, Westchester county.

Chapter 36, Laws of 1886, conferring additional powers upon the board of education of union free school district no. 1, town of Westchester, Westchester county, does not abridge or take away the right of appeal to the State Superintendent.

Where an act complained of is a continuing one an appeal may be taken at any time during such continuance.

When a duty is imposed by law upon a board of trustees, the board has no authority to employ other persons to perform such duty at the expense of the district in the absence of special statutory provisions to that effect.

Decided March 19, 1887

Draper, *Superintendent*

Union free school district no. 1, of the town of Westchester, is engaged in the erection of a new school building. The board of education of the district, in charge of the work, is proceeding under the general laws governing such boards as well as under the provisions of chapter 36 of the Laws of 1886, which has special reference thereto. While the work of erecting the new building was in progress, and on the 30th day of September 1886, the board adopted a resolution appointing one Thomas S. Ryan, with compensation at the rate of $4 per day,

"to superintend the work that is being done on the new school building, and to look after the interests of the board in the matter."

From this act of the board this appeal is taken. The appellants set forth that they are residents and taxpayers in the district. As the grounds of their appeal they set up that, prior to the employment of Ryan, the board employed one John E. Kirby, as supervising architect, adopted plans submitted by him, and agreed to pay him for his services the sum of 5 per cent on the contract price of the building. They set up the written contracts entered into between the board and the other parties for the erection of the building, in which it is provided that the work shall be performed "to the satisfaction and under the direction of said architect," and, also, that "should any dispute arise respecting the true construction or meaning of the drawings or specifications, the same shall be decided by the architect and his decision shall be final and conclusive." In view of this fact, the appellants say that the appointment of a superintendent of the work was unnecessary and unlawful, and could confer no authority upon the person appointed to inspect or pass upon the work of the contractors.

The respondent answering, says: (*a*) that the Superintendent of Public Instruction has no power or jurisdiction over the matter, for the reason that chapter 36 of the Laws of 1886 provided that the erection and furnishing of the building and all matters connected therewith should be solely under the control of the respondent; (*b*) that the appeal was not taken within thirty days from the time of the passage of the resolution complained of, as provided by the rules of the Department; (*c*) that the appeal is not verified, as required by the rules of the Department. For either of these reasons the respondent insists that the appeal should be dismissed.

If the appeal should not be dismissed for either of the reasons above set forth, then the respondent says that upon its merits, the act of the board was proper and that there was ample lawful authority for it. It is asserted that the contractor for the mason work had sublet his contract, and that the work was not being performed according to the plans and specifications; that the architect could not visit the work very frequently because of other engagements; and that the work was being so badly done that it was necessary for the board to have a representative who was an expert builder continually on the ground to protect its interests. The board insists that the continuance of the inspector is essential "as the only means of insuring safe and proper work upon said building, and the prevention of frauds upon said district."

I will consider the preliminary objections raised by the respondent in the order stated in the answer.

The respondent denies the jurisdiction of the superintendent to hear and determine this appeal.

Title 12, section 1, subdivision 7 of the Consolidated School Act of 1864 provides that any person conceiving himself aggrieved in consequence of "any other official act or decision concerning any other matter under this act *or any other act pertaining to common schools*" may appeal to the Superintendent of

Public Instruction. Chapter 36 of the Laws of 1886, which applies only to the particular district here interested, certainly enlarges the powers of the board of education in said district for the purpose of enabling the board to issue bonds, raise money and erect a new school building, but it will not be contended that such chapter is not "an act pertaining to common schools." That chapter, in all of its provisions, gives evidence of having been enacted for the purpose of enabling the district to do something which it could not do under the general school law, and not for the purpose of otherwise taking the district out from under the operation of the statutes of general application. In the face of the explicit and comprehensive provisions of the general laws conferring the right upon any aggrieved party to appeal to this Department from any act of school officers, there must be something in the special act showing, with clearness and distinctness, the intention of the Legislature to cut off that right as to this particular district, in at least this particular matter, or the views of the respondent can not be adopted. I have examined the special act with much care. It expresses no such purpose and, in my judgment, it implies none.

In the next place, the respondent sets up that the appeal should be barred because of the fact that it was not taken within thirty days of the occurrence of the act complained of. But the act complained of is a continuing one. If it is without lawful authority, any taxpayer is entitled to complain each day of the continuing expense involved in the retention of the inspector or superintendent.

Again, the respondent says that the appeal is not verified as required. This objection must also fail. I find in the appeal papers, a copy of which is proved to have been served on the respondent, an affidavit by Mr Seward Baker, the leading appellant, which meets all of the essential requirements of an affidavit of verification. He swears that he "has read the foregoing appeal and the allegations thereof, and that the material allegations of the appeal are true to the knowledge of the deponent." This must be held to be sufficient.

I now come to the consideration of the real question in the case, namely, whether there was authority of law for the appointment of Ryan as an inspector or superintendent of the new building, and if so, whether the act of the board was a proper exercise of such authority.

When a law imposes a duty upon school trustees, it does not follow that they can employ some one to perform it for them. They must perform it in person, unless some provision is either expressly made or necessarily implied for the employment of others to do it. There must either be express authority for the employment of agents or the work must be of such a nature as necessarily to imply that it is not to be done by the trustees, and then the money must be provided for paying others for their work.

The act of the Legislature having special reference to the construction of a new school building in the district under consideration (chapter 36, Laws of 1886) charges the board with the supervision of the work, and gives numerous directions in the premises. It does not provide for the employment of an expert

superintending builder. I have examined the act with care, and I can find no clause which reasonably implies the intention of the Legislature to give such a power to the board. There is no reason which I am able to discern for supposing that the Legislature intended to absolve this board from personal attention to the matter. Trustees, are, ordinarily, men of experience in such matters and entirely able to protect the district against fraud. This is a part of their general responsibility, and there is nothing in the special act changing the rule as to this particular case.

But the board in this case had employed an architect previous to the appointment of Ryan, and had adopted his plans and specifications, and had made the usual agreement with him for an architect's supervision of the erection of the building. No objection is raised by the appellants to the employment of the architect, and the size and cost of the new building would seem to make such action necessary and proper. It had also entered into contracts with different builders for the work to be done. The ground which the board advances as justification for the appointment of the inspector, is that it was necessary in order to secure the proper fulfilment of these builders' contracts. These contracts bind the contractors to "erect and finish the new building (describing it), agreeably to the plans and specifications made by John E. Kirby (the architect), signed by the said parties and hereto annexed, within the time aforesaid, in a good, workmanlike and substantial manner, *to the satisfaction and under the direction of the said architect.*" They provide also that payments for the materials furnished and work performed, shall be made to the contractors only upon the certificates of the architect, and further provide that if "any dispute arises respecting the true construction or meaning of the drawings or specifications, the same shall be decided by the architect, and his decision shall be final and conclusive."

In view of these agreements between the board and the builders, it is difficult to see any practical necessity for the appointment of an inspector, or what advantage he can be to the board. The contractors are not obliged to submit to his dictation. They fulfil their contracts when they satisfy the architect. The architect makes an affidavit in the matter and says that the inspector has reported to him matters in which the terms of the contract have been violated, and upon such complaint he has caused the same to be remedied, and that by the inspector's assistance, he has been enabled to prevent frauds. But it is the duty of the architect to know all about these frauds himself and to protect every interest of the district, and for this he is amply paid. If he requires assistance in the discharge of his agreement with the board, he should pay for it and not make it a charge upon the district.

For these reasons, I think the appellants are justified in their complaint. As there was delay in bringing the appeal, I do not think that the effect of my conclusions should be retroactive, so as to invalidate payments made to Ryan prior to the issuance of the injunction order granted by me upon the 19th day of February 1887. But that order must be made perpetual, and it is so ordered.

3989

In the matter of the appeal of Ed. P. M. Lynch and others v. James Gibney, as trustee of school district no. 3, town of Minerva, county of Essex.

Election of a school district trustee upheld where the proofs fail to establish the fact alleged that the unsuccessful candidate received a larger number of legal votes than his opponent.

A person, a citizen of full age, resident of a district, is not a voter simply because he is the possessor of more than fifty dollars' worth of personal property, unless his name appears upon the town assessment roll, assessed for personal property of the value of over fifty dollars.

A contract to purchase land does not constitute a person a voter.

An unintentional omission to give notice to every elector, of a district meeting to be held, does not necessarily render the proceedings of such district meeting illegal.

A trustee should be a person possessed of all faculties to properly discharge the duties of the office.

Decided July 31, 1891

Draper, *Superintendent*

At a special meeting held in district no. 3, town of Minerva, Essex county, October 4, 1890, for the purpose of choosing a trustee, the respondent was declared elected by a vote of 10 to 7, one Michael Lynch receiving the 7 votes. From such election this appeal was brought. It is alleged by the appellants that several persons who voted for respondent were aliens, two not of full age and not otherwise qualified if of age, and one other not a qualified voter.

I have carefully considered the evidence in support of the above allegations, and also respondent's proof in answer thereto, and find that two persons — John and Michael Mallon — who voted for respondent, although of full age, citizens and residents of the district, were not otherwise qualified. They claimed the franchise upon the ground that each possessed more than fifty dollars worth of personal property, but not being assessed upon the town assessment roll therefor, this was insufficient. It also appears that James Mallon who claims to own real estate, has simply a contract for the purchase of land, which is not a qualification. The respondent's other supporters whose right to vote is questioned, I find to be duly qualified.

This finding reduces the legal vote of respondent to seven, and therefore, not a majority. But it appears that the right of several of those who voted for Michael Lynch, the opposing candidate, is questioned by the respondent, and from the evidence before me, I am not satisfied that one of those, William Stewart, was a resident of the district, assuming him to have been a citizen, which is stoutly denied; and another, Mary Gates, whose right to vote depends upon the ownership of real property, by her own admission is not the owner in fee, but simply holds a contract for the purchase of land. This finding so reduces the number of legal votes cast for Michael Lynch as to still leave the respondent a clear majority.

The appellants, however, allege other grounds of appeal, namely — that legal notice of the meeting was not given, and that the respondent is physically

incapacitated from properly discharging the duties pertaining to the office of trustee.

It appears that several electors were not personally notified of the meeting, but I do not find this to have been an intentional omission or that any voter was absent from the meeting for want of notice thereof, per contra, it seems that so much interest centered in the contest that the adherents of each side were active in canvassing the district, and that every voter who chose to participate in the meeting had ample opportunity to do so.

I have serious doubt about the ability of the respondent to satisfactorily discharge the duties of trustee, with eyesight impaired as his is shown to be. In fact, his own communications with this Department prove that he may be imposed upon, and the district be involved in loss thereby. It is especially desirable that, in a district in which there is so much contention as there is in this, the trustee should be in the possession of all faculties.

The electors of the district will, in a very few days, have an opportunity to choose a trustee for the ensuing year, and in view of all the circumstances presented, I have concluded to overrule the appeal.

3715

In the matter of the appeal of Hand Taylor from the proceedings of the annual school meeting in district no. 3, town of Moriah, county of Essex.

A district meeting proceeded by a viva voce vote to elect a trustee; the chair declared a person elected, but as there were two candidates the declaration of the chair was unsatisfactory and a ballot was called for and proceeded with without protest upon the part of the person first declared elected, who also participated in it.

As a result of the ballot another person was chosen trustee by a vote of 12 to 6.

Held, That the election by ballot will be sustained.

Decided October 3, 1888

Draper, *Superintendent*

This appeal is brought for the purpose of determining who was elected sole trustee at the annual school meeting, held upon the 28th day of August 1888, in district no. 3 of the town of Moriah, Essex county.

There are two claimants to the office, the appellant and one Hiram F. Green. The appellant claims that after the annual meeting had organized and transacted some business it was moved and seconded that he be elected trustee, and that the chairman put the question to the meeting, and that a majority voted in favor of the adoption of the motion, and that the chair declared the motion adopted. He says that subsequently to this it was agreed in the meeting to proceed to take a ballot, and that such ballot resulted in favor of Mr Green. The appellant claims that he was elected upon a viva voce vote, and that the subsequent action was void. He admits that subsequent to the taking of the ballot the chair declared Mr Green elected trustee.

Mr Green, on the other hand, insists that there was no election of the appellant, and that it was not so understood by the meeting. He swears, as two other persons do also, that both candidates were named for the office of trustee; that the chairman put the question whether Mr Taylor, the appellant, should be trustee, and hurriedly declared the motion adopted; that thereupon a question was raised as to whether or not it was in fact adopted; and that as the result of this controversy it was agreed to take a ballot, which resulted in 18 votes being cast, of which 12 were for Mr Green and 6 for Mr Taylor.

I can not see my way clear to sustain the appeal. A district meeting in a district having less than 300 children of school age can elect a trustee by a viva voce vote; but it is clear that in this case the meeting was not satisfied with the proceedings of the chair, and that without admitting that the election had occurred, it at once determined to take a ballot.

It is undisputed that Mr Taylor not only made no protest against this procedure at the time, but that he actually participated in it. I think that the meeting was regularly and properly held, and that the result finally attained must be upheld.

The appeal is therefore dismissed.

3970

In the matter of the appeal of James Duffy v. Russell F. Hicks, as trustee of school district no. 1, of the town of Ulster, Ulster county.

A person chosen trustee of a school district rests his claim to eligibility upon these grounds: first, that being a citizen, 21 years of age, and a resident of the district, owning a house situated on land owned by his wife; second, that being a parent, his child has attended the district school for a period of eight weeks *in a preceding year.*

Held, that he does not show qualifications as a voter, and is therefore not eligible to the office of trustee.

Decided April 20, 1891

G. D. B. Hasbrouck, attorney for respondent

Draper, *Superintendent*

The above-named respondent was chosen a trustee of school district no. 1, town of Ulster, Ulster county, at the annual school meeting held in said district August 5, 1890, for the term of three years.

Appellant, an elector of said district, now brings this appeal and alleges that the respondent is, and was at the time of his said election as trustee ineligible, not possessing either of the qualifications required by statute to constitute a person a voter at school meetings.

The respondent answers and alleges that he is and was August 5, 1890, a legal voter.

First. That he is and was a citizen, 21 years of age, and a resident of the district and the owner or hirer of real estate.

Second. That he is the parent of a child of school age, which *in a preceding year* attended the district school for a period of at least eight weeks.

The proof shows that respondent's claim to own or hire real estate rests upon the fact that his wife has the title to certain lands in said district, upon which respondent has erected a building with his wife's permission, with the understanding that said building was to be and remain respondent's property, and is respondent's property.

That he resides with his wife and family in said building.

That he is assessed for said property, has always paid the taxes thereon, and is recognized as the actual owner, he having paid therefor, and

That he is in possession of the property, and is the tenant of the same.

I am unable to find authority to sustain the position of the respondent. His wife is the owner in fee of the premises referred to.

It was held by the Court of Appeals in Martin v. Rector (101 N. Y. 77), etc., that since the passage of the acts in relation to the property of married women, there is no presumption that the husband is in occupation of his wife's land.

He may still be the head of his family without being in a legal sense the possessor or actual occupant of the house or lands in or upon which the family resides. A tenant for life may not remove permanent improvements annexed to the freehold, and it has been held that when the husband of a tenant in fee erected a dwelling house upon the wife's land, he could not remove it after her death. (1 Wash. on Real Estate 134)

There is no sufficient evidence given that respondent is a tenant.

The fact that real property is assessed in his name does not qualify him a voter, nor does the fact that he pays taxes upon real estate.

Upon the second ground, that of being a parent, etc., the respondent's pleading is, that the child has attended the school *in a preceding year.*

This is not sufficient and does not overcome the appellant's positive averment that the child did not attend school for eight weeks in the year preceding the annual meeting.

Respondent's attorney does not complain that appellant's allegation is untrue, but seeks to overcome its effect by showing that for several *preceding years,* the child attended the district school and insists upon a liberal construction of the statute in behalf of the respondent.

The respondent having been the decided choice of the district meeting, and being clearly identified with the success of the school, I have reached the conclusion that he was not and is not a qualified elector and therefore ineligible to the office, with reluctance, but I am unable to find otherwise. The appeal must be and is sustained, and the respondent accordingly removed from the office of trustee of the before mentioned district.

5273

In the matter of the appeal of Theodore Nieman and Henry D. Wellard from the action of the trustee of school district no. 11, town of Ripley, Chautauqua county, in hiring a teacher.

While a trustee, as a general rule, should respect, so far as possible, the wishes of the inhabitants of a district in the employment of a teacher, he is not bound by any action which a district meeting may take in relation to the teacher to be employed.

Decided September 11, 1906

Draper, *Commissioner*

The annual meeting of school district no. 11, Ripley, Chautauqua county, adopted a motion directing the trustee not to hire Miss Carrie Robinson as teacher in said district. Appellants do not allege that Miss Robinson is not a qualified teacher, nor do they allege that she is not a suitable person to be in charge of a public school. The only ground upon which they ask that the contract of the trustee with Miss Robinson be set aside is that the annual meeting directed the trustee not to hire her. The law gives a trustee discretionary power in employing a teacher. The only restriction upon a trustee in employing a teacher is that he shall employ one who is legally certified and who is not related to him. While a trustee as a general rule should respect, so far as possible, the wishes of the inhabitants of a district in the employment of a teacher he is not bound by any action which a district meeting may take in relation to the teacher to be employed. This appeal must therefore be dismissed on the moving papers. It is so ordered.

4894

In the matter of the appeal of Barent T. Waldron from proceedings of annual meeting held August 7, 1900, in school district no. 4, Coeymans, Albany county, relative to a spring of water outside of schoolhouse site.

The trustee or trustees of a school district, when duly authorized by a school district meeting, have the authority to cause a well to be dug on the schoolhouse site, or to provide for drinking water for the pupils and teachers of the school in the district, to be obtained upon premises other than upon such school site.

Decided October 15, 1900

C. M. Barlow, attorney for respondent

Skinner, *Superintendent*

This is an appeal from the action of the annual meeting held August 7, 1900, in school district 4, Coeymans, Albany county, authorizing the trustee of the district to expend a sum not to exceed $15 for digging and stoning a spring located on land owned by one Crum, lying northeast of the schoolhouse, to provide water for the scholars attending such school.

John C. Ten Eyck, the sole trustee of the district, has answered the appeal.

The respondent asks that the appeal be dismissed upon the grounds that the appeal is not signed; that the verifications are not in accordance with the rules of practice regulating appeals to the State Superintendent; that the appeal was not brought within the time required by said rules; that the appeal was not served upon the respondent personally, but by mail; also, that the appeal should be dismissed upon the merits.

The appeal is irregular in form, and a copy thereof was served by mail. The appeal was not brought within the time required by the rules; but I have the power of extending the time in which an appeal may be taken to me.

I have decided to receive the appeal and render a decision therein upon the facts established.

The following facts are established by the pleadings herein:

That the schoolhouse site in said district 4 comprises about one-fourth of an acre of land lying along the westerly boundary of what is commonly known as "the mountain road" leading from Ravena to South Bethlehem; that lying along the westerly boundary of such site is a ledge or mountain of rocks about 175 feet high, and extending for miles in a northerly direction and forming a part of the Helderberg range; that the character of the soil comprising such site is exceedingly stony and rocky, and covered largely with growing trees, boulders and loose rocks of many tons' weight; that there is no well or spring upon such site; that one Crum resides about 80 rods southerly from such site; that upon the lands of Crum there is a spring about 40 rods northeasterly from the schoolhouse in such district; that the water from such spring has been used for twenty years and over by the pupils and teachers of such school, and is the only available place to obtain good drinking water for such school without going a long distance, and at much inconvenience; that at the annual meeting held in such district on August 7, 1900, the trustee was empowered to expend not to exceed $15 for digging and stoning the spring located on the lot lying northeast of the schoolhouse, belonging to James J. Crum; that on August 8, 1900, said Crum executed and acknowledged an instrument in writing whereby he granted, for the consideration of one dollar, to trustee Ten Eyck and his successors in office, for the term of five years, the right to construct and maintain a well of water for the use of said school, on his premises about 200 yards distant from such schoolhouse, with the privilege of going to and from said well in the path that was then used; that pursuant to the aforesaid action of the annual meeting the respondent has caused repairs to be made to said spring, and the well properly dug, etc., and that such work is nearly completed.

The trustee of a school district, when duly authorized by a school district meeting, has the authority to have a well dug on a school site, or to provide for drinking water for pupils and teachers of the school in the district, to be obtained upon premises other than such site.

From the proofs herein, it is clear that it was impossible to obtain drinking water for the pupils and teachers of the school in such district upon the school

site. The action of the annual school meeting, appealed from, and the acts of Trustee Ten Eyck in carrying into effect such acts are approved.

The appeal herein is dismissed.

3897

In the matter of the appeal of Alonzo Knowles v. DeWitt A. Marion, trustee of school district no. 13, of the town of Van Etten, county of Chemung.

It is not only against public policy, but it is a direct violation of law for a school district trustee to engage in district work for which he is to receive compensation. A claim for such service can not be allowed.

Decided July 29, 1890

Draper, *Superintendent*

The school commissioner of Chemung county made an order, as he was empowered to do by statute, directing the respondent, the trustee of school district no. 13, town of Van Etten, county of Chemung, to make certain repairs, specified therein, to the schoolhouse in said district. The trustee procured the materials necessary to comply with such order, employed mechanics and others to do the work and labor necessary, and caused the schoolhouse to be repaired. The appellant asks that the trustee be removed from the office he holds, upon the following grounds, namely:

1 That the work above mentioned was not properly done, that the floor was not properly laid, the siding put on in an unworkmanlike manner, an abutment was not laid up with proper material; that the main door is so hung that it can not be closed; and generally, that the repairs are not worth the sum charged — in fact, not worth the cost of the material used.

2 That the trustee has appropriated to his own use several pounds of nails purchased for the district, and several of the old sashes which were removed from the building.

3 He is charged with doing work himself upon the building for which he has made a charge against the district.

4 When work was completed, he neglected to call a district meeting when requested by a reasonable number of inhabitants.

Numerous affidavits are presented of residents and others to substantiate the charges.

The trustee, in answer to these charges, insists that the work has been properly and expeditiously done, and the material furnished and the work done was reasonably worth the sum charged therefor, namely, $125. The trustee is supported in his defense by affidavits of residents of the district and neighborhood, including the principal contractor.

The respondent denies that he has appropriated any property of the district to his own use. He alleges that several pounds of nails, which were not used

upon the work, were sold to another at the cost price and the district credited therefor by the person from whom they were purchased. The sashes, he states, were not of any particular value, having been in use in the schoolhouse thirty years, and that the commissioner valued all seven at one dollar; that he sold three of the seven to his mother for one dollar and five cents, who used them in a barn.

He admits that he worked upon the building three days of ten hours each, at the request of the workman in charge, for which he charged at the rate of nine shillings per day, and was not then aware that he was committing any impropriety, or violating any law by so doing, and is now ready and willing to make any restitution the Department may direct.

The respondent admits that he did not call a special meeting of the district as requested, and in justification states that he consulted the school commissioner, and was advised by him that a meeting for the purpose requested was unnecessary, as the liability of the district was already established.

The value of the evidence of at least two of the appellant's witnesses is considerably shaken by affidavits presented by the respondent, and the allegation that the repairs made are not worth as much as the material used, actually cost is, to say the least, quite remarkable. The proof shows that the man who had charge of the work was an experienced carpenter, and had done similar work and given satisfaction. I am not able to find, from the conflicting evidence before me, that the work was not done in a substantial and skilful manner. I am convinced, from the proof before me, that the trustee has acted in good faith in carrying out the directions of the commissioner.

The charge of appropriating nails and sashes is sufficiently answered and disproved. The trustee, however, is at fault for becoming interested in the work as an employee and making a charge therefor, however small. I do not consider his charge at all unreasonable, but he being the representative of the district, and the officer to pass upon the work done and its sufficiency, it is not only against public policy, but a direct violation of law, for such an officer to receive compensation from his district. This claim the trustee must waive, or, if he has been compensated, he must refund the same to the district, or he will be liable to prosecution therefor.

The most serious charge, to my mind, is the refusal to call a special meeting, as requested by a reasonable number of the inhabitants, to consider the work done for the district. Although the order of the commissioner made it obligatory upon the trustee to make the repairs, and when made the district became liable for the expense thereof, still the legal voters of the district were entitled to a report from the trustee, both as to the nature of the repairs and cost thereof, and to a meeting to secure the same.

However, the advice of the commissioner that a meeting was unnecessary was some justification of the trustee's refusal. The trustee is directed to make a complete and detailed report of the work done upon the schoolhouse, the cost

of material used and labor performed, at the annual meeting to be held on the 5th proximo.

I do not deem the charges established sufficient upon which to grant the relief asked for, and the appeal is therefore overruled.

3783

In the matter of the appeal of William R. Kinne v. William Stetson, trustee of school district no. 9, of the town of Butternuts, Otsego county.

Appeal by a former trustee from the refusal of the present trustee of a school district to levy a tax for the purpose of raising the money to pay a claim of the former for work done upon district property during the time he was trustee of the district, dismissed upon the ground that it is a violation of law for a trustee to charge for work of this character.

Decided April 1889

Draper, *Superintendent*

This appeal is taken by a taxable inhabitant of school district no. 9, of the town of Butternuts, Otsego county, N. Y., from the refusal of the respondent, the trustee of said district, to pay or levy a tax for the purpose of raising money to pay a certain claim of the appellant for work done in erecting outhouses and privies for the use of said district, while the appellant was trustee thereof.

It is alleged by the respondent, in his answer, that the work has not been done in accordance with the directions of the district meeting, and that the district meeting has refused to accept the same; that the work has not been done in a workmanlike manner, nor in compliance with the provisions of chapter 538 of the Laws of 1887, known as the "health and decency" act.

A trustee of a school district has no authority to do work of this kind for a district. He is the officer who is to represent the district and see that the work is properly done and the district protected. It is unnecessary for me to pass upon the question of the unsuitableness of the work done, but must dismiss the appeal upon the ground that it is a violation of the law for a trustee to charge for work of this character.

3846

In the matter of the appeal of Charles McCarthy v. I. N. Webb and Joseph W. Shipway.

A trustee had no right to sell lumber to himself, nor to employ his own team upon school work, or otherwise to perform labor for the district, for which he expected to be paid while acting as trustee.

Decided December 24, 1889

James Young, attorney for appellant
Barnum Bros., attorneys for respondents

Draper, *Superintendent*

The parties hereto are residents and taxpayers in school district no. 11, towns of Middlefield and Cherry Valley, in the county of Otsego. Mr McCarthy was the trustee during the last year. Mr Webb is the present collector, and Mr Shipway the present trustee of the district. While the appellant was trustee of the district, he was directed by the school commissioner to make certain repairs to the school building, and to make necessary additions to the furniture thereof, which he did. He presented his bill to the annual school meeting, held August 6th, last. Touching the action of the meeting upon the same, there is a dispute. The appellant alleges that the bill was approved by the meeting, and so declared by the chairman, although the clerk's record fails to show the fact. The respondents allege that the meeting determined to act upon each item of the bill separately. The bill, in the aggregate, amounted to the sum of $447.84. One of the items was in favor of the appellant himself for lumber furnished, labor performed and moneys otherwise paid out. The respondents allege that all of the items of the bill were allowed except that in favor of the appellant and that such item was rejected by a vote of 5 to 12. They insist that the bill of the appellant is excessive in some particulars, and that he either exceeded the authority conferred upon him by the order of the school commissioner, or the school commissioner assumed to exercise an authority in excess of that conferred upon him by statute.

It is impossible for me to arrive at any confident conclusion as to the real facts in the case; but the burden of establishing his case is upon the appellant. There is presented no preponderance of evidence which sustains his claim, and I am forced to the conclusion that I can not sustain his appeal and direct the officers of the district to levy the tax which he insists upon. It seems more than likely that the district is fairly indebted to him, but in just what sum I can not say. He had no authority to sell lumber to himself as trustee, nor to employ his own team upon the work, or otherwise to perform labor for the district for which he expected to be paid while acting as trustee. I am not sure that this was done, and yet there are some things to indicate it. The appellant has his remedy against the district by an action at law, and while I am forced to the conclusion that I must dismiss his appeal, it is done without prejudice to his right to bring such action.

The appeal is dismissed.

3753

In the matter of the appeal of Edwin W. Smith and others v. Harley Wood, as trustee of school district no. 13, of the town of Virgil, county of Cortland.

A school district trustee who becomes a subcontractor upon district work, and thereby places himself in a position which destroys his power to act as an official for the district independently and without bias or self-interest, removed from office.

A tax list issued by a trustee for the purpose of raising money to pay for work done under these circumstances should be set aside. The contractor must enforce his remedy, if any, by an action at law against the district.

Decided January 19, 1889

William D. Tuttle, attorney for appellants
Henry M. Dickinson, attorney for respondent

Draper, *Superintendent*

This is an appeal from a tax list issued by the respondent on or about the 27th day of November 1888, for the collection of the sum of $308.06. The principal item of this sum is that of $285, for building a new schoolhouse. At an adjourned annual meeting held upon the 18th day of September 1888, it was voted that the schoolhouse should be erected pursuant to detailed specifications as to the quality and quantity of materials to be used. It was also voted that the meeting should adjourn to the 22d day of September 1888, to receive bids for building, according to the specifications, the contract to be let to the lowest bidder. A meeting was held on the 22d day of September 1888, and bids were received, ranging from $400 down to $300. For some reason, about which there is some controversy, no contract was awarded at that meeting. The trustee claims that the meeting directed him to let the contract to the lowest bidder. He received several other bids subsequent to this meeting and finally let the contract to his brother, Farnham Wood, for the sum of $285. It is admitted that the trustee worked for his brother in the performance of the contract.

It seems to be conclusively shown by the appellants that the contract has not been performed in a workmanlike manner. They allege that neither the contractor nor the trustee are builders or carpenters. They produce the affidavits of a large number of persons who first show their long experience as builders, and then impeach the character of the work done upon the building in question. This arraignment of the trustee and the contractor is so overwhelming in the evidence, as to leave no room for reasonable question as to the character of the work. I have not lost sight of the fact, however, that the contract price is apparently an exceedingly low one. There is small reason to expect much of a schoolhouse to be built for the sum of $285; but the contractor is bound to keep his agreement after he has made it. It is the business of a trustee to protect his district, and it is an impropriety for him to enter into any business relations which are not compatible with his doing so thoroughly and effectually. I can not say that the trustee was guilty of fraud when he let the contract to his brother, although that fact is strongly charged by the appellants; but I must say, that when he let the contract to his brother, and then worked for his brother in fulfilling the same, he thereby made it impossible for him to represent the district in passing upon the character of the work done, and in determining whether the whole contract was properly fulfilled or not. This fact taken in connection with another, that he refused to recognize any right on the part of a committee appointed by the district meeting to inquire into the matter and protect the interests of the district, and with the over-

whelming proof that the work has been very defectively and unskilfully performed, makes a strong showing against him.

It is true that the trustee was clothed with the official power to control the erection of the schoolhouse, but he was bound to do it in the manner directed by the district meeting, and in a way which would thoroughly and effectually protect the interests of the district. Instead of doing this, he has either wilfully or thoughtlessly entered into relations which are inconsistent with his official duty as trustee.

The district is in some way entitled to protection. It is not spending a large amount of money for a schoolhouse, but it is entitled to get the worth of its money. At all events, it is entitled to have the contractor carry out his agreement. The officer, whose duty it has been to see that this was done, has voluntarily entered into relations which have destroyed his power to do so independently and without bias or self-interest. I can not uphold this proceeding, and therefore I can not sustain the tax list from which this appeal is taken.

I have considered what the result of this conclusion may be. It may leave the district without a schoolhouse; it may leave the contractor without any pay for his work, when he may fairly be entitled to something. It is possible that the defects in the work might be remedied. It is apparent that there can be no adjustment of the matter so long as he remains trustee, and there is good reason for his retirement from the office of trustee. Indeed, both the interests of the district and his own personal interest, and that of the contractor would be best promoted by his retirement, as thereby an opportunity may be afforded for an adjustment of existing complications and difficulties.

I have therefore concluded to sustain the appeal, set aside the tax list and remove the trustee from office. The district will hold a special meeting within fifteen days from this date and elect a trustee, whose duty it will be to pass upon the character of the work performed and determine what it may be necessary for the contractor to do in order to fulfil the terms of his agreement. If an adjustment can be effected in that way, a tax list to carry the same into effect will be upheld. If it can not be, the remedy of the contractor will be to bring an action at law against the district.

The appeal is sustained, and the tax list appealed from set aside, and the trustee removed from office.

The statute directing town superintendents (supervisors) to pay out public money only to qualified teachers, duly employed, upon the order of the trustees employing them, was enacted for the purpose of preventing embezzlement by trustees, and if they pay the public money to a trustee or other person than the teacher, without his order, they do it at their peril.

Decided November 11, 1854

Rice, *Superintendent*

The provision of the law which directs town superintendents (supervisors) to pay out public money only to qualified teachers duly employed, upon the order

of the trustees employing them, was enacted for the express purpose of preventing the opportunity of embezzlement by trustees. If in the face of this fact public money is paid to a trustee, in the name of a teacher or otherwise without a properly attested order from the person to whom it is due, the town superintendent (supervisor) does it upon his own responsibility. In the case in controversy, the trustee, Reed, is liable for the means by which he obtained the money, and the town superintendent of Otto is responsible to school district no. 9 for the amount paid by him to Reed, and he must make good the deficiency, looking to Reed for reimbursement.

This appeal is accordingly sustained, and the town superintendent of Otto is hereby ordered by pay to said Hosea Edwards, teacher aforesaid, the sum of $15.86 claimed by him, and to preserve district no. 9 good in that amount, not charging said district for the amount paid illegally by him to said Isaac Reed.

3868

E. D. Curtis and another v. Charles G. Gillett, trustee of school district no. 2, towns of Barre and Elba, in the counties of Orleans and Genesee.

Appeal will be dismissed when charges against a trustee are too general, and the matters which are the subject of the appeal are trivial.

Decided April 10, 1890

Church & Kirby, attorneys for respondents

Draper, *Superintendent*

This appeal is by alleged taxpayers and voters of joint district no. 2, towns of Barre and Elba, from the action of the trustee in issuing a tax list for $357.48, bearing date October 25, 1889, for the purpose of meeting the expense incurred in repairing the schoolhouse, furnishing the same, and constructing necessary outbuildings. The charges against the trustee are too general to be considered upon a proceeding of this nature. From the respondent's answer, which is more specific, it appears that the trustee has made necessary repairs by general authority of the annual meeting, and upon the specific order of the school commissioner, and that he has furnished the schoolhouse with suitable desks by direction of the commissioner. It is charged that the trustee personally furnished goods to the district, and sold other property without the authority of the district. It appears from the respondent's answer that the trustee did furnish two doors to the district at the price of one dollar, and that he sold some material which had been left upon the ground after the repairs were made, for from two to three dollars, with which sum he credited the district. These items are too trivial to be made the subject of an appeal.

I fail to discover any sufficient ground from the appellant's pleading for sustaining the appeal, and an examination of the respondent's answer satisfies me that there is no merit in it, and that the appeal should be dismissed.

The appeal is therefore dismissed.

3580

In the matter of the appeal of Aaron L. Hill and Otis S. Lewis v. E. O. Dean, trustee of school district no. 15, town of Ridgway, Orleans county.

It is one of the powers of a district meeting to advise and direct the trustee as to what the people desire him to do in regard to the erection of a school building.

It is a duty of the trustee to carry out the directions of a district meeting, relative to a new school building.

Decided April 18, 1887

Wheden & Ryan, attorneys for appellants
John Cunneen, attorney for respondent

Draper, *Superintendent*

This is an appeal taken by legal electors of school district no. 15, town of Ridgeway, Orleans county, from the alleged refusal of the sole trustee of said district to call a special meeting of the qualified electors when requested by a sufficient number to do so, and from his alleged neglect to carry out the directions of a district meeting, relative to the erection of a school building.

It appears from the evidence presented that there is a dispute in the district as to the plan to be followed in building, and it clearly appears that a very large majority prefer a plan which the trustee does not approve of.

Since this appeal was taken, a special meeting has been held, and the wishes of the district made sufficiently clear to fully advise the trustee just what the people desire him to do in regard to the building. The law does not confer upon a trustee the power to either approve or disapprove of the plan selected by the people. The duties of his office are to carry out their desires as legally expressed, subject only to the approval of the school commissioner so far as heating, lighting and ventilation are concerned. When the district meeting has adopted this plan and approval is obtained, it is the duty of the trustee to proceed with the work in hand.

In view of the facts presented, I have reached the conclusion that the appellants had grounds for this appeal. The trustee will forthwith present the plans decided upon to the school commissioner, and if he approves of the same as required by law, the said trustee will proceed at once to secure proposals for the construction of the schoolhouse, and enter into the necessary contracts to secure its erection.

The stay, heretofore granted herein, is set aside.

3413

It is clearly the duty to make repairs in obedience to the order of the school commissioner. When such repairs have been made, the district becomes liable therefor, and the trustee must issue a tax list and warrant to raise the necessary amount to pay for the same.

Instance where claim had been assigned.

Decided April 2, 1885

Ruggles, *Superintendent*

On the 16th day of June 1884, the school commissioner of the second district of Schoharie county, made an order directing the trustee of school district no. 2, Fulton, Schoharie county, to make certain repairs upon the schoolhouse of the district in the form of an addition thereto. This order was made under and in accordance with the provisions of subdivision 3, section 13, title 2 of the Consolidated School Act of 1864. This appellant, Jacob Feek, at the date of said order, was the trustee of the district, and made or caused to be made the repairs or additions to the schoolhouse in obedience to such order. By so doing he contracted a liability on the part of the district of the sum of $188.58 for material and labor. The district, at the annual meeting, refused to order a tax for the payment of this amount or any part thereof. Two appeals have been brought to this Department, and decisions rendered sustaining the claims of two persons who furnished material and labor for the repairs upon its schoolhouse. The remaining claims for materials and labor, amounting to $165.47, since the expiration of said Jacob Feek's term of office as trustee of said district, have been assigned to this appellant, who on the 11th day of March, 1885, presented said claim to George L. Haner, the trustee of said district, and requested him to pay the same to this appellant. Thereupon the trustee refused and still refuses to pay this claim, or to issue a tax list and warrant for the same.

Assuming that the order of the school commissioner was regularly and legally made, and no appeal having been taken therefrom, it can not now be questioned; it was clearly the duty of the trustee to make the repairs in obedience thereto. This done, the district became liable therefor, and must pay for the benefits which it has legally received, and is now enjoying. Trustee ordered to issue tax list and pay claim.

3927

In the matter of the appeal of Aaron A. Harder from the proceedings of a special school meeting, held in district no. 5, town of Herkimer, county of Herkimer, September 6, 1890.

An annual meeting was held, but without electing district officers adjourned sine die.

A special meeting to transact the business which should have been attended to at the annual meeting, was held and a trustee chosen.

The trustee who held over after the time of the annual meeting claims to be entitled to the office until the election of a trustee at the next annual meeting. *Held* otherwise, the person chosen trustee at the special meeting succeeds to the office.

Decided December 1, 1890

Draper, *Superintendent*

Appellant, who was chosen trustee at the annual school meeting of 1889, and who acted as such trustee thereafter, brings this appeal from the proceedings of a special meeting called by the district clerk, and held December 6, 1890, at which meeting it is alleged one Irving P. Harder was declared elected trustee of the district. It appears that on the fifth day of August last, an annual meeting

was held, which was duly organized by the election of a chairman and secretary, and adjourned sine die without proceeding to the election of district officers. Subsequently, the district clerk called a special meeting as stated. The appellant claims that an annual district meeting having been held at the time fixed by law, and no election of district officers having been attempted thereat, he, as trustee elected at the previous annual meeting, would continue to hold over until the next annual meeting.

No answer has been interposed, the respondent seemingly acquiesces in the appellant's statement of the facts.

In determining this appeal, I am aware that a note of the editor in the last edition of the Code of Public Instruction, would lead to the conclusion that the appellant, upon the facts submitted, would be entitled to hold over as trustee until the next annual meeting but I am compelled to dissent therefrom.

The appellant was entitled to hold over as trustee until a duly called special meeting of the electors of the district should choose his successor. This having been done at a meeting held September 6, 1890, I decide Irving P. Harder the person there elected as trustee to be the trustee of the district, succeeding the appellant in said office.

The appeal is dismissed.

3870

Cornelius Slattery v. George Flack, trustee of school district no. 17, of the town of Hartland, county of Niagara.

The removal of a trustee from office is sought by this appeal for general neglect of duty, failing to carry out directions of a commissioner's order, and to provide by tax for teachers' wages, etc. An appeal pending brought by the trustee from the order referred to, is assigned as the cause for the apparent neglect of the trustee. *Held*, that the former appeal having been dismissed, the trustee will now be given an opportunity to comply with the commissioner's order and the law.

Decided April 14, 1890

Millar & Moyer, attorneys for respondent

Draper, *Superintendent*

The removal from office of the respondent, George Flack, trustee of school district no. 17, of the town of Hartland, county of Niagara, is sought by this appeal. The grounds upon which the application is based are that the respondent has neglected the duties of his office, having failed to carry out the provisions of an order of School Commissioner Robert G. Woods, condemning the school building in said district, and directing the erection of a new schoolhouse; that he has neglected to raise sums necessary for teachers' wages long past due; that he has not observed the requirements of the health and decency act, and, as a further ground, that not being a taxpayer in said district, and having no children of school age attending school therein, he is not eligible to hold a district office.

, The respondent, in answer to the foregoing charges alleges, that before the order of condemnation was received by him, a district meeting had voted to repair the schoolhouse, and the trustee thereupon proceeded to prepare a tax list to raise the amount deemed necessary for repairs, and to pay teachers' wages, and place said tax list with the warrant attached, in the hands of the collector who did not enforce the same, having been advised that the tax to repair was illegal because of the issuance of the commissioner's order condemning the schoolhouse. The respondent, in the meantime, had taken an appeal to this Department from the order of the commissioner, and states as an excuse for neglecting to raise the amount needed for teachers' wages, that he delayed, awaiting the decision of such appeal. He insists that he has complied with the requirements of the health and decency act, and has constructed suitable and separate outhouses and erected a division fence. The respondent admits that he is not now the owner of real estate. He alleges that he was an owner of real estate at the time of his election to the office of trustee, and had been for many years. Upon a careful examination of the proofs submitted, I do not feel warranted in sustaining this appeal. Upon the appeal referred to from the commissioner's order condemning the school building, I have sustained the commissioner's order, and I feel that the trustee should have an opportunity to carry out the directions of such order. There is not sufficient proof before me that the respondent is not eligible to the office of trustee. A person may be qualified to hold the office who is neither a taxpayer nor the parent of children.

I therefore dismiss the appeal.

4008

In the matter of the application for the removal of Samuel Penfold and F. Finkbeiner from the office of trustees of school district no. 6, in the towns of Cheektowaga and West Seneca, county of Erie.

Application for the removal of school district trustees from office for neglect to carry out the directions of a school district meeting.

The proof submitted disclosed the fact that the people of the district were much agitated over the selection of a site and the construction of a school building; and also over a proposition to divide the district, steps for the accomplishment of which had been taken.

Application denied.

Decided September 22, 1891

Draper, *Superintendent*

This is an application for the removal of the trustees of the above-named district, on the ground that they have wilfully refused to carry out the directions of a district meeting in relation to the selection of a new schoolhouse site. It is shown that the district, by a majority vote, determined to accept a certain new site donated to it by a corporation known as the "Bishop Land Company." The two trustees above named have been strongly opposed to the acceptance of

this site. They allege that it was given for the purpose of enhancing other lands controlled by the land company, and that it was not advantageous to the district to accept it. One of the trustees swears that he was offered $50 by the land company if he would accept the site. The school district lies in two commissioner districts. One of the school commissioners favors the proposition, and the other strongly opposes it. The school district is in the neighborhood of the city of Buffalo, and the territory is rapidly becoming more thickly populated. The boundaries of the school district have been altered recently, which fact led to the consideration of the necessity of a new site. The necessity for still further alterations in the district is becoming manifest, and steps have been taken to accomplish this.

The papers submitted disclose the further fact that an agreement is demanded of the two trustees against whom charges have been preferred, the nature of which agreement has not been disclosed by the pleadings. If the land in question is to be donated by the Bishop Land Company, I can not understand why an agreement from the trustees should be required. All that would be necessary would be for the land company to execute the deed and tender it to the trustees.

From a reading of the papers, I conclude that the trustees whose removal is sought, have failed to act upon the directions of the district meeting. They have thought that they had good reasons for this. If other changes are to be made in the territory of the school district, they should be effected before the location of the new site is finally determined. In any event, I do not feel justified in granting the application for the removal of the trustees at present, or until it shall be settled whether there is to be a further change in the boundaries of the district, at an early day.

The school commissioners having jurisdiction are directed to advise together about the matter, and determine it so far as they have power to do so. It is possible that when such determination is reached the ground for controversy will have been removed.

In the meantime, the application is denied, but without prejudice to the appellants to renew it at some future time, if in their judgment the circumstances shall seem to justify such action.

4010

In the matter of John Clingan, trustee of school district no. 1, of the town of New Paltz, in the county of Ulster.

A school district trustee persistently and wilfully disobeyed and violated the orders and directions of the State Superintendent of Public Instruction, and the laws of the State, to which his attention had been repeatedly called; *held,* sufficient cause for his removal from office.

Decided October 27, 1891

Linson & Van Buren, attorneys for appellant
D. M. DeWitt, attorney for respondent

Draper, *Superintendent*

Two appeals have heretofore been taken by Abraham M. Hasbrouck a taxpayer in the district above named, from the action of John Clingan as trustee of said district. The first was in December 1890, from the action of the trustee in expending the moneys of the district and levying a tax upon the same for the payment of teacher's wages and other alleged expenses of the district, in disregard of an agreement entered into between the district and the local board of managers of the State normal and training school at New Paltz. The second appeal was against the action of the trustee in calling a school meeting in the district on the 4th and 5th days of August 1891, for the purpose of transacting district business and electing district officers, in disregard of chapter 54 of the Laws of 1891, and against his action in attempting to carry out the alleged action of the district meeting and otherwise in disregard of said act.

In the consideration of these appeals it appeared to my satisfaction, from the evidence and papers submitted, that said John Clingan as said trustee had been guilty of a wilful violation and neglect of his duties as such trustee, and of the provisions of the Consolidated School Act, and of other acts pertaining to public schools, and that he had unreasonably delayed the collection of taxes necessary to pay the indebtedness of said district; that he had issued a tax list in which he had included sums which he had no right to collect or charge against said district; that he had even attempted to raise money to pay himself for services, and had refused and neglected to obey the directions and orders of the State Superintendent of Public Instruction in the premises. In the disposition of said appeals, the trustee was restrained and forbidden from acting as trustee of said school district, except so far as it might be necessary for him to act for the purpose of paying the indebtedness of said district, as the same existed or had been incurred on March 10, 1891. The trustee was also directed to proceed to determine the amount of the indebtedness of the district, due or incurred on the 10th day of March 1891; to apply any moneys now standing to the credit of the district to the payment of such indebtedness, so far as the same may be legally applicable thereto; and if there were not sufficient moneys on hand for that purpose, to forthwith issue his tax list and warrant for the collection of the deficiency, and as soon as collected to pay and discharge the indebtedness of the district. He was directed to withdraw the old tax list appealed from; restore any moneys collected thereunder to the persons from whom collected; cancel and destroy the same, and issue a new tax list and warrant for the sum necessary to liquidate the said indebtedness of the district.

The said trustee was also ordered to show before me, at the Department of Public Instruction, on Tuesday, the 29th day of September 1891, at 10 o'clock in the forenoon of that day, what proceedings he had taken in fulfilment of the terms and directions of said orders and decisions in said appeals; and in the event of his failure to show that he had proceeded to comply with said orders and decisions, with intelligence and in good faith, he was ordered to show cause why he should not be removed from his said office of trustee.

At the time and place named, the said trustee appeared by D. M. DeWitt, Esq., his attorney, and filed a return to said order. Said return failed to show what proceedings he had taken in fulfilment of the terms and directions of said orders and decisions, and admitted that he had not complied with said terms and directions. The return of the said trustee and the attorney appearing for him admitted that said trustee had, in violation of the terms of said orders and without any authority on the part of said district, commenced a litigation in the Supreme Court, in his official capacity as trustee of said district; and also that he had advised teachers, procured and employed by him during the last preceding school year, to commence suits against the district for their wages, instead of levying taxes for the payment of said wages, as he was directed to do in said order of the Superintendent; and that he had otherwise neglected and refused to comply with the terms of said orders.

It therefore appearing before me, upon the papers submitted in the proceedings above mentioned, that said John Clingan has been guilty of a wilful violation and neglect of duty, under chapter 555 of the Laws of 1864, and the acts amending the same, and the acts pertaining to common schools, and particularly the act, chapter 54 of the Laws of 1891, and that he has wilfully disobeyed the orders and decisions of the Superintendent.

Now, therefore, it is ordered and adjudged, that John Clingan be and he hereby is removed from the office of trustee of school district no. 1, of the town of New Paltz, in the county of Ulster.

3956

In the matter of the appeal of James Gormly, Owen Mathews and John R. Mathews v. Howard T. Montgomery and John A. Biggs, trustees of union free school district no. 2, town of Flatbush, county of Kings.

The practice of trustees of reporting a less balance of moneys on hand at the annual meetings, than they really had or should have had, in continuance of a custom of the trustees, which was to deduct from amount of funds on hand an amount equal to the outstanding indebtedness of the district. *Held,* to be a reprehensible and pernicious custom, and inexcusable. Duty of school officers relative to the care and management of school moneys pointed out.

Decided January 26, 1891

F. L. Backus, attorney for respondents

Draper, *Superintendent*

This is an application for the removal of the respondents from the office of trustee in the district above named. The charges alleged against the respondents are, that they have not only been derelict in managing the business of the district, but that they have misappropriated moneys.

The papers are exceedingly voluminous. The allegations are serious and are met by flat denials. Being unable to come to any satisfactory conclusion

upon the pleadings, I directed an investigation to be made by the school commissioner, and he has taken a vast amount of testimony which has been returned. Upon the oral arguments before me, the counsel for the appellants substantially withdrew the allegation of personal dishonesty on the part of the respondents. Since the argument, I have come to know that the respondents have removed from the district and vacated their offices. These facts simplify matters somewhat. The main fact still remaining is that the trustees have for several years been accustomed to report to the annual school meeting a balance of moneys on hand, which was much less than what they really had or should have had. This fact is not disputed. It is attempted to explain it by saying that it was the custom of the trustees to take out of the funds to the credit of the district an amount equal to the outstanding indebtedness of the district. Without claiming that this was proper, they attempt to excuse themselves on the ground that it was a custom which had been practised for many years. It is very clear to me that it was a reprehensible and vicious custom, and that there is nothing to excuse it. It is the business of school officers to keep school funds separate and by themselves, and not to mingle such moneys with any other moneys, as it is also their business to report to the district meeting each year the precise amount of money coming into their hands, the precise amount of money paid out by them, and to show for what purpose such moneys were paid out, and to indicate with precision and exactness the amount of money remaining in their hands. It would be well for them to also report the outstanding liabilities of the district, but it is a grave error to fail to report moneys on hand which have not already been actually and properly paid in the discharge of a liability of the district.

I am relieved of the duty of determining whether I should remove the respondents from office, by reason of the fact that they have voluntarily abdicated their positions, but I have deemed it proper to make the foregoing characterization of the methods shown to have been practised in this district, for the benefit of others.

3755

In the matter of the appeal of James R. Warner v. Ezra C. Clemence.

A school district trustee will not be removed from office upon the ground of his ineligiblity, unless the charge is clearly established.

Decided January 19, 1889

Draper, *Superintendent*

The respondent was elected a trustee in district no. 23, town of Brookhaven, in the county of Suffolk, at the last annual school meeting. The appellant claims that he is not eligible to the office, by reason of the fact, as he alleges, that the respondent neither holds nor hires real estate in the district liable to taxation for school purposes; that he is not the parent of a child or children of school age

who has attended school; that he has residing with him no child of school age who has attended school, and that he has not been assessed for personal property.

No proofs of the allegations of the appellant are submitted.

The respondent, in his answer, swears that he owns certain real estate lying in district no. 23 of the town of Brookhaven.

The nature of the title which the respondent claims in the real estate described is not disclosed, but there certainly is no proof submitted by the appellant which will justify me in holding that the respondent is not eligible to the office.

The appeal is dismissed.

3701

In the matter of the appeal of Isaiah M. Merrill, for reinstatement as trustee of school district no. 8, town of Northfield, Richmond county.

The office of trustee does not become vacant by reason of the neglect or malfeasance of the officer, until charges have been preferred and an opportunity afforded the accused person to be heard in answer to them, and he is removed from office by competent authority.

Decided July 26, 1888

T. W. Fitzgerald, attorney for the petitioners
Lot C. Alston, attorney for the respondent

Draper, *Superintendent*

The petitioner has heretofore been a trustee of school district no. 8 of the town of Northfield, Richmond county. It is alleged that he has been guilty of neglect and malfeasance in office. Other trustees and interested persons have taken the view that, under section 58 of title 7 of the Consolidated School Act, the office held by Merrill had become vacant. Acting upon that supposition, they procured from Edward P. Doyle, supervisor of the town of Northfield, in June last, an order appointing one Decker as trustee in the place of the petitioner. This is an application on the part of the petitioner to be reinstated.

The case may be very easily disposed of. I am clearly of the opinion that no vacancy existed. Whether or not the petitioner had forfeited the office by reason of the things complained of, no vacancy would arise until charges were made against him, and he could be afforded an opportunity to be heard in answer to them, and should be removed by competent authority. It may be added also, though not material, that the supervisor had no power to appoint a trustee even if a vacancy had existed, for the power of appointment had been vested in the school commissioner, by operation of chapter 331 of the Laws of 1888. It is therefore held that the petitioner is still the trustee and entitled to exercise the powers of his office as such.

3894

In the matter of the appeal of H. B. Harrison, school commissioner of the second commissioner district of Steuben county, v. DeVoy Bailey, trustee of school district no. 2, of the town of Troupsburg, Steuben county.

A trustee who persistently neglects to make repairs to the school building, which are necessary, and which have been directed by the commissioner's order; *held,* a sufficient cause for his removal from office.

Decided July 24, 1890

Draper, *Superintendent*

The commissioner, the above-named appellant, on or about August 6, 1889, made and issued an order directing certain repairs to be made to the schoolhouse in school district no. 1, Troupsburg, Steuben county. The order was duly delivered to the respondent, the trustee of said district. The order has not been obeyed and its requirements complied with.

The Department has been very lenient with the trustee. No answer to the appeal having been received, an order to show cause why the order had not been obeyed was issued and caused to be served upon the trustee. No sufficient answer has been made thereto.

The respondent states that a district meeting will not authorize the repairs directed by the order. The trustee has been repeatedly advised that no such authorization was necessary; that the commissioner was acting within the scope of his authority, and that the statute makes it the duty of the trustee to obey his order. The repairs are necessary for the comfort of the pupils of the school and the teacher employed to instruct them.

The appeal is sustained. The respondent, DeVoy Bailey, is hereby removed from the office of trustee. If the district and the person who may be chosen trustee continue to ignore the commissioner's order public money will be withheld from the district. The order of the commissioner must be obeyed.

3960

In the matter of the appeal of Eldorado and Ruth Frasier v. George W. Houghton, as trustee of school district no. 7, town of Day, county of Saratoga.

A school trustee charged with being ineligible to the office, not being a voter at school meetings, answers the charge by swearing to the qualifications of a voter. Charge dismissed.

A school trustee included in a tax list a charge for personal services rendered the district; *held,* illegal, and the item directed to be eliminated from the tax list.

Upon an appeal appellant obtained leave to serve and file a reply, and in such reply filed set up an entirely new and different cause of complaint; *held,* not permissible, and such new matter will not be considered.

Decided February 9, 1891

S. M. Richards, attorney for respondent

Draper, *Superintendent*

This appeal is brought by electors of school district no. 7, town of Day, county of Saratoga. Appellants allege that, although the respondent was chosen trustee at the annual district meeting of 1890, he was not and is not eligible to the office, not being a qualified voter at school meetings in the district; that that fact was unknown to the appellants until a few days prior to the bringing of this appeal, and that such respondent has included in a tax list recently placed in the collector's hands an item for personal services rendered, the charge for which is exorbitant.

An order to enjoin the enforcement of the tax warrant issued by the respondent as trustee was applied for and a temporary stay granted. The appellants further allege that respondent neglected to render any report to the last annual meeting, but nowhere allege that he was trustee prior to August 6, 1890.

The respondent answers and alleges that he is a qualified voter, being a citizen over 21 years of age, a resident of the district, the lessee of land, and in fact a taxpayer. He admits that he has charged the district $1.50 for fourteen hours' work.

The appellants obtained leave to serve and file a reply and now come in with an entirely new charge — that of permitting the teacher to punish pupils with severity, and to an unnecessary and inhuman degree. To this new cause of complaint the trustee has not answered, and I have not required him to do so. The appellants should have made this a ground of appeal in their initiatory pleading if they wished to raise this issue at this time.

The charge that the respondent is ineligible is clearly not established by the evidence.

The charge for personal services by the trustee is an illegal item in the tax list, and the trustee is hereby directed to withdraw and correct the tax list by eliminating that item therefrom.

If this order be complied with the order staying the enforcement of the warrant will be revoked and this appeal overruled.

3834

In the matter of the appeal of Thomas T. Powell v. Thomas E. Butler, as trustee of school district no. 13, of the town of Coeymans, county of Albany.

A qualified elector duly chosen a school officer was, by a misrepresentation of the law, induced to state to the meeting at which he was chosen, "that he wanted no fuss about the matter, and did not care for the office;" *held,* not to be a refusal to serve. The subsequent election of another person to the same office at the same meeting; *held,* void.

Decided December 2, 1889

O'Brien & Addington, attorneys for appellant
Barlow & Greene, attorneys for respondent

Draper, *Superintendent*

Thomas T. Powell, a resident elector of school district no. 13, town of Coeymans, Albany county, who claims that he was duly chosen sole trustee of said district at the last annual meeting, asks that he be declared trustee and that the respondent be removed from the office of trustee for neglect of duty and upon other grounds.

A singular state of facts is presented. The proofs show that the annual meeting was attended by thirteen electors, and that appellant was chosen trustee without dissent, and so declared by the chairman. Subsequently the respondent stated to the meeting that the appellant was not eligible to the office, not being a taxpayer. Whereupon appellant stated "that he wanted no fuss about it, and did not care for the office." Some one thereupon nominated respondent for trustee, and two or three voted for the proposition, and respondent was declared elected; not, however, without objection by one of the electors, who stated that no vacancy existed.

There is no question about the election of the appellant as trustee, and it appears he is and was eligible to the office. The only point in the case is this: Did the appellant at the annual meeting or since, refuse to serve as trustee? Acting upon the erroneous information given to the meeting by the respondent, appellant stated he "did not care for the office and wanted no fuss about it." It appears he does want the office, and does not refuse to serve therein.

I do not consider the language used at the annual meeting by the appellant, based upon the unwarranted remark of respondent, a refusal to serve, and I therefore declare Thomas T. Powell to have been duly chosen sole trustee of district no. 13, town of Coeymans, Albany county, at the annual meeting last held, to be entitled to perform the duties of said office, and, until his term expires, or he vacates the office, it is incumbent upon him to discharge the duties of trustee.

There was no warrant for the second election of trustee at the annual meeting. The respondent clearly had no title to the office, there existing at the time of the election no vacancy in the office of trustee; consequently, the assumed election of respondent was void.

In accordance with the above findings of facts, the appeal is sustained.

3725

In the matter of the application for the removal of Marquis Lewis, sole trustee of school district no. 1, town of Kortright, county of Delaware.

A trustee, incapable of transacting business by reason of advanced age, and who is wholly irresponsible and living on charity, and who has refused or neglected to carry out the directions of the district meeting for a long time, is unfit to hold the responsible office of trustee.

Decided November 14, 1888

Draper, *Superintendent*

It seems that, at a special meeting held in the above-named district on the 14th day of September 1886, a resolution was adopted in the manner provided by statute, to change the schoolhouse site and purchase a certain plot of land owned by one Hiram Every. The vote was very close, standing 23 in the affirmative and 22 in the negative. By the action referred to, the trustee of the district was directed to purchase the said plot of ground for the sum of $175. It is alleged, and not controverted in the papers before me, that Mr Lewis, the trustee, has neglected to carry out this determination of the district meeting. In subsequent meetings held in the district he has been called upon to state what, if anything, he had done to comply with the action of the district meeting, and stated that he had done nothing. Beyond this, it is alleged that the trustee is advanced in age, wholly irresponsible, incapable of transacting business and living upon charity. There seems to be a very grave question about his eligibility to the office of trustee. It is shown that he is occupying a certain tenement house on premises belonging to one Emeline Foreman, who swears that he does not pay any rent, and that she expects none from him, and that she permits him to remain there only at sufferance and as a deed of charity. If this is so, then he is not eligible to the office of trustee. But whether it is or not, it seems to be well established by the papers that he is a man entirely unfit for the responsible duties of school trustee, and particularly so in a district about to engage in the erection of a new school building upon a new site. I find nothing involving the personal integrity of the trustee. No such charge is made against him. But it seems clear to me that a man of advanced age, without any visible means of support, and who has, for a long time, wholly refused or neglected to comply with the directions of the district meeting at which a matter of so much importance as the erection of a new schoolhouse was ordered (even after the old one had been condemned by the school commissioner), should not continue to hold the office of school trustee, I have, therefore, reluctantly come to the conclusion that it is my duty to remove him and direct a new election.

It is therefore ordered that Marquis Lewis be, and he is hereby removed from the office of trustee in school district no. 1 of the town of Kortright, Delaware county, and the district clerk is hereby ordered to call a special meeting of the district for the purpose of filling the vacancy hereby created.

3939

In the matter of the appeal of R. B. Luckenbach v. John W. Hill, as trustee of school district no. 5, Perry, Wyoming county.

A person chosen trustee of a school district was subsequently chosen district collector, which latter office he accepted; *held,* to have vacated the office of trustee.

Decided December 3, 1890

Draper, *Superintendent*

The appellant, a taxable elector of school district no. 5, Perry, county of Wyoming, states the following as the grounds for his appeal:

That, at the annual school meeting, held August 5, 1890, the respondent acted as chairman and the appellant as secretary pro tem. and one Charles H. Damon was appointed teller; that an informal ballot for trustee was had, and 7 votes cast, resulting in no choice; that a formal ballot was then taken, with this result: for appellant 4 votes, and for respondent 3; that thereupon, some one announced that a two-thirds vote was necessary to elect, and successive ballots were taken until the respondent Hill received 5 votes and the appellant 2, and the chairman thereupon declared himself elected trustee.

The respondent answers and avers that upon the first formal ballot, there was no choice, appellant and respondent herein each receiving three votes, and one ballot cast contained the name or word "Vial," which latter ballot respondent asserts he voted himself; that upon a subsequent ballot, he was elected trustee by a vote of 5 to 2 for appellant; that appellant was subsequently elected district collector.

The first question which presents itself, and upon which there is a direct conflict of testimony, is the result of the first formal ballot. The appellant submits the joint affidavit of four electors of the district that they voted upon that ballot for the appellant, and that the result of the ballot was 4 for appellant and 3 for respondent. The person who acted as teller also swears to the same result, and it does not appear that he voted. He also states that no other vote was cast upon this ballot, and that he did not declare the vote was a tie.

The respondent is supported in his statement as to the result of the first formal ballot by two electors.

The respondent alleges that he has endeavored to discover the ballots which were left in the schoolhouse, but has been unable upon a search, to find them, and asserts that he believes some one has destroyed them. It is admitted by the respondent that he received from the former trustee the key to the schoolhouse, and the district property.

I am brought squarely, then, to the issue. Does the appellant affirmatively show, by a preponderance of proof, that he received a majority of the votes upon the first formal ballot for the election of trustee? For the appellant, we have the affidavits of himself, Patrick Sullivan, Martin McIntyre and William Morgan, all voters, supported by Charles H. Damon, teller. Opposed thereto, we have the evidence of the respondent himself, who swears he voted a ballot marked "Vial," and Dayton P. Stowell and A. Wilbur Watson, the two latter corroborating the respondent's statement of the vote. Here we have seven persons who voted, four who swear that they voted for the appellant, one who swears that he voted "Vial," and two others who do not declare how they voted, but presumably for the respondent. The teller, in addition, swears that the vote was 4 to 3 in favor of appellant, and as alleged by him, thus corroborating the appellant and his witnesses.

Respondent insists that the vote was 3 for appellant, 3 for him, and his own vote for "Vial." Who then cast the third vote for respondent? The proof fails to disclose the voter. The case thus far is clearly with the appellant. His evidence preponderates. His proof is clear, and his witnesses unimpeached. I am satisfied that appellant was chosen trustee on the first formal ballot, and should have been so declared. It is admitted that some one at the close of this ballot stated that a two-thirds vote was necessary to elect, and that balloting was continued until a two-thirds vote was cast for respondent for trustee. This statement was without warrant. A trustee having been chosen, there was no vacancy, and the subsequent vote for a trustee was a nullity.

This brings me to the second proposition which is disclosed by respondent's proof and not denied by appellant, that subsequently appellant was elected district collector. This occurred while appellant was yet present. He did not decline the office, nor did he refuse to serve therein, and must, therefore, be presumed to have accepted the office of collector. Further, it appears that appellant entered the record of his election as district collector upon the minutes of the meeting which he kept as its secretary. The appellant could not hold both the office of trustee and collector at the same time. Section 23 of title 8 of the Consolidated School Act prohibits this.

I am, therefore, compelled to hold that the appellant, by accepting the office of district collector, vacated that of trustee, and a vacancy was created which was not filled. The district is, therefore, without a trustee, and the district clerk is hereby ordered and directed to forthwith give notice of a special meeting to choose a trustee to fill the vacancy.

The appeal is sustained.

4028

In the matter of the appeal of James Bucroft, David Myers and others v. Thomas H. Betts, school commissioner of the first district of Rensselaer county.

Where a trustee of a school district resigns, no notice of such resignation being given to the district clerk and the district having no notice of such vacancy, an order of the school commissioner, made upon the supposition that the district had knowledge of such vacancy and that it did not intend to elect a trustee, after such vacancy had existed for thirty days, vacated and a special meeting directed to be held to fill such vacancy.

Decided December 15, 1891

Draper, *Superintendent*

The object of this appeal is to test the legality of the appointment of Frederick Wiley as a trustee in school district no. 1 of the town of Schaghticoke.

It appears that William C. Cromby held the office of trustee in said district. He sent his resignation as such to the school commissioner, under date of October 3, 1891. On the 16th day of October 1891, the school commissioner appointed Mr Wiley as his successor. Proof is offered that the district had

no knowledge of the vacancy. The district clerk swears that Mr Cromby, the former trustee, is a landowner in the district and still a resident there, and that nothing had occurred to lead him or others in the district to suppose that he intended to vacate the office. No notice of his resignation was given the district clerk. The school commissioner acted in the supposition that the vacancy was known to exist, and that the district was inactive about the matter.

He appears to have appointed a worthy man as trustee. Nevertheless, there seems to be now a general desire in the district to proceed to an election, and there is some complaint because the opportunity was not afforded. The school commissioner is apparently anxious to have the district settle the matter, but feels that he has no authority to vacate his own order, which would have the effect of removing his appointee. In this he is perhaps correct. It was unquestionably the intention of the statute that districts should have the opportunity to fill a vacancy in the office of trustee. Authority was given the school commissioner to appoint only after a vacancy had existed for thirty days and when there would be reason to suppose that the district did not intend to elect. In a case where no notice of the vacancy was given to the district, the reason disappears.

I have therefore concluded to vacate the order of the school commissioner appointing Mr Wiley, and of directing that a special meeting be held for the purpose of an election to fill the vacancy.

The appeal is sustained and it is so ordered.

3921

In the matter of the appeal of Chauncey M. Soule and Elmer E. Mogg v. school district no. 4, town of Clay, county of Onondaga.

A trustee announced to his associate members that he would resign his position as trustee, and then left a meeting of the board. He also publicly announced his abandonment of the office; *held*, that a vacancy in the office of trustee was created which a district meeting could fill.

Action of a special meeting at which a trustee was chosen to fill a vacancy, when a very close vote was had between rival candidates, where it appears that many voters failed to receive notice of the meeting, and at which meeting illegal votes were cast, set aside and special meeting directed to be called.

Decided October 31, 1890

Lewis & Wilson, attorneys for appellant

Draper, *Superintendent*

It seems that, on the 6th day of September 1890, Chauncey M. Soule, Elmer E. Mogg and Arthur Hall were the trustees in the district above named. At a meeting of said trustees held upon said date, Mr Soule announced that he would resign his position as trustee, and left the meeting. Subsequently Mr

Smith Soule visited the remaining trustees, they still being in session, and notified them that Mr Chauncey M. Soule had resigned his position, and that there was a vacancy in the board. The two remaining trustees then decided to call a special meeting of the district on the 13th day of September for the purpose of filling such vacancy. Subsequent to this, and up to the time of the special meeting, Mr Soule announced in conversation, that he had resigned. When the special meeting convened it witnessed a strenuous contest between the contending elements in the district. A protest was presented to this meeting against any action on its part, on the ground that Mr Soule had not resigned, inasmuch as he had not filed a written resignation with the school commissioner. The meeting, however, proceeded to hold an election. Upon a ballot being taken, 47 votes were found to be cast for Charles DeLong, and 48 votes for Eugene DeLong, and the latter was declared to be elected. The appellants now ask the determination of the Department that Mr Soule has not resigned his office, and that accordingly there was no vacancy. In the event that it shall be determined that a vacancy did exist, then the appellants seek to avoid the result of the special meeting, on the ground that it was not duly called, that all qualified electors were not notified, and that five or six persons who voted for Eugene DeLong were not qualified electors. The respondents seek to uphold the action of the district meeting, claiming that all who voted for Eugene DeLong were entitled to vote, and naming several persons who voted for Charles DeLong without being entitled to do so.

I think it must be said that there was a vacancy in the office of trustee. Mr Soule had announced to his associates that he would resign, and thereupon left the meeting, and he had caused it to be stated to the other trustees while still in session, that he had resigned, and that there was a vacancy in their board. They had taken immediate steps to call a meeting to fill such vacancy. In the meantime, he had publicly announced his abandonment of the office.

While the statute does provide that a trustee may vacate his position by filing his resignation with the school commissioner, it by no means forbids or prevents a trustee from abandoning such position in any other way. It has been repeatedly held that a public announcement and determination not to act in such a capacity, might be deemed a resignation or abandonment of the same. I think Mr Soule did all that was necessary to do in this case to justify the district in proceeding to elect some one in his stead.

I have carefully considered the question as to whether the action of the district meeting should be upheld. In view of the fact, which is undeniable, that some of the qualified electors in the district failed to receive notice of the meeting, and that the vote in the election of a trustee was so exceedingly close, and of the farther fact that allegations are raised on each side against the right of persons on the other side to vote, I have come to the conclusion that the result of the meeting must be set aside. It is very clear to me that the best interests of the district will be promoted by ordering a special election.

It is therefore determined that there is a vacancy in the office of trustee in said district, and that the proceedings of the special district meeting held September 13th must be set aside and held to be of no effect. The remaining trustees will give notice of a special meeting to be held not more than fifteen days distant, and will exercise care to give such notice in the way provided by the statute, to the end that all electors in the district may participate therein, if they desire to, and that the right of all persons to vote may be inquired into.

4286

In the matter of the appeal of John Bliven, as trustee of joint school district no. 3, towns of Bridgewater and Sangerfield, Oneida county, and Brookfield, Madison county, v. Oscar W. Helmer.

A person elected to the office of trustee of a school district who publicly expresses his doubts of his eligibility to hold the office and that he would not serve as trustee and who circulates a petition to the school commissioner to appoint a person as trustee and afterward calls a special meeting of the district for the election of a trustee will be deemed to have vacated the office to which he was elected, and the person elected as trustee at such meeting to fill such vacancy will be held to be the legally elected trustee of such district.

Decided October 23, 1894

J. D. Senn, attorney for appellant
N. A. Crumb, attorney for respondent

Crooker, *Superintendent*

On August 7, 1894, the annual school meeting in joint school district no. 3, towns of Bridgewater and Sangerfield, Oneida county, and Brookfield, Madison county, was duly held, and at said meeting Oscar W. Helmer was legally elected trustee and R. Sherman Langworthy was legally elected collector of said district; that one A. C. Sisson was elected district clerk, but not by ballot; that soon after said annual school meeting the question as to the eligibility of the said Helmer to hold the said office of trustee was discussed by the qualified voters of said district, it being claimed that he was a single man and not a taxpayer in said district and did not own or hire, nor was he in the possession, under a contract of purchase, of real property in said school district liable to taxation for school purposes and was not the parent of a child or children of school age who had attended the school in said district for at least eight weeks in the year preceding said school meeting, and not being such parent did not have residing with him a child or children of school age who had attended the school in said district for at least eight weeks during the year preceding said meeting, and was not assessed for any personal property on the last preceding roll of the town in which he resides. That the said Helmer publicly expressed to various qualified voters of said district his doubts as to his eligibility to hold the said office of trustee and also expressed fears that said district might

lose the public money if he should hold such office, and also publicly stated that he would not serve as trustee of said district. That a special meeting was held in said district on August 28, 1894, but no action relative to the office of trustee was taken thereat; but the question of the eligibility of said Helmer to said office was discussed, and the statement was there made that School Commissioner Francis had stated that after thirty days from the annual meeting a vacancy occurring as alleged, he (Francis) would appoint a trustee. That said Helmer circulated a petition asking that the said commissioner appoint one Charles Drumgoole as trustee of said district. That Irving Cook, the trustee of said district at said annual meeting, believing from the action and statements of said Helmer, that the office of trustee was vacant and that he (Cook) had authority, called a special meeting of said district to be held on September 4, 1894, for the purpose of electing a trustee for said district. That said meeting assembled on September 4th, at which said Helmer was present and did publicly announce that the meeting was not legally called, but that on September 11, 1894, there would be a special meeting at the schoolhouse for the purpose of electing a trustee, at which meeting he (Helmer) would give his reasons for resigning. That at said meeting of September 4, 1894, said Helmer served notice upon all the qualified voters then present that a special meeting of the qualified voters of said district would be held at the schoolhouse in said district on September 11, 1894, at 7 o'clock, p. m., for the purpose of electing officers, as follows: a chairman, clerk, trustee and collector. That on September 11, 1894, pursuant to the aforesaid notice of said Helmer, a special meeting of said district was held. The meeting was called to order by Helmer, and Albert Beebe was nominated as chairman and elected, said Helmer seconding said nomination. That Charles Drumgoole was elected by ballot as district clerk. That the chairman then announced that a ballot for trustee was in order, when Helmer stated to the meeting that he (Helmer) was trustee and decided to hold the office, and said "The meeting is adjourned." That the chairman declared said Helmer out of order. Whereupon said Helmer and Drumgoole, the clerk, took the books of the district and left the meeting. That the meeting then proceeded to ballot for trustee, and John Bliven received a majority of the votes cast for said office. That immediately after said meeting said Bliven demanded of said Helmer the key of the schoolhouse, and the possession of the books and property of the district; but said Helmer refused to deliver said property or the possession thereof to said Bliven or to recognize said Bliven as the trustee of said district. The said Bliven is a qualified voter of said district and eligible to hold the office of trustee of said district. The appellant, John Bliven, thereupon brought an appeal from the action and decision of said Helmer, and asks that said Helmer, be ordered and directed to deliver to the appellant, as trustee of said district, the property of the district and the possession of the schoolhouse and appurtenances of said district.

The respondent, Helmer, in his answer to the appeal herein states that he is 35 years of age, a native-born citizen of the United States, a resident of

the town of Brookfield, Madison county, and for the past twenty years a resident of joint school district no. 3 of the towns of Bridgewater and Sangerfield, Oneida county, and Brookfield, Madison county, and that he can read and write. That he is one of the ten heirs of Philip Helmer, deceased, who died intestate on or about November 27, 1891, who at his decease was the owner in fee simple by deed duly recorded, of about 200 acres of land in said town of Brookfield, subject only to a certain mortgage thereon; that the wife of the said Philip Helmer was appointed the sole administratrix of the estate of said deceased, and has discharged all known obligations against the estate of said deceased except said mortgage; that said respondent and his brothers and sisters are the joint owners and tenants in common of the lands, real property and estate formerly owned by their father, now deceased, subject only to right of dower therein of their mother, Angeline Helmer, which has never been admeasured; that the respondent and his brothers and sisters are now in possession of said real property, as aforesaid, which real property is situated in said joint school district no. 3. The appellant does not controvert said statements, as aforesaid, of said Helmer, and I hold that the respondent, Helmer, owns real property in said school district subject to taxation for school purposes, and is eligible to hold any district school office in said district.

The respondent having been legally elected trustee of said school district at said annual school meeting, and being eligible to hold said office the only question for my consideration appears to be whether said respondent has, by his acts and declarations, created a vacancy in the office of trustee of said district, that the special meeting of said district, held on September 11, 1894, had the legal right to supply.

By section 30, article 3, title 7 of the Consolidated School Law of 1894, it is enacted that a trustee who publicly declares that he will not accept or serve in the office of trustee . . . vacates his office by a refusal to serve.

It appears from the proofs presented that the respondent had doubts of his eligibility to hold the office of trustee in said district; that he publicly expressed said doubts and his fears that if he acted as trustee the district would lose the public moneys; and he might be liable pecuniarily for such loss; that he publicly declared he would not serve as trustee; that he circulated a petition to the school commissioner to appoint one Drumgoole as trustee; that he publicly announced to the voters assembled at the meeting of September 4th and then and there gave notice of a special meeting to be held on September 11, 1894, for the purpose of electing, among other district officers, a trustee, and that he would at said meeting announce his reasons for resigning. It clearly appears that the voters of the district believed the respondent was ineligible to hold the office, and understood, from the public declarations and acts of the respondent, up to the time of the special meeting of September 11th were about to ballot for a trustee, that the respondent so believed and had refused to serve as trustee.

The respondent admits in his affidavit filed herein that up to September 4th, nearly a month after the annual meeting, and at the time he served notice of the special meeting for September 11th, he had not taken counsel as to his eligibility to hold said office. It was the duty of the respondent as soon as doubts as to his eligibility to hold the office of trustee were raised to have submitted the facts to competent counsel, and have promptly notified the voters of the district his decision therein after taking such counsel.

I find and decide, That a vacancy occurred in the office of trustee of said joint school district no. 3, towns of Bridgewater and Sangerfield, Oneida county, and Brookfield, Madison county, by the public declarations and acts of said Oscar W. Helmer, who was elected such trustee at said annual meeting of said district. That John Bliven, the appellant herein, was legally elected trustee of said district to supply such vacancy.

The appeal herein is sustained.

It is ordered, That Oscar W. Helmer, late trustee of said joint school district no. 3, do forthwith deliver to said John Bliven, the present trustee of said district, the books, records and property of said district in the possession of said Helmer, and that said Helmer forthwith deliver to said Bliven the possession of the schoolhouse of said district and the appurtenances thereof.

3957

In the matter of the appeal of Adelbert F. Bronson v. school district no. 9, town of Vernon, county of Oneida.

A trustee advised the school commissioner that he would resign his office. The commissioner in turn advised the district clerk of the trustee's action, and directed the calling of a special meeting for the purpose of filling the vacancy.

In the meantime the first mentioned trustee concluded he did not care to resign and would continue to serve, which he attempted to do; *held,* that the action of the trustee was a resignation and a vacancy was created.

The special meeting not having been properly noticed, in consequence of which but few electors attended; *held,* that the election of the succeeding trustee was irregular, and is set aside, and a new election ordered.

Decided February 3, 1891

Draper, *Superintendent*

The appellant was elected trustee in the district above named at the last annual school meeting. Afterwards he was absent from the district for some weeks upon private business. In the meantime he had caused a special meeting of the district to be held for the purpose of having such meeting consent to the employment of his daughter as a teacher in the district school. The special meeting was held and refused to consent to such employment. It seems that

he made some efforts to employ another teacher. In the meantime complications accumulated which led him to contemplate resigning as trustee. On the 13th of October appellant wrote to Fred E. Payne, school commissioner, saying that he would resign his office, and the school commissioner advised the district clerk that the appellant had resigned, and directed the calling of a special meeting for the purpose of electing his successor. Such meeting was held and elected one A. T. Blair as trustee to fill the alleged vacancy. In the meantime the appellant had concluded that he did not want to resign, and it has since been claimed that his letter did not amount to a resignation. He has insisted upon his right to exercise the functions of trustee, and consequently there have been rival claimants to the office.

The papers relating to the matter are exceedingly voluminous. The statements and counterstatements are highly contradictory, and it is almost impossible to eliminate the mass of irrelevant matter which has been injected into the case, sufficiently to get at the facts and determine the truth. I am of the opinion that the appellant must be held to have resigned his position. The school commissioner certainly thought so when he wrote the district clerk to call a special meeting to elect a successor. That such a meeting was held and was allowed to elect a successor without such action being contested, or without being served with legal notice that there was no vacancy, is of itself very suggestive of the fact that the trustee who had been elected at the annual meeting desired to vacate the position. On the other hand, I am of the opinion that the special meeting which assumed to elect a trustee, was held inconsiderately and without proper notice throughout the district. I am confident that the best interests of the district will be promoted by holding that there is a vacancy in the office of trustee, and directing that a special meeting be held to elect a person to fill such office. The majority of qualified electors in the district ought to have their way as to the person who shall fill the office of trustee. The fact that only a small portion of the children in the district are attending school under the present management, which seems to be revealed in the papers, of itself, indicates that a majority of the district are opposed to the action of the special meeting.

I have no difficulty in concluding that there is a vacancy in the office, and that the best interests of the district will be promoted by ordering a special election to fill it.

The school commissioner having jurisdiction will therefore see that notices of a special meeting for the purpose of filling the office of trustee, which meeting shall be held not more than fifteen days from date, be at once issued by the district clerk or by some qualified elector in the district.

The appeal is dismissed.

3871

T. G. Knights, trustee of school district no. 8, towns of Burns and Almond, Allegany county, from the proceedings of special district meeting of said district, held February 12, 1890.

A trustee's public announcement of his intention to remove from the district, his public refusal to longer serve in the office, and his notice to such effect to the district clerk, accompanied by his resignation; *held,* sufficient to create a vacancy in office of trustee, and a special meeting could fill the vacancy.

Decided April 17, 1890

W. C. Windsor, attorney for appellant

Draper, *Superintendent*

Appeal by a resident elector of school district no. 8, towns of Burns and Almond, county of Allegany, from the proceedings of district meeting held February 12, 1890, at which one E. S. Gilbert was elected as trustee of said district. It appears from the evidence presented, that at the annual meeting held August 6, 1889, one Clark Crawford was duly elected trustee, and thereupon entered upon the discharge of the duties of the office; that on or about November 22, 1889, said Crawford who was about to remove from the district to an adjoining State, publicly stated that he could not longer act as trustee, refused to serve any longer and went to the district clerk of said district, to whom he declared that he resigned the office and refused longer to serve, and delivered the books and papers pertaining to his office; that on the 3d day of December 1889, at a special meeting regularly called by the district clerk for the purpose of electing a trustee to fill the vacancy, the appellant was elected as trustee, and thereupon he accepted the office, and the district clerk delivered to him the books and papers pertaining to the office. Subsequently, the former trustee returned to the district, and on the 30th day of January 1890, by an instrument in writing, addressed to the commissioner, resigned the office of trustee; that, on the 12th day of February 1890, at a meeting called by the district clerk, the above-named E. S. Gilbert, against the public protest of the appellant, who was present at the meeting, was chosen such trustee.

No appeal from the proceedings of the meeting held December 3d, for the election of the appellant thereat, has been taken. On behalf of the appellant, the affidavit of the former trustee is furnished, showing that he did in fact give up the office of trustee for the purpose of going to an adjoining State, and on or about November 22, 1889, publicly announced that he would no longer serve as trustee, and that he filed his resignation with the district clerk, and that subsequently, upon his return to the district because of ill health, to avoid any question as to his intention, formally tendered his resignation in writing to the school commissioner.

Upon the part of the respondent, it is claimed that there was no vacancy in the office of trustee at the time the appellant was elected, and that the

vacancy was only created when the former trustee tendered his resignation to the school commissioner, and consequently that E. S. Gilbert is the duly elected trustee of the district. Other matters are alleged by the respondent which may possibly form grounds of appeal from the action of the appellant as trustee, but do not raise an issue to be determined upon this appeal.

It is clear to me that the trustee of the district chosen at the annual meeting, by his announcement of his intention to remove from the district, his public refusal to serve in the office, and his communication of those facts to the district clerk, together with his resignation, created a vacancy in the office, as provided by sections 30 and 31 of title 7 of the general school laws, and that the district meeting regularly called and held on the 3d day of December 1889, possessed the power to elect a trustee to fill the vacancy.

The appeal is therefore sustained, and the appellant, T. G. Knights, is declared to be the trustee of school district no. 8, towns of Burns and Almond, county of Allegany, for the unexpired term caused by the refusal to serve and resignation of Clark Crawford, who was duly elected trustee at the last annual meeting.

3630

Application of Charles Chase and others for the removal of Martin V. Brown from the office of trustee of district no. 5, of the town of Cameron, county of Steuben.

It is alleged, as grounds for the removal of a trustee from office, that unnecessary repairs have been made, outhouses built when the district meeting voted down the proposition to do so, and that he has involved the district in needless litigation and expense; *held*, not sufficient. The allegations are too general. A trustee can repair to a certain limit. It is not shown he has exceeded it. He is required to build outhouses, and in litigations the district is not bound to pay unless the district meeting, or a county judge, upon an appeal, authorizes it.

Decided August 16, 1887

Draper, *Superintendent*

This is an application for the removal of the respondent from office. No answer has been interposed. The allegations are that the trustee has made unnecessary repairs upon the school building and that he has built two new outhouses after the district meeting voted down a proposition so to do. It is also said that he has involved the district in needless litigation and subjected the taxpayers to unnecessary expense.

The law confers upon the trustee the power to make certain repairs and to include the expense thereof in his tax lists without the vote, or even against the vote, of the district meeting. The law also requires two outhouses in connection with each schoolhouse. It is not shown that the repairs complained of were beyond those which the law authorizes the trustee to make. If the tax lists included improper items the remedy was to appeal from the tax lists rather

than to demand the removal of the trustee. If the trustee has involved the district in litigation it need not pay the bills incurred until after settlement before the county judge, as the statute provides.

Again, the respondent is a sole trustee, whose term expires in two weeks. The whole matter can come before the annual meeting, soon to occur, and be disposed of there.

The application is, therefore, denied.

4338

In the matter of the appeal of E. W. Watkins from proceedings of annual school meeting held in school district no. 8, towns of Portville and Olean, Cattaraugus county, in August 1894, in election of district officers.

The supervisors of towns have no authority to accept the resignation of a trustee of a school district. The acceptance of a resignation of a trustee being void, there is no vacancy in the office of trustee and a special meeting held in said district and the election of a trustee to fill such assumed vacancy is null and void.

Decided March 13, 1895

Crooker, *Superintendent*

The appellant in the above-entitled matter appeals from the election of the trustees, district clerk and collector of school district no. 8, towns of Portville and Olean, Cattaraugus county, at a meeting of said district, held August 14, 1894, and from the official acts of John Mohan as trustee and William Baxter as collector of said district. In the appeal, eight grounds upon which the appeal is taken, are stated.

An answer to the appeal by John Mohan has been made.

The appellant appeals from a tax list and assessment made by Mohan as trustee, but he has failed to show by proofs in what respect it is irregular or void and no copy of said tax list is annexed to his appeal, and therefore I am unable to decide as to its legality or validity.

There appear to be only two questions presented to me by this appeal for decision, namely, first, was the annual school meeting held in said district on the first Tuesday of August 1894, and, second, was Mary Patterson on September 1, 1894, at the time of her employment as teacher in said school district by said Mohan as trustee, related by blood or marriage in any degree to said Mohan.

It is alleged by the appellant that the annual school meeting in said district was not held on the first Tuesday of August 1894 (that is, August 7th), but that a school meeting in said district was held on August 14, 1894. In support of this allegation he produces a sworn copy of an extract from the records of the clerk of the district giving the proceedings of an annual school meeting held in said district, on the second Tuesday of August 1894, and also the affidavits of himself and eight others, that the said meeting was held on August 14, 1894. The respond-

ent, Mohan, produces his own affidavit and the affidavits of five others that the said meeting was held on August 7, 1894 (that is, the first Tuesday of August), and also the affidavit of one E. Jerolds that said meeting was held on the same night in August 1894, that the school meetings in the adjoining school districts were held, but he can not remember the day of the month. The respondent, Mohan, also annexed to his answer a sworn copy of the records of the annual meeting upon the book of the clerk of the district, stating that the annual meeting in said district was held on the second Tuesday of August 1894.

It is established that at the school meeting held in said district on either August 7 or 14, 1894, that John Mohan was elected trustee, William Baxter, collector, and D. Dunning, clerk. The appellant contends that the records of the district clerk, that said meeting was held on August 14, 1894, are conclusive as to the date such meeting was held. In this he is in error. Superintendent Ruggles, in a decision in appeal no. 3415, decided April 13, 1885, held that he was not bound by the clerk's minutes; that were such record conclusive, a careless or ignorant clerk could easily undo or annul the proceedings of any meeting; that he could go behind such records and inquire as to the actual facts. I concur with Superintendent Ruggles, and hold that the records of the district clerk that said meeting in said school district was held on August 14, 1894, is not conclusive, and that I will go behind the records and inquire into the actual facts.

It is not alleged nor proven that said Mohan, prior to the school meeting held either August 7 or 14, 1894, was a trustee of said district, and the claim to be such trustee was by virtue of an election had at the meeting held in said district either on said 7th or 14th of August 1894. It is proved that on August 10, 1894, said Mohan went to W. B. Mersereau, supervisor of the town of Portville, and resigned said office of trustee of said district, and then and there signed a written resignation of said office of trustee, and said Mersereau mailed said resignation to D. Dunning as clerk of said district. That on said August 10, 1894, said Mersereau wrote to School Commissioner Chapin, informing him of such resignation and inquiring whether another school meeting had better be called or whether said Chapin would appoint a trustee to fill the vacancy. That on August 11, 1894, School Commissioner Chapin wrote to said Mersereau, acknowledging the receipt of his letter of the 10th, and advised a special meeting of the district. That on August 28, 1894, a special meeting of said district was held at which the respondent Mohan was elected trustee of the district.

The resignation of Mohan as trustee to said Supervisor Mersereau, and his acceptance thereof, were without the authority of the school law, and the special meeting of said district to elect a trustee in place of Mohan was invalid and void; but the fact that on August 10, 1894, said Mohan resigned the office of trustee, is controlling with me upon the question as to whether a school meeting in said district was held on August 7th or 14th. It is clear to me that the annual school meeting in said district was held on the first Tuesday of August 1894, to wit, August 7, 1894, and not on August 14, 1894, as Mohan could not on August 10th resign an office to which he had not been elected, or to which he was not elected until August 14, 1894.

On September 1, 1894, the respondent Mohan as trustee of said district contracted with one Mary Patterson to teach the school in said district for thirty-two weeks, commencing September 3, 1894, at $7 per week. The appellant alleges that said Mary Patterson was a sister of the wife of Mohan. Miss Patterson and said Mohan each swear that at the time of said employment Miss Patterson was not related to said Mohan in any manner. The burden is upon the appellant to establish his appeal by a preponderance of proof, and in that he has failed.

I find and decide that the annual school meeting in school district no. 8, towns of Portville and Olean, Cattaraugus county, was duly held on the first Tuesday of August 1894, and that at said annual school meeting John Mohan was duly elected as trustee of said district; that D. Dunning was duly elected as district clerk and that William Baxter was duly elected as collector. That the attempted resignation of said Mohan to Supervisor Mersereau of said office of trustee, and the acceptance there by the supervisor, Mersereau, was without authority of law, and null and void. That the special meeting held in said district on August 28, 1894, in the election of a trustee to fill an assumed vacancy in said office was null and void. That at the time of the contract of employment of Mary Patterson as a teacher in said school district by said Trustee Mohan, appellant has failed to show she was related to said Mohan by blood or marriage in any degree whatever.

It is ordered, That so much of the action and proceedings of the special meeting in said district held on August 28, 1894, as relates to the election of a trustee of said district in place of John Mohan be, and the same is, hereby vacated and set aside as illegal and void.

The appeal herein is dismissed.

3873

John Near, trustee of school district no. 9, towns of Ellicott and Ellery, Chautauqua county v. Myron Clark and G. Vetter.

Supervisor has no authority to appoint to fill a vacancy in the office of trustee. An appeal will not be considered unless seasonably taken.

Decided April 17, 1890

Draper, *Superintendent*

This appeal was brought by the service of the appellant's petition upon the respondents on the 31st day of January 1890, and the 1st day of February 1890, respectively. The appellant was duly elected trustee of the district at the last annual school meeting. It appears that there were three trustees in this district. Some time after the annual meeting, the time not being given, one, Richard Lee, then a trustee of said district, moved from the district, and a vacancy was created. Subsequently, one G. Vetter was appointed by the supervisor to fill such vacancy. Thereupon Myron Clark who was then a trustee, together with said G. Vetter,

employed a teacher against the protest of the appellant, and school was commenced on the 16th of September last. A tax list was prepared by Myron Clark and G. Vetter, and delivered to the collector, and it appears, the money was collected and the teacher paid by the collector. On the 9th of November, the above-named Myron Clark moved from the district to an adjoining state, and on the 16th of December last, the school commissioner appointed G. Vetter trustee, and one Ambrose Rhodes trustee, to fill the vacancy caused by the removal of Myron Clark from the district.

No answer has been interposed, and if this appeal had been taken promptly and at the time the act complained of took place, I should sustain the appeal. The appointment of G. Vetter by the supervisor, was without authority of law. The action of Myron Clark and G. Vetter in employing a teacher without consulting the appellant, was illegal. The preparation of a tax list by Messrs Clark and Vetter was also illegal, but the appellant having delayed his appeal for months after the acts complained of took place, and after the teacher had been employed, a tax collected and the teacher paid, it is too late for me to apply a remedy.

I therefore dismiss the appeal.

3581 and 3582

In the matter of the appeal of Alice D. LaFarge v. the board of education of union free school district no. 2, of the town of Mount Pleasant, Westchester county.

When a member of a board of trustees is chosen clerk of the board, he can not be removed from membership in the board because of neglect of duty as its clerk.

A supervisor of a town has no authority to appoint to fill a vacancy existing in a board of trustees in a union free school district.

Employment of a person to teach, not sustained, when no regular meeting of the board is held at which such action is taken, and the board at no time recognized the employment.

Decided March 26, 1887

E. T. Lovatt, attorney for appellant
George S. Rice, attorney for respondents

Draper, *Superintendent*

These two appeals arising in the same family, at nearly the same time, and against the same respondent, may be considered together. Martin LaFarge appeals from the action of the respondent in removing him as a member of the board, and his daughter, Alice D. LaFarge, appeals from the action of the respondent in refusing to permit her to teach the school in the district after an alleged engagement with her, and in refusing to pay her wages for the first month of the term of such alleged employment.

From the voluminous papers in the case, I gather that the facts, so far as the appeal of Martin LaFarge is concerned, are as follows: He was elected a member of the board in August 1884, for the term of three years. On the 28th or 29th of September 1886, a paper signed by George S. Rice, William L. Carle, John A. Minnerly and Gilbert DeRevere, the other members of the board, making charges against LaFarge for alleged official misconduct, was left at the house of appellant during his absence from home. The charges were (*a*) that he had refused to permit one of the other members of the board to take the book containing the records of the board; (*b*) that he had refused to bring or send the book of records to a trustees' meeting held at the schoolhouse on the 20th day of September 1886; (*c*) for refusing to bring or send the book of records to a special meeting of the inhabitants of the district on the 27th day of September 1886. This paper required LaFarge to answer these charges before the board at a meeting to be held October 9, 1886. At that time LaFarge appeared and presented his answer to the charges, and, claiming that he had only reached home two or three days before, asked for a week's delay in the determination of the matter. He then withdrew, and the board took action removing him from membership.

I do not think that this action can be sustained. The charges against LaFarge were not of a serious character. At the most, they only affected his acts as clerk and not as a member of the board. He had been elected as a trustee by the people. He could not be removed except for causes affecting his character or his administration of the office of trustee. The retention of a book of records which had come into his hands as clerk, was not such a cause. Then, too, his answer to the charges seems to me very reasonable and effectual. Beyond this there are some evident irregularities in the proceedings of the board which could not be overlooked if they were to become material to the determination of the appeal. Taking all these things into consideration, I am obliged to sustain the appeal of Martin LaFarge.

Alice D. LaFarge claims that she was appointed a teacher by the board of education on the 30th day of August 1886, the board at the time of such appointment consisting, as she says, of four members, namely: George S. Rice, Martin LaFarge, Thomas Birdsall and William L. Carle, there being one vacancy caused by the death of James S. See. On the 30th day of August 1886, she received a letter signed by George S. Rice, Martin LaFarge and Thomas Birdsall, notifying her of her employment for a term of ten months, commencing September 6, 1886, at $45 per month. When she undertook to commence the school, she was forcibly prevented from doing so, and when her first month's pay was due, she demanded the same and was refused.

Of the three men who signed the letter to the appellant, Mr. Rice claims that he did not sign it, but placed his name upon the margin, and that he was induced to do this by the misrepresentation of Birdsall and LaFarge. It is also insisted by the respondent that Birdsall was not a member of the board. It

seems that a member of the board by the name of Babcock removed from the district and created a vacancy; that LaFarge, as clerk, addressed a communication to Moses W. Taylor, supervisor of the town, asking him to appoint a person to fill the vacancy, and that Taylor assumed to appoint Birdsall. It is conceded that Taylor had no power to appoint a member of the board. That could be done only by the board itself. It is claimed, however, on behalf of the appellant, that the board *approved* of the appointment of Birdsall and recognized him as a trustee, and that the people of the district so recognized him, and that, consequently, he was such so far as Miss LaFarge is concerned. There are many troublesome and suspicious circumstances surrounding the claims of the appellant.

1 The appointment of Birdsall by the supervisor was void.

2 It is disputed that there was any pretense of a meeting of the board held at the time when it is claimed that the board *approved* of the appointment, except that a record of a meeting appears in the record book, which record was made by the father of the appellant.

3 Even if the record is true, the only members of the board present at the time were LaFarge and Carle. This did not make a quorum. The alleged meeting is claimed to have been held at Carle's house, but Carle says there was no meeting. He says LaFarge and Birdsall came to his house, but that there was no pretense of a meeting of the board there. Birdsall could not have made one of a quorum to approve of his own appointment.

4 Formal action of the board at a meeting regularly convened was necessary to the employment of a teacher, and it seems lacking in this case.

5 The girl's father was one of three who signed the letter upon which she relies, as the basis of her employment. He had a personal interest not identical with the interest of the board. Birdsall was another of the three, and it seems very doubtful if he was a member at all. The third swears he was induced to put his name on the margin of the paper by misrepresentation.

6 The letter bears date the day before the two new members were elected to the board.

Taking all these circumstances in connection with the fact that the board has from the first repudiated the communication and denied any obligation because of it, and has refused to permit Miss LaFarge to teach the school, it must be concluded that her appeal can not be sustained.

It is therefore, ordered:

1 That the appeal of Martin LaFarge be sustained and that the action of the respondents in removing him as a trustee be set aside and held to be of no effect.

2 That the appeal of Alice D. LaFarge be dismissed.

3805

In the matter of the appeal of Charles Robbins v. Hiram P. Moore, trustee of school district no. 16, town of Orleans, Jefferson county.

In a school district having two schools, it rests with the trustees to determine primarily which of the schools children of the district shall attend.
Their decision may be reversed upon appeal.
Decided August 2, 1889

George E. Morse, attorney for appellant
W. T. Ford, attorney for respondent

Draper, *Superintendent*

This appeal is by a resident taxpayer and parent of children of school age of school district no. 16, town of Orleans, Jefferson county, from the refusal of the trustee of said district to permit two children of appellant, aged respectively 11 and 8 years, to attend a branch school established in said district. The facts of the case, which are substantially agreed upon by the parties to the appeal, are that the district possesses one main schoolhouse, and that a branch school has been established which the appellant claims is nearer to his residence than the main schoolhouse.

It is admitted that the children of appellant who have heretofore attended the main school, have been denied admission to the branch school.

The connecting circumstances, as alleged by the respondent, are that the branch school was established temporarily in a section of the district known as Thousand Island Park, and that it was established for the accommodation of children resident at the park. A teacher was employed and is teaching, upon the condition that only the children at the park would be received as pupils. The branch school is held in a building which is also used for post office purposes.

It is true that the appellant resides something more than one-third of a mile nearer the branch school than the main house, but the distance to the main house is less than one mile and one-third by actual measurement. The determination as to which of two schools in a district the children shall attend rests with the trustee. From an unreasonable decision an appeal to this Department is proper, but I do not find this element in the case before me, and believe it my duty to sustain the trustee.

The appeal is overruled.

4005

In the matter of the appeal of Ira Austin and others v. Lewis G. Humphrey, as sole trustee of school district no. 1, Lowville, Lewis county.

The wisdom of the action of a trustee in establishing two departments in a school, in which the school attendance is not large, questioned, but an appeal from his action in employing an additional teacher *overruled*. The district having become liable under the contract with the teacher, a decision by the State Superintendent sustaining the appeal would not affect vested rights thereunder.
Decided September 16, 1891

W. B. Breen, attorney for appellants

Draper, *Superintendent*

Appellants are electors of school district no. 1, town of Lowville, county of Lewis. It is charged that the respondent as trustee of said district, has employed two teachers for a term of forty weeks, at a weekly compensation of $8 and $7 respectively, and that the number of children in attendance at the school the past year — but fifty-five with a daily average of but thirty-four and one-half — does not warrant the employment of but one teacher.

The respondent alleges that the schoolhouse has been prepared for two departments; that there are 119 children of school age in the district, and that by grading the school and the establishment of a second department, the attendance will increase and better results will be secured.

While it is a serious question to me, whether the trustee has acted wisely or not in anticipating a large increase in pupils' attendance, yet I am not prepared to assert that he did not soundly exercise his discretion. It is also alleged by appellants that the schoolhouse is difficult of approach and badly located, and for these reasons, children will not attend school in the district. If this is a fact, which I have no reason to question, this difficulty can be remedied by the electors through a change of site.

It is conceded by both appellants and respondent, that two teachers have been hired by the trustee who had the legal authority to enter into the contracts. The district by the action of the trustee, has become liable for the wages agreed upon to the persons employed. Any conclusion upon the facts presented that I might reach, would not affect their vested rights. For wilful misconduct in office, the trustee could be removed from office, but this is not charged.

Whether or not the anticipations of the trustee as to the growth of the school are to be realized, will soon be determined. If his judgment is shown to have been erroneous, a future annual meeting will have authority and power to choose a successor who will reflect its views.

As relief can not be afforded the appellants, I dismiss the appeal.

4044

In the matter of the appeal of John T. Bradshaw v. John H. Albright, of school district no. 3 of the town of Ontario, county of Wayne.

The respondent, assuming to be trustee, issued a district tax list. At the annual meeting, on a ballot for trustee, 15 votes were cast, no person voted for receiving a majority. Upon a second ballot one J. H. Riker received a majority. Eight of the voters declined to vote on the second ballot because of the unauthorized announcement by the chairman that the vote must be confined to two of the persons who were candidates upon the first ballot. No appeal was taken and the electors have acquiesced in the election of said Riker as trustee. The respondent, not having the color of an election, and being neither a de facto nor a de jure officer, the tax list issued by him is void.

Decided December 30, 1891

Draper, *Superintendent*

This is an appeal from the action of the respondent, who, assuming to be trustee of school district no. 3 of the town of Ontario, Wayne county, has issued a district tax list.

The appellant alleges that the respondent is not the trustee of the district. It is shown that at the annual meeting 15 voters participated in the first ballot for a trustee. From the vote, as announced, no person voted for received a majority and, in consequence, no election occurred. The chairman directed another ballot, when but 7 votes were cast, and one J. H. Riker received a majority. Eight of the voters present declined to vote upon the second ballot because of the unauthorized announcement by the chairman that the vote must be confined to two of the persons who were candidates upon the first ballot.

Had an appeal from the proceedings of the meeting been promptly taken, its action would have been set aside and a new election ordered, in order that the majority might have had an opportunity to express its choice.

But the electors have acquiesced in the decision that John H. Riker was chosen trustee, as he was on the second ballot, receiving a majority of all the votes cast.

In any event, the respondent had not the color of an election and he is neither a de facto nor a de jure officer. The tax list issued by the respondent is void.

Appeal sustained.

3575

Trustee can not be custodian of the public money.
Teachers can not be compelled to board with trustee. A contract to that effect is illegal and void.
Decided May 25, 1887

Draper, *Superintendent*

The first ground of appeal is that the trustee took from the collector all the district funds and retained them himself. This the trustee admits, but attempts to justify his action on the ground that the collector had never given a bond and was not responsible, while he, the trustee, was responsible for the safe-keeping of the same.

The second ground of appeal is from the refusal of the trustee to pay the teacher the amount of wages claimed to be due her. It seems to have been stipulated in the contract of hiring that the teacher should board with the trustee and pay for such board $2.50 per week. During Christmas week the appellant ceased to board with the trustee and a bitter feeling sprang up between the parties. *Held,* That the trustee has been guilty of gross neglect of duty in delivering a tax list and warrant to a collector before a satisfactory bond had

been executed and delivered to him as required by law, and a person who has held the office of trustee for three successive years, can have no reasonable excuse for such neglect. The collector rendered himself personally liable when he voluntarily paid over the district moneys to the trustee, as the trustee was blamable when he received them. *Held, also,* that the teacher has a perfect right to change her boarding place at any time. An agreement with the trustee to the contrary is illegal and void. While a teacher may board with a trustee it can not be made obligatory upon the teacher so to do. *Order,* The trustee is hereby directed to pay over all the district moneys in his hands to the collector, first requiring such collector to give a sufficient bond to protect the district from loss, and take his receipt therefor. Also, to deliver to the appellant an order upon the collector for the full amount due her for teacher's wages.

2979

Advanced studies in the common schools.
Decided May 27, 1880

Gilmour, *Superintendent*

The appeal is brought from the action of the trustees excluding from the district school certain advanced studies.

This Department will neither insist upon, nor prohibit, the introduction and the teaching of branches not usually taught in the common schools of the State, unless it is clearly shown that there is a great abuse of discretion in such matter, believing that the teaching of such studies constitutes a matter that should be left to the discretion of the district, and one which the district, through the election of trustees, can effectually regulate.

Trustees can not impose, by contract, a duty upon a teacher which the law makes it the duty of the trustees to perform.
Decided January 20, 1836

Dix, *Superintendent*

Trustees of school districts can not transfer to teachers the right of prosecuting individuals for their tuition bills. The trustees are responsible for the payment of their wages, and the teachers should look to them alone. If the teacher agrees to collect his own dues, it is right that he should do so to the extent of his ability; but I have always held that, in case of a refusal on the part of the individuals indebted to him to pay their dues, the trustees should issue a rate bill, and direct the amount so due to be collected, notwithstanding

any agreement with the teacher to the contrary. The justice of such a decision is manifest. The teacher contracts with the trustees to teach the district school, and he is entitled to the aid of the authority which the law has deposited with them, for the purpose of enforcing the payment of his dues from the inhabitants of the district. They will not be allowed to make a contract with a view to transfer this responsibility to the teacher, and deprive the latter of the legal remedies which the law has provided for him. If those who are indebted to the teacher do not pay him voluntarily, the sums due him must be collected in the mode prescribed by law.

TUITION

Where children whose home has been broken up are brought to the residence of a grandfather to find care and protection, for an indefinite period, they become residents of the district in which such grandparent lives.

Decided September 28, 1857

Van Dyck, *Superintendent*

An appeal is taken from the decision of the trustees of a district refusing to admit certain children into the district school, or to share in the public moneys thereof.

The children whose admission is thus refused are within the age prescribed to entitle them to the privileges of the school, and are residing with their grandfather, an inhabitant of the district. It also appears that the home of the parents of these children has been entirely broken up, and that they are brought to the residence of their grandfather to find the care, protection and privileges of a home.

The ground of objection to their admission is, that they are not residents of the district.

Held, that they are residents of the district in the fullest sense, as implied by the statute, and, as such, entitled to a share in the public moneys apportioned to the district in which they reside.

Where a child goes into a district to get employment, and not for the purpose expressly of attending the school, he is a resident of such district, and entitled to a portion of the public money, apportioned to district, as also to share in the privileges of the school.

Decided December 14, 1865

Barr, *Deputy Superintendent*

What constitutes a child a resident of a district depends upon circumstances. If the child removes to a district for the sole purpose of attending school in such district, the parents or guardian meanwhile residing elsewhere, such child does not become a resident of the district, so as to be entitled to share in the distribution of the public money. But where the child goes into a district for the purpose of obtaining employment, and of remaining in such district, the employment, and not the school, drawing him to such district, in such case, he would be entitled to the privilege of the school, and to share in the public money apportioned to the district.

General guardian may constitute his own district the residence of his ward by removing him thereto.

Decided July 8, 1871

Weaver, *Superintendent*

Appeal by a general guardian under appointment of surrogate, from the refusal of the trustees of the district in which appellant resides, to permit his ward to attend the school in said district, except upon payment for tuition therein. The residence of the deceased father of the ward was, at the time of his decease, in a county adjoining that of the guardian and appellant. The trustees seem to base their refusal upon the ground that the residence of the ward is that of the deceased father. The Superintendent holds as follows; "While it is true as a general rule, that the last domicile of a deceased father continues to be that of his minor child, yet this rule, in my judgment, has an exception in case such child becomes the ward of a guardian, who takes him to live in the district of his own residence; at least, to the extent of entitling the ward to attend gratuitously the public school of the district in which he may thus be placed. If this were not so, a minor of lawful school age, if under the charge of a general guardian, who may, if he chooses, remove him from the last place of residence of his deceased father, might be wholly deprived of the right to gratuitous instruction which it is the object of the common school system of the State to afford to all residents of the prescribed age." Trustees directed to admit the said ward to the privileges of the school in common with other pupils of the district.

Children residing with their grandmother as part of her family and for her convenience and support, entitled to attend school in the district as resident pupils.
Decided July 4, 1875

Gilmour, *Superintendent*

Two minor children of M., who resides in district no. 9, town of W., were, by the desire of their grandmother, Mrs D., permitted to live with her at her home in district no. 29 of the same town. The trustees of the latter district refused to allow these children to attend the school in district no. 29, except upon condition of paying a tuition fee, claiming that their residence is in no. 9 where their father resides.

In support of the claim on behalf of the children, it is shown that Mrs. D. is aged and infirm in health, and needs the companionship and the aid to some extent of her said grandchildren in her household affairs. That the said children are a part of her family, that they have been placed with her to assist her and make companionship for her, and that they have not gone to reside in no. 29 for the purpose of attending its school. It was decided by my immediate predecessor that where a person of school age had left the residence of his father, and gone into another school district for the purpose of earning his own support, he was entitled to attend the school of the latter district free of charge. I concur in the correctness of this decision, and deem the principle upon which it is based well founded, and that it is sufficient to meet the present case.

The right of the children in question to attend the school in no. 29 upon the same terms as other pupils of the district, upheld.

3386

Decided November 28, 1884

Ruggles, *Superintendent*

The appeal is brought from the refusal of the board of education of union free school district no. 3, Sinclairville, Chautauqua county, to allow the grandniece of appellant to attend the public school without paying tuition therefor.

The appellant is a resident and taxpayer in said district, and Katie is the grandniece of the appellant. The mother of the child is dead and the father, who has married again, resides in Dakota. Previous to her death, Katie's mother requested that Katie might live with the appellant and his wife. The appellant says: "We gladly responded to the request of her now dead mother, and, on or about March 12, 1884, we received Katie, aged 14 years, into our family with the intention of not only furnishing a home for Katie but of caring for her as our own child."

The facts in this case fully establish such a substantial adoption of the pupil as to make her a resident of the district and entitled to the privileges of the school. It has been the uniform ruling of this Department that where children, whose home has been broken up, are brought to the residence of one who stands in the place of the parent, to find care and protection for an indefinite period, they become residents of the district in which said person lives. Board ordered to admit the child to the free privileges of the school.

3877

Mary Moore v. the board of education of union free school district no. 6, town of Manlius, Onondaga county.

A minor child, whose parents reside in one district, and who have permitted her to live in another district with a grandparent, for the purpose of securing better school accommodations than the district in which the parents reside affords; *held* to be a nonresident, and if permitted to attend the school, liable for tuition.

Decided May 12, 1890

Draper, *Superintendent*

Appellant is the grandmother of Helen Moore, a pupil in attendance at the public school in union free school district no. 6, of Manlius. Assuming that the pupil is a nonresident of the district, the board has treated her as a foreign pupil, and made a charge for her tuition. From the evidence submitted, it appears that the pupil has parents who are residents of an adjoining district, but that they deem the school facilities of said district no. 6 greater than those of their own district. They have consented to her living with her grandmother in said district no. 6, for the purpose of deriving the benefit of such school facilities. The girl commenced school in this district at the beginning of the last fall term. It

is alleged by the appellant that she has cared for several sisters of the pupil in the past, and given them an opportunity to secure an education. It is alleged by the respondent that the child has come into the district solely for the purpose of securing the advantages afforded by the school of this district, and that her parents, who reside in an adjoining district, are able to furnish her with an education.

It is often difficult to determine the question of one's residence. In the case of a minor, the residence of the parents will be presumed to be its place of residence, unless the contrary is clearly established. It seems clear to me that however meritorious the desire of the appellant may be, the case is one where a foreign pupil is temporarily sojourning in the district solely for school purposes, and that the evidence presented on the part of the appellant does not satisfy me that any change of residence was intended, or did in fact occur by the act of the pupil in coming into the district.

I must dismiss the appeal, and hold that the board was justified in making a charge for tuition.

3878

In the matter of the appeal of S. F. Snow v. the board of education of union free school district no. 10, town of Skaneateles, county of Onondaga.

A boy 14 years of age residing in the district with a brother by whom he is supported and cared for, his parents living without the district and separate, neither furnishing the other support, and neither possessed of means to support the boy; *held,* that the boy is entitled to free tuition, and entitled to be enumerated as a resident of the district.
Decided May 12, 1890

Draper, *Superintendent*

Appeal from the decision of the respondent, the board of education of union free school district no. 10, town of Skaneateles, in determining that Corry L. Snow was not a resident of the district, and therefore not entitled to free tuition in the district. The appellant alleges that he is a resident householder and elector in the above-mentioned district; that he has residing with him a brother of the age of 14 years; that the parents of the boy, although living, do not live together, and neither furnishes the other means of support; that neither of said parents has means to support said boy, and that since the separation of the father from the mother, which occurred in 1886, he has been supported largely by deponent or by his own work in several districts, where he has since resided; that prior to 1889 the appellant sent said Corry to the Dundee Academy, at Dundee, N. Y., paid his expenses and supported him there; that during the past year the appellant married and commenced housekeeping in this district, and soon after brought said boy to his home to live with him, and that he has since resided in said district, wholly cared for and supported by the appellant as a part of his family.

Appellant alleges that he believes he will have to care for and support said Corry in the future, and that said Corry has no other place of residence than with him.

The respondents allege that the appellant is not a taxpayer of the district and that if he is a voter, it is solely by reason of his being a householder. They allege that the said Corry is in the employ of appellant in caring for his horse or horses and otherwise rendering services, the value of which is equal to the value of the support, care and schooling of said boy. It is further alleged that appellant's parents and the parents of Corry, pay no taxes in the district and that neither of them are residents thereof, but that the appellant is able to pay for the boy's tuition.

There is but one question involved in this case, that of residence, and it is often a difficult one to decide. The facts alleged by the respondent, that neither the boy's parents nor his brother, with whom he is residing, are taxpayers in the district or that the appellant is able to pay for the tuition of the boy, can have no bearing. If he is a non-resident, tuition must be paid, if required by the board. If a resident, he is entitled to tuition free of charge.

In a case of this nature, while the boy whose place of residence is in question, has been deprived of a home with his parents for several years, through no fault of his own, and where in fact there is no home because of the separation of the parents, the law should be as liberally construed as possible in favor of the boy. It is clear to me that, after going from one district to another, he has become, through the favor of the appellant, his brother, a member of his family and a resident of the district to which this appeal relates, and I so hold.

The appeal is sustained, and the board of education of union free school district no. 10, of the town of Skaneateles, is hereby directed to admit Corry L. Snow to the privileges of the school in said district, as a resident thereof.

3876

Arthur C. Watkins v. the board of education of Sandy Creek High School, Oswego county.

Residence of a ward not necessarily the same as that of his guardian. A minor born in a district and living there, whose parents resided there until their decease, who owns real and personal property in the district, and whose intention it is to make the district his home, held to be a resident thereof.

Decided May 12, 1890

Draper, *Superintendent*

This appeal comes before the Department by a statement of the facts agreed to and signed by the respective parties. The respondents claim that the appellant is a nonresident of the district, and therefore, liable to a charge for tuition. The facts appear from the statement to be as follows: That the appellant is now 16 years of age; that he was born in the district, and resided there with his father

until August 1888, when his father died. Soon thereafter his stepmother was appointed his guardian, and in December 1888, the appellant removed with said guardian to the state of Ohio, having in his own mind no fixed determination as to his future place of residence.

The appellant owns real estate in the district which is in charge of an administrator who represents his guardian. He is also the owner of personal property which is in the possession of the guardian. About three months after removing from the State, he returned to the district, with the intent of making said district his home, and entered the school for the purpose of completing his education.

Considering the appellant a nonresident of the district, the board of education exacted from him payment for tuition. Giving the above statement of facts full consideration, I am satisfied that the appellant is a resident of the district and entitled to the rights which pertain thereto. The residence of a ward does not follow that of a guardian as does that of a child its parents. If the appellant had lost his residence in the district when he removed from the State with his guardian, he again acquired residence in the district when he returned to the same, with the intent of making it his home.

The appeal is sustained, and the board of education of the Sandy Creek High School, is hereby directed to admit the appellant to the privileges of the school as a resident of the district.

3843

In the matter of the appeal of Lena Marzolf v. C. Hyman, jr, trustee of school district no. 10, of the town of Sheldon, county of Wyoming.

A minor residing with a sister, who is a resident of a school district, by whom she is supported; *held,* entitled to the privileges of the school, although parents are nonresidents.

Decided December 9, 1889

Draper, *Superintendent*

The appellant has a minor sister living with her in district no. 10, of the town of Sheldon, Wyoming county. The parents reside in another district. The girl assists the appellant in the millinery business carried on in said district, and is cared for by appellant. Appellant asks that her sister Annie be admitted to the district school of district no. 10.

No answer has been interposed by the trustee. From the uncontroverted evidence before me, I find that Annie has a residence in the district, and is therefore entitled to the privileges of the school.

The appeal is sustained.

3704

In the matter of the appeal of Frank E. Losee and Sarah D. Losee v. school district no. 2, town of Alexander, Genesee county.

A residence of a minor child is held to be with its parents unless the contrary is clearly established.

The burden is upon the parents to establish the fact to be otherwise.

Decided August 22, 1888

Draper, *Superintendent*

The appellants reside in district no. 5 of the town of Darien, Genesee county. They have a child of school age who has for a considerable portion of the time been staying with her grandmother, who resides in district no. 2 of the town of Alexander. It is desired that such child shall attend the district school in the district where her grandmother resides. The trustees exact pay for tuition, which is resisted on the part of the parents.

The question involved is one of residence. This is always a difficult question to determine, inasmuch as it ordinarily depends upon many facts. If the home of this child is with her grandmother by the concurrence of her parents, then she would be entitled to school privileges in the district where the grandmother resides. If she is sent to the grandmother's only for the purpose of getting the benefit of superior school facilities, then the parents should pay for tuition. The facts upon which to determine the question in this case are very meager. Inasmuch, however, as the residence of a minor child must be held to be with the parents, unless the contrary is clearly established, and as the burden is upon the parents to establish the fact to be otherwise, if that be the case, and inasmuch as they fail to show it to be so in this instance, I am obliged to dismiss the appeal, and held that the trustees are justified in collecting pay for tuition.

3769

In the matter of the appeal of Alfred C. Thayer v. the board of education of union free school district no. 1, of the town of Chateaugay, county of Franklin.

A minor child having parents living outside of a school district, who, in good faith, came into the district to reside permanently with a family who are residents thereof, for the purpose of having a home with them, and who has been included in the enumeration of a preceding year as one of the resident children of the district; *held,* entitled to the privileges of the school.

Upon questions of this nature, the decisions of the Department have always inclined to the side of liberality. It is to be observed, however, that a child of school age who moves into a district for the sole purpose of securing the benefits of the school, and intends to remain there only temporarily, is to be deemed a nonresident. The residence of a minor child is presumed to be with its parents, but this presumption may be overcome by proof.

In a union free school district, the rule concerning residence is the same as in a common school district.

Decided March 23, 1889

Draper, *Superintendent*

This is an appeal from the action of the trustees of union free school district no. 1, of the town of Chateaugay, Franklin county, in refusing the privileges of the school under their charge to one Bertie Mitchell, a minor 16 years of age, living with the appellant, on the ground that she is not a resident of the district. The girl swears that she came to live in the family of the appellant on the 25th day of March 1888, under an agreement that she should live with him and his wife; that she has ever since continued to reside with appellant, and that she in good faith, intends to continue to reside with him permanently; that the principal reason or inducement which led her to come and live with him was that she might have a home. She admits that she has parents living, but says that they are unable to support her, and that consequently, she accepted a home with the appellant. The appellant swears to the same state of facts substantially, and says that he verily believes that it is the purpose and intent of the girl to permanently remain a member of his family, and that it is his purpose and intent to keep her and make a home for her. He also swears that he is an actual resident of the district and intends to remain such resident. He says also that Bertie Mitchell was included in the enumeration of 1888 of the children of school age in said district, as a resident member of the appellant's family, and that an examination of the enumeration shows that fact.

The respondents allege that the child is not in good faith a resident of the district, and, therefore, not entitled to the privileges of the school, and justified themselves in excluding her therefrom.

I think the facts as sworn to by the appellant and the girl, and which are not successfully controverted, bring the case within numerous decisions of the Department and entitle her to the privileges of the school. The decisions have always inclined to the side of liberality. If a child of school age moves into a district for the sole purpose of securing the benefits of the school in the district, and intends to remain there only temporarily, it is to be deemed a nonresident and required to pay tuition fees. But when it comes into the district to take up its abode permanently therein, even though its parents may be living, it is entitled to the school accommodations of the district. The residence of a minor child is presumed to be with its parents, but it may be elsewhere by their consent. It is shown that, in the present case, the child is living with the appellant by and with the consent of her parents, and the proof is strong that it is not a mere temporary arrangement in order to secure the advantages of the school; but, on the other hand, is intended to be permanant. This clearly brings the case within a long line of decisions which would give her the right to attend the school.

The respondents claim that the decisions referred to apply only to common school districts, while the district now under consideration is a union free school district. I know of no distinction in the law. The discretion on the part of a board of education in a union free school district, upon such a matter as this, is no greater than that vested in a trustee in an ordinary common school district, and the rule concerning residence would be the same in both cases.

The appeal is sustained and the respondents directed to admit the said Bertie Mitchell to the privileges of the school under their charge.

4344

In the matter of the appeal of Elizabeth Ostrander and Margaret E. Campbell v. board of education of union free school district no. 4, Johnstown, Fulton county.

A lady, residing in a union free school district, of the age of 72 years, in feeble condition and in need of a companion, receives into her family her granddaughter who continues to reside with her at her request and with the consent of the parents of the granddaughter and is under the care of and supported by her grandmother, the parents of the grandchild not exercising any control or contributing to the support or maintenance of their said daughter; *held,* that said grandchild was adopted into the family of her grandmother and for school purposes said granddaughter became a resident of the union free school district in which said grandmother resided and entitled to attend the schools therein free.

Decided March 20, 1895

Philip Keck, attorney for appellants
Harwood Dudley, attorney for respondent

Crooker, *Superintendent*

This appeal is taken from the action and decision of the respondent, made on April 9, 1894, that the appellant, Elizabeth Ostrander, is not entitled to tuition in the school under its charge except upon payment therefor, and excluding her from said school until tuition is paid, or until my decision reversing said decision of the respondent.

An answer to the appeal has been received, and also a reply to the answer.

The question presented by this appeal is as to the residence of the appellant, Elizabeth Ostrander.

It appears that the appellant, Elizabeth Ostrander, is a minor and of the age of 13 years on April 24, 1894; that the parents of said appellant are living and reside in school district no. 3, town of Johnstown, Fulton county, about two miles from the village of Johnstown, and have so resided therein for many years, and are able to educate and support their said daughter Elizabeth; that the appellant Margaret E. Campbell is the grandmother of said Elizabeth Ostrander, and resides in and is a qualified voter and taxable inhabitant of union free school district no. 4, Johnstown; that her husband died in the year 1891; that she was 72 years of age on March 11, 1895; that she is and has been for many years afflicted with heart trouble, and is enfeebled and in infirm health, and it is not now, and has not been for many years, safe for her to live alone and without the care and watchfulness of some suitable companion; that said Elizabeth Ostrander has since the years 1884 resided with and been a part of the family of her said grandmother, and her said grandmother has furnished the said Elizabeth with all her necessary wearing apparel and has boarded, kept and maintained the said Elizabeth Ostrander at her own cost and expense and has had the care, control and custody over her, the same as if she were her own daughter; that the parents of the said Elizabeth have not had or exercised any control over or

contributed to the support or maintenance of the said Elizabeth during all said years; that said Elizabeth Ostrander attended the school in union free school district no. 4 without payment of tuition, and with the acquiescence of the board of education of said district, until the fall term in 1893; that in November 1893, the appellant, Margaret E. Campbell, paid, under protest, to the treasurer of said union free school district no. 4, the sum of $9, being for tuition of said Elizabeth Ostrander for the fall term of said school of twenty weeks, the claim of the appellants Ostrander and Campbell being that said Elizabeth Ostrander was a resident of said school district no. 4; that on April 9, 1894, the respondent herein adopted a resolution, in substance, that said Elizabeth Ostrander was not entitled to tuition free of charge in said school district no. 4, and that she be excluded from the schools of the district until tuition is paid, or until I shall decide against the said decision of the respondent; that from said decision of said respondent of April 9, 1894, this appeal is brought.

Under the decisions of the courts of the State the residence of a minor is usually that of the parents until said minor has been emancipated from parental control or adopted into a new family, and the residence of a minor may be elsewhere than that of the parents with their consent.

The question involved in this appeal is one of residence, and it is usually a difficult question to determine. In the decision of such questions this Department has always inclined to the side of liberality.

The proofs herein show that Mrs Campbell is a qualified voter of, and an inhabitant in, said union free school district; that she is 72 years of age and has heart disease, in feeble condition and in need of a companion; that in 1884 her granddaughter, Elizabeth Ostrander, came to reside with her at her request and with the consent of the parents of the said Elizabeth Ostrander, and has had the care and control of, and supported, the said Elizabeth with the consent of her parents, said parents not having exercised any control of or contributed to the support or maintenance of their said daughter.

I find and decide that said Elizabeth Ostrander has been adopted by the said Margaret E. Campbell into her family, and that for school purposes the said Elizabeth Ostrander is a resident of union free school district no. 4, Johnstown, Fulton county, and as such resident is entitled to attend the schools in said district free.

The appeal herein is sustained.

4264

In the matter of the appeal of William L. Fowler v. board of education of union free school district no. 2, town of Trenton, Oneida county.

Where a board of education of a union free school district establishes a department in the schools therein, to teach stenography, typewriting etc., and requires as a condition for admission of a resident pupil of the district into such class or department, that he or she should pay tuition at the rate of $8 for a term for instruction in stenography etc., such action of said board is without authority of law and void.

Decided September 21, 1894

Crooker, *Superintendent*

The appeal in the above-entitled matter is taken by the appellant from the action and proceedings of the respondent in requiring from the appellant the payment of a sum of money for the admission of his daughter E. Mae Fowler, a resident of said school district, of school age, into a class or department in the schools conducted by the respondents, in which was taught stenography, typewriting etc.

From the papers presented upon this appeal the following facts are established: That union free school district no. 2, town of Trenton, Oneida county, was organized under the school laws of the State, and the respondent is the board of education of said district; that the appellant is a resident in and qualified voter of said district, and that he is the father of E. Mae Fowler, a girl of school age residing with her father in said district, and said daughter of the appellant attended the said school during the school year, commencing on August 1, 1893; that prior to December 24, 1893, the respondent, pursuant to vote to that effect, passed at annual school meeting in said district in August 1893, established a class or department in the school under their charge, in which stenography, typewriting etc., were to be taught, and passed two resolutions relative to said class or the admission therein, to wit: first, that no resident pupil should be allowed to enter said class except those who had passed the preliminary course of said school; and second, that resident pupils not eligible by reason of qualifications, but of suitable age, should be allowed to enter said class by paying the sum of $8 per term; that under and pursuant to the said second resolution, the said daughter of appellant entered said class, and on or about December 20, 1893, the appellant, by his said daughter, paid to one John C. Chase, the principal of the school of said district, the sum of $8 for instruction in stenography, typewriting etc., in said class for the winter term ending March 16, 1894, and received from said Chase a receipt, as follows: "December 20, 1893. Received of William L. Fowler $8, as tuition fees for Mae Fowler for the present term of school. John C. Chase, Prin." That said daughter of the appellant continued in said class during the spring term of school, and graduated therefrom on or about June 22, 1894; that on or about May 15, 1894, the respondent demanded of appellant the sum of $8 for permitting his said daughter to continue in said class for the term of school commencing March 26th, and ending June 22, 1894, which sum the appellant refused to pay.

It further appears that the appellant, in conversation with three members of said board of education, had at different times in December 1893, informed said members respectively that they had no right to charge or receive tuition from a resident pupil of said school district.

Under the school laws of the State, the common schools in the several school districts therein are free to all persons over 5 and under 21 years of age residing in the school district. The boards of education of union free schools have power to receive into said union free school any pupils residing *out* of said districts, and to regulate and establish the tuition fees of such *nonresident* pupils

in the several departments of said schools. The board of education of every union free school district severally have power, and it shall be their duty "to prescribe the course of study by which the pupils of the school or schools shall be graded and classified, and to regulate the admission of pupils and their transfer from one class or department to another, *as their scholarship shall warrant.*" See subdivision 4, section 15, article 4, title 8 of the Consolidated School Law of 1894.

The school in union free school district no. 2, of Trenton, during the year 1893–94, was free to the said daughter of the appellant herein, and the several classes and departments thereof open to her admission therein as her scholarship should warrant, without the payment, by her or the appellant, of any sum of money as a condition for her admission into any class or department.

The respondent has the legal right to establish a class or department in the school under their control in which stenography, typewriting, etc., should be taught, and adopt regulations for the admission of pupils therein who had passed the preliminary course of said school, or possessed the necessary mental qualifications; but said respondent had no legal authority to adopt as a resolution, rule or regulation, that resident pupils, not eligible by reason of qualification, but of suitable age, should be allowed to enter said class or department by paying the sum of $8 per term. The respondent, in answering the appeal herein, claims that the special agreement or concession (that is, admitting resident pupils not eligible by reason of qualifications, but of suitable age) into said class or department was not intended to be in the nature of a tax or tuition; but in the reply of respondent to the answer of the appellant, it is admitted that in the conversations between appellant and Messrs Nolton, Park and Pride it was stated to appellant that the payment of $8 per term was a *condition* which the parent must agree to, or the pupil would not be allowed to attend the special course. I am of the opinion that the condition made by respondent that the appellant or his daughter should pay the sum of $8 per term for the admission of the daughter into the class or department of a school under the control of respondent, in which stenography etc., was taught, was the exacting of tuition fees for instruction given to a resident pupil in a public school of the State, and was without authority of law.

The appeal herein is sustained.

I find and decide, that the resolution, rule or regulation of the board of education of union free school district no. 2, town of Trenton, Oneida county, that resident pupils not eligible by reason of qualifications but of suitable age should be allowed to enter the class or department in the school in said district in which stenography, typewriting etc., are taught by paying the sum of $8 per term, was and is without authority of law, and the same is hereby vacated and set aside.

That the board of education of said school district can not lawfully exact or receive any sum of money whatever as a condition for the admission of a resident pupil into any class or department of the school in said district.

That the exaction by, and payment to, the said board of education from and by the appellant herein of the sum of $8 as a condition for the admission of the said daughter of appellant into the class, and her instruction in stenography etc., for the term of school in said district, commencing on December 20, 1893, and ending on March 16, 1894, was without authority of law on the part of said board of education.

It is ordered, That said board of education of union free school district no. 2, town of Trenton, Oneida county, without unnecessary delay, pay and refund to William L. Fowler, the appellant herein, the sum of $8 paid by said Fowler to said board on December 20, 1893, as a condition of the admission of the daughter of said Fowler into the class or department of the school in said district in which stenography etc., was taught, and the instruction of said daughter of appellant in stenography, typewriting etc.

4226

In the matter of the appeal of Maria L. Ellis v. board of education of union free school district no. 8, Clayton, Jefferson county.

Where a minor whose parents reside in the state of Arizona comes to live with a resident of a school district within this State, but such residence is not in any respect permanent, but may be terminated at the option of the minor or her parents, or the person with whom she is so residing in this State, and the parents and brother of the minor contribute to her support; *held,* that such minor is not a resident in the school district in this State in which she is so temporarily residing, within the school laws of this State.

Decided March 22, 1894

H. E. & E. Morse, attorneys for appellant

Crooker, *Superintendent*

The above-named appellant appeals from the action and decision of the respondent in excluding one Mary R. Moore, a pupil of school age, from the schools of union free school district no. 8, Clayton, Jefferson county, without payment of tuition for such pupil.

The appellant alleges, as ground of appeal, that such pupil is a resident of said school district. The respondents deny that such pupil is a resident of such district.

From the proofs presented upon this appeal it appears: That the appellant is a single woman, residing with her sister in Clayton, Jefferson county, and is a qualified voter residing in union free school district no. 8, in Clayton; that on or about March 1888, the appellant went to the state of Arizona for the benefit of her health, returning to her residence in Clayton in August 1891; that the appellant was accompanied on her return from Arizona by a cousin, one Mary R. Moore, a young girl then about the age of 12 years, whose parents then resided,

and ever since have resided, and still do reside, in the state of Arizona; that while in Arizona the appellant offered to the parents of said Mary R. Moore to take her (said Mary) into her care, charge and keeping, and give her moral instruction and training in the matters of household duties, and such school advantages as she would be entitled to as a resident of the district, in consideration of the society, companionship and service of said Mary, and that thereupon the parents of said Mary confided her to the care and keeping of the appellant for an indefinite period; that said Mary commenced in the month of September 1891, to attend school in said school district no. 8, and continued to attend school until the end of the school year of 1892, and was registered by the respondent as a resident pupil of said school district; that the said Mary continued to attend said school down to about January 1, 1894, and was continued upon the register as a resident pupil until, by investigation by respondents, it was decided that she was a nonresident, but at what time said decision was arrived at does not appear; that in May 1893, two bills for tuition of said Mary, from September 7, 1891, to March 3, 1893, were received by appellant from respondents, and in June 1893, the appellant and the president of the board of education had a conversation in relation to said bills for tuition; that said Mary heard the said conversation between appellant and the president of the board relative to the claim for tuition, and believing she would have to pay such tuition wrote to her parents for money for that purpose, and thereafter in September 1893, when she resumed her attendance in school, informed Mr Johnson, the president of the board, that she had written to her parents for money to pay her tuition, and that when she received the money she would pay such tuition; that at a meeting of respondents on January 2, 1894, it was resolved that the said Mary R. Moore be expelled from the public school, in view of the fact that the fee charged for tuition had not been paid, and on January 3, 1894, the said Mary received a letter from the clerk of respondents that she had been excluded from the public school for nonpayment of tuition; that no tuition of the said Mary had been paid to respondents by her nor by the appellant, nor by any one on behalf of the said Mary or the appellant; that the appeal herein was brought on January 5, 1894. It also appears from the proofs that the parents of the said Mary R. Moore are willing to contribute as far as they are able toward clothing, school books and such incidental expenses as are necessary for her, and sent to her prior to January 1, 1893, an aggregate of $97; and that the brother of said Mary, during the year 1893, has contributed money to assist his sister in supporting her; that during the summer of 1893, while the sister of appellant was absent from Clayton, the appellant took her meals out, and that the said Mary also took her meals out and paid toward the same the sum of $36 out of money sent to her by her said brother.

No proof has been presented herein that the parents of the said Mary have emancipated her from their parental control, nor that the appellant herein has adopted the said Mary into her family, nor that the appellant occupies the relations of a parent to the said Mary. It clearly appears that the domicile of the

said Mary with the appellant is not in any respect permanent, but temporary, to be terminated at the option of the said Mary or her parents or the appellant.

The residence of a minor is presumed to be that of the parents of such minor. A minor is generally deemed incapable of changing his or her domicile, but if the parents change their domicile that of the minor follows it. This rule is subject to qualification if the minor has been emancipated from parental control or adopted into a new family.

It is conceded that the residence of the parents of Mary R. Moore is in the state of Arizona. That being so, the residence of their minor daughter, said Mary R. Moore, is in the state of Arizonia unless it is proved that the parents of said Mary have emancipated her from their parental control, or that she has been legally adopted into a new family. No such proof has been given in the appeal herein. The burden is upon the appellant to establish by a preponderance of proof that said Mary R. Moore is a resident of union free school district no. 8, Clayton, Jefferson county. In that she has failed.

It appears that upon said Mary R. Moore applying for admission into the school in said district in September 1891, said board of education neglected to investigate as to whether or not she was a resident of the district and permitted her to attend the school free and carried her name upon the school register and their reports as a resident pupil, and the school district has received public moneys pursuant to such registration and reports. It does not appear that prior to May or June 1893, it was brought to the personal knowledge of the appellant or the said Mary R. Moore that it was claimed by such board of education that said Mary was not a resident of such district and that payment of tuition fees for her attendance at school was demanded.

I am of the opinion that owing to the said neglect of board of education to properly investigate such question of residence of the said Mary, said board is not entitled to demand or receive any tuition fees for the attendance of said Mary in the schools of their district prior to the commencement of the school year for 1893, to wit, August 1, 1893.

I find and decide that the said Mary R. Moore is not, nor has she been, since she came with the appellant from the state of Arizona to Clayton, Jefferson county, a resident of union free school district no. 8, Clayton, Jefferson county, within the meaning and intent of the school laws of this State; and that she is not entitled to be received into the school in said district free, but only upon the payment of such tuition fees as the board of education of such school district has regulated or may regulate and establish for nonresident pupils; but the board of education of said union free school district shall not demand or receive any sum or sums whatever for tuition for such Mary R. Moore for any period of time in which she attended the school in said district prior to the commencement of the school year for 1893, to wit, August 1, 1893.

The appeal herein is dismissed.

4167

In the matter of the appeal of C. A. Patterson v. board of education of the union free school of Honeoye, Ontario county.

Where a statute prescribes "residence" as a qualification for the enjoyment of a privilege or the exercise of a franchise the word is equivalent to the place of domicile of the person who claims the benefit. To acquire a domicile two things are necessary — the fact of residence in a place and the intent to make it a home. To retain a domicile once acquired, actual resistance, however, is not indispensable, but it is retained by the mere intention not to change it or adopt another, or rather, by the absence of any present intention of removing therefrom. *Held*, that the appellant was a resident of Honeoye, Ontario county, and his children were entitled to attend the union free school therein without payment of tuition.

Decided March 3, 1893

Crooker, *Superintendent*

This is an appeal from the action of the board of education of union free school of Honeoye, Ontario county, in refusing to permit two daughters of the appellant to attend said school, without payment of tuition, on the ground that their father, the appellant, was not a resident of said school district.

The main question to be considered upon this appeal is, as to the residence of the appellant at the time of the action and decision of the board of education of the union free school of Honeoye, from which action and decision this appeal is brought.

A large number of affidavits on behalf of the appellant and respondent have been filed, in many of which the matters stated are not material or relevant to the question of the residence of the appellant. After a careful examination and consideration of the papers presented, it appears:

That in the year 1866, the appellant became a resident of Honeoye, Ontario county, and continued to reside there until the year 1883, when he purchased a farm in the town of Conesus, Livingston county, and removed to, and became a resident of, said town of Conesus; that he continued to reside in said town of Conesus, until the fall of the year 1890, when he removed to Honeoye, and ever since has been, and still is, a resident of Honeoye. That his wife and two minor daughters reside with him in Honeoye, and that he and his said family occupy a house or part of a house therein rented by him for such residence. That the appellant has voted in Honeoye at the general election of this State held in the years 1891 and 1892, and that his vote thereat has never been challenged. That the appellant has, during his residence in Honeoye, frequently been to his farm in Conesus on business connected with said farm, and spent considerable portions of time at said farm, and that his wife and daughters have frequently accompanied him to said farm and remained with him during his stay thereat. That when not engaged in any business upon his said farm the appellant has worked in different employments in Honeoye.

It is not affirmatively shown that since the removal of the appellant to Honeoye in the fall of 1890, he has attempted to exercise or has exercised any rights and duties of a citizen in the said town of Conesus.

Under the laws, the words residence, domicile and inhabitancy mean generally the same thing. "Inhabitancy and residence mean a fixed and permanent abode or dwelling place for the time being, as distinguished from a mere temporary locality of existence." (8 Wendell 140.) To acquire a domicile two things are necessary, the fact of residence in a place, and the intent to make it a home. To retain a domicile once acquired, actual residence, however, is not indispensable, but it is retained by the mere intention not to change it or adopt another, or rather, by the absence of any present intention of removing therefrom.

The appellant, in the fall of 1890, removed from Conesus to Honeoye, intending to make Honeoye his residence, and he acquired a residence or domicile in Honeoye, by the fact of such residence therein, and intent to make it his residence. Having acquired such domicile, actual residence all the time in Honeoye was not indispensable to retain such residence, and his frequent visits to his farm in Conesus without the intent on his part to remove from Honeoye to Conesus, retained his residence in Honeoye. A domicile once acquired remains until a new one is acquired. In legal contemplation every person must have a domicile somewhere, and he can have only one domicile at one and the same time. Mere intention to remove, without the fact of removing, will not change the domicile, nor will the fact of removal without intention to change the residence, change such residence.

Where a statute prescribes "residence" as a qualification for the enjoyment of a privilege or the exercise of a franchise, the word is equivalent to the place of domicile of the person who claims the benefit. The People, etc., v. Thomas C. Platt, 117 N. Y. 159.

Upon the facts established herein, I am of the opinion that the appellant, in the fall of 1890, became a resident of, and domiciled in, Honeoye, and in the union free school district of Honeoye, and was, at the time of the action and decision of the board of education of such union free school appealed from, a resident of such district, and still is a resident of said district. That the children of said appellant between the ages of 5 and 21 years of age, residing with him at Honeoye, in said district, are entitled, under the school laws, to admission free in said union free school in said district, and the said board of education of said union free school had no legal right or authority to refuse to admit the two daughters of the appellant to said school without the payment of tuition therefor.

The appeal herein is sustained.

It is ordered, That the board of education of the union free school of Honeoye, Ontario county, are hereby directed to forthwith admit to said school the said two daughters of the appellant, C. A. Patterson, as resident pupils in said school district, and without demanding or receiving any tuition therefor; and said board of education are hereby enjoined and restrained from demanding or receiving any tuition by reason of the attendance of said pupils in said school since the fall of the year 1890.

3596

In the matter of the appeal of John H. Clark and Harriet M. Clark v. the board of education of Lyons union free school district no. 6.

The residence of a minor, naturally, is identical with that of his parents; but it may be elsewhere by their consent.

Trustees have the right to suspend pupils from the privileges of the school where their conduct is so wilfully insubordinate as to be destructive of the discipline and efficiency of the school, and to continue to deprive pupils of such privilege until they unequivocally submit to the discipline.

Decided May 5, 1887

Draper, *Superintendent*

The appellants are husband and wife. The appellant, John H. Clark, is the principal of the Lyons union school. Henry Merrill is a brother of Mrs Clark, and has resided with the appellants in the village of Lyons since August 1886. He is 17 years of age. His parents, who formerly resided in the city of Rochester, removed to Colorado in the summer of 1886. Merrill had been a pupil in the Lyons Union School from the 30th day of August 1886, up to the latter part of January 1887, when he was suspended from the privileges of the school by the board of education, by the adoption of the following resolution, namely:

Resolved, That the board deems the conduct for the past few days of Henry Merrill, a nonresident pupil, highly disorganizing and injurious to the government of the school, and feel it their duty to sever his connection with the school until the further pleasure of the board.

The cause of this action of the board was the misconduct of Merrill towards John H. Patterson, who, from the 12th day of January had been temporarily acting as principal of the school during the illness of Principal Clark. The facts in relation to such misconduct are stated somewhat differently by different persons. It certainly amounted to an assault on the 25th of January, in the presence of the school upon the acting principal, when he was engaged in disciplining other pupils. Upon the next day Merrill used grossly insulting and abusive language to the acting principal in the school building, and while the school was in session, charging him with lying, and offering to fight him. Merrill admitted all this in the presence of the board, and aggravated his conduct by justifying it. His statements before the board were reduced to writing and read over to him, and pronounced by him correct. He said:

"I first laid hands on Mr Patterson on the morning of the 25th; I was taking the part of the smaller boys; I did not think he had any right to act as principal; I did not know what he was; I think I did right in taking hold of him; if Mr. Gardner had not interfered I do not know who would have come out ahead, he or me; this was in the morning during school hours.

"I met Mr Patterson in the hall; I asked him if he wrote the piece in the *Democratic Press* of the 26th; he said, "No"; I said it looked like his work and as if he had a hand in it; I said if he told about town that he blackened my

eye, he lied; I told him I could whip him and if he wished to try it I was ready, he could come on; I offered to fight him several times there in the hall; this was during school, January 26, 1887."

After hearing these statements the board then passed the resolution of suspension. Upon subsequent application, it refused to rescind the same, and from this action this appeal is taken.

The board of education in their answer say:

1 That Merrill was a nonresident pupil, and in consequence was in the school only at the sufferance of the board, regardless of the matters here under discussion.

2 That the appeal was not taken within the thirty days required by the rules of this Department

3 That the board in this matter exercised the discretion which the law gives it, properly and wisely.

The question of residence is always one difficult of determination. It depends upon the *intent* of the party whose place of residence is disputed. The residence of a minor undoubtedly follows that of his parents, but it may be elsewhere by their consent. In the present case, the appellant, John H. Clark, swears that "after consultations upon the subject with them (Merrill's parents), and deponent and deponent's wife, it was agreed upon by all of said parties that Henry should not continue to reside with his parents and that he should make his home in Lyons with deponent. This is his home, and he is here for the purpose of making it his home and not for the sole purpose of attending school, and he is wholly supported by this deponent, and deponent and deponent's wife control him in the place and stead of his parents and as their own son." I think we must accept this testimony of an unimpeachable witness, occupying the relations which he does to the pupil and to the school, as determining the question of Henry Merrill's residence, and must hold that he is a resident pupil of the village of Lyons.

The papers on appeal were served on one of the respondents on March 30th, and on another on March 31st. The action appealed from was taken March 1st. I think service upon one member of the board would have been sufficient and have no hesitancy in holding that the appeal was taken in time.

We come now to the real question in the case, namely, Had the board of education the power to deprive Henry Merrill of the privileges of the school, and if so, was the power wisely and properly exercised?

There can be no doubt of the power of local school authorities to suspend pupils from school privileges when their conduct is so wilfully insubordinate as to be destructive of the good order and efficiency of the schools. There are undoubtedly some cases which would justify an entire and perpetual taking away of school privileges. There are many more cases which call for a temporary taking away of such privileges, to continue until such time as the pupil gives satisfactory evidence of his willingness to submit himself to the discipline of the school. The suspension of the privileges of the school should not be imposed for slight cause. The privilege is a sacred one. The common schools belong to

all alike and are for the benefit of all. All have rights in them. But one can not be allowed to so conduct himself as to trample upon the rights of others by destroying the schools. If he does, he is liable to have his right taken away in deference to the general and common good.

The conduct of the boy Merrill, in the present case, was very bad and inexcusable. He is 17 years of age, almost at man's estate, and is shown to be large for his age. His relations to the permanent principal of the school placed a special responsibility upon him. Notwithstanding this, he deliberately undertook to overthrow the government of the school. It may be that the temporary or acting principal lacked experience in managing a school; perhaps he dropped an indiscreet expression or acted unwisely. Even in that case, the proper course was to bring the matter to the attention of the board. It was not the business of this pupil to take the matter in hand. If it was possible to overlook or mitigate the attack of the pupil upon the teacher which occurred on the 25th of January, on the ground that he had acted impulsively, it would not be so as to the language of the boy to the teacher on the succeeding day, nor of his subsequent justification of his conduct in the presence of the board.

It was necessary that the board should reduce the school to a state of discipline and control, promptly and thoroughly, and I have had no difficulty in reaching the conclusion that the board had ample justification for its action in reference to Merrill. I do not see how it could have done less.

I have not lost sight of the evidence in relation to an apology from the pupil to the teacher. From Mr Patterson's statement, it does not, however, seem to have given much evidence of regret or contrition. Going through the form of an apology is of small consequence. The board of education is the best judge of the circumstances of the school, the disposition of the pupil and the necessities of the case. This Department will not be inclined to overrule the action of the board in this case, at least before it is shown that it refuses to readmit Merrill to the privileges of the school after he has given abundant proof of regret for his misconduct and of readiness to submit unreservedly to the discipline of the school. When such evidence shall be adduced, it is assumed that the board will rescind its own action.

For these considerations I feel compelled to dismiss the appeal.

3984

In the matter of the appeal of Earnest C. Nichols v. the board of education of the city of Elmira.

The school laws provide that public schools shall be free to all resident pupils between the ages of 5 and 21 years; *held,* that a rule of a local board intended to modify the law is of no effect.

Decided July 2, 1891

Dráper, *Superintendent*

This appeal is brought by a resident of the city of Elmira, from the action of the board of education of said city in refusing to admit to the privileges of the school as a pupil, the daughter of the appellant. It is shown that the child was more than 5 years of age (having been born November 22, 1885), when its admission to the school under the control of the respondent, was demanded.

No answer has been interposed by the board, but from correspondence which has been carried on with the Department, the ground upon which the board would seek to justify its refusal to admit the child, is apparent, and I shall, therefore, refer to it.

The present system of common schools in the city of Elmira is controlled by a special act of the Legislature. The act provides for a board of education, and by subdivision 9 of section 20 of the act, this board is authorized to establish rules and regulations for the reception of pupils in the schools. Under this provision a rule has been adopted prohibiting the admission of pupils to school privileges except at the commencement of the term in September of each year.

It is insisted by the board that the rule referred to is not an unreasonable one, and that in proper cases the rule is relaxed. The argument of the board in support of the justice of the rule is that the entrance of pupils at other periods of the school year would materially interfere with the success of the class work and the advancement of pupils.

In considering the question presented, I am free to admit that the reception of pupils at irregular times during the school year may cause some embarrassment, but I am confronted by the provision of the general act which provides that common schools shall be free to all pupils between the ages of 5 and 21 years, who are actual residents of the district. A like provision was incorporated in the special act relating to the schools of Elmira.

I am of the opinion that the board of education has exceeded its power in the adoption of the rule objected to by the appellant. The statute authorizes the board to establish rules for the reception of pupils, but not to prohibit the admission of resident pupils within the prescribed ages.

The rigid enforcement of this rule would, in some cases, deprive eligible persons of school privileges for nearly an entire year. If the board possessed the power in the respect claimed, it might enforce a rule to admit pupils otherwise eligible, biennially. The evil effects resultant from the enforcement of this rule would, without doubt, largely exceed any disadvantages the rule is intended to prevent.

But the appeal must be sustained upon the broad ground that the common schools are free to resident pupils between the ages of 5 and 21 years and that the act referred to does not empower the board to adopt a rule to modify this provision of the law.

The board of education of the city of Elmira is hereby ordered to admit the daughter of the appellant to the school as a pupil.

3791½

In the matter of the appeal of Lowen E. Ginn v. union free school district no. 1, of the town of Chateaugay, county of Franklin.

A child 16 years of age left Potsdam, where she had attended the Potsdam Normal School, and where her parents reside, with the consent of her parents, to accept a home with a married brother residing in another district. The brother offered the girl a home with him, and the girl accepted the same. Tuition fee for her attendance at the public school has been demanded; *held,* under the ruling in the case of Thayer recently decided, the girl has become a resident of the district in which her brother resides, and is entitled to the privileges of the school in that district free of tuition.

Decided April 27, 1889

Draper, *Superintendent*

This is an appeal from the action of the respondent in refusing to permit a sister of the appellant to attend school in said district without the payment of tuition fees. The appellant is a taxpayer in the district, and a married man with an infant child. The sister alluded to is 16 years of age. Their parents reside at Potsdam, in the county of St Lawrence. The girl has, until recently, been an attendant upon the Potsdam Normal School. With the consent and approval of her parents, she has gone to reside with her brother at Chateaugay. The brother swears that he has offered her a home. The sister swears that she has accepted the same. Their mother swears that the arrangement is by the consent and approval of their parents.

Nothing is offered on the part of the respondent to disprove these facts. Moreover, it is not likely that the girl left Potsdam to live in Chateaugay for the purpose of getting the advantage of improved school facilities.

I think the circumstances bring this case within the rule laid down in the case of Thayer, recently decided in the same district, and must, therefore, sustain the appeal and direct the board of education to extend to the girl the advantages of the public school in the district.

4850

In the matter of the appeal of George L. Abbott v. board of education of school district no. 9 city of Corning, Steuben county.

This Department holds that where a child resides in a city of school district other than that in which his parents reside, for the purpose of finding a home with relatives, or for any other sufficient cause, and the school in the city or district is but an incident of such residence, such child is entitled to attend the school in such city or district without payment of tuition; but when such residence is for the main purpose of enabling the child to enjoy the advantages of the school in that locality, then the right of such child to attend such school is a matter within the discretion of the school officers, and under section 36 of title 7 of the Consolidated School Law of 1894, is subject to the payment of such tuition as such school officers may impose.

Decided April 9, 1900

Sebring & Cheney, attorneys for appellant

Page, Tully & Ferris, attorneys for respondent

Draper, *Superintendent*

This is an appeal from the decision of the board of education of school district 9, city of Corning, Steuben county, in excluding one Nellie M. Clayton from the schools of such district unless tuition for her attendance therein shall be paid. The usual pleadings have been filed in this case by both parties.

It is contended by the appellant that said Nellie M. Clayton is entitled to attend the public school of such district without the payment of tuition on the ground that she is, and since September 1899, has been a member of his family residing with him in said district, while on the part of the respondent it is contended that said Nellie M. Clayton is not a resident of the school district and is therefore not entitled to attend the public school therein without payment of tuition.

The proofs in this case show that the said Nellie M. Clayton is 15 years of age, is the child of a deceased sister of the appellant, who died about ten years ago; that the father of said child now resides in the city of Denver, Colorado; that in the month of September 1899, the said Nellie took up her residence with the appellant herein in the city of Corning and has since resided with him and is treated in all respects as his daughter, and that the appellant receives no compensation for furnishing her a home in his family, but that the same is provided solely because of his affection for the daughter of his deceased sister.

It would seem, from the proofs, that at some time since the said Nellie has resided in the family of the appellant he was required to pay tuition for her attendance at the schools in the city of Corning, and that under protest and still insisting that she had a right so to attend without payment of tuition, he did pay a small sum to the board of education of that district, but I am of the opinion that such payment does not stop the appellant from insisting that this child is entitled to attend such schools free.

This Department has held that where a child resides in a city or district other than that in which its parents reside for the purpose of finding a home with relatives, or for any other sufficient cause, and the school is but an incident of such residence, then such child is entitled to attend the school in that city or district without payment of tuition; but where such residence is for the main purpose of enabling such child to enjoy the advantages of the school in that locality, then the right of such child to attend such schools is a matter within the discretion of the board of education, and under section 36 of title 7 of the Consolidated School Law is subject to the payment of such tuition as the board of education may impose.

I am clearly of the opinion, from the proofs presented in this case, that this child is entitled to attend the public schools in the district where she now resides without payment of tuition.

The appeal herein is sustained.

It is ordered:

That the board of education of school district 9, city of Corning, be, and it hereby is, directed to admit the said Nellie M. Clayton to the privileges of the school under its charge without the payment of tuition.

It is further ordered:

That said board of education, without unnecessary delay, refund to the appellant herein the sum of $7, which the proofs herein establish was paid by him as tuition for the said Nellie M. Clayton on or about February 10, 1900.

3977

In the matter of the appeal of Rosamond L. Houser v. the board of education of union free school district no. 6, town of Manlius, county of Onondaga.

Appeal from the action of local school authorities requiring tuition to be paid for a minor for the privilege of attending a public school. It appears that the child had for eight years resided with persons other than its parents, in the district. *Held,* a legal resident of the district, and entitled to free school privileges.

Decided April 21, 1891

Emmons H. Sanford, attorney for appellant

Draper, *Superintendent*

This appeal is brought from the action of the board of education of union free school district no. 6, town of Manlius, county of Onondaga, in refusing to admit Clarence Hale, a minor living with appellant, to the privileges of the school under its charge, without payment for tuition.

The evidence shows that the boy is now 10 years of age, and for the past eight years has resided with appellant in district no. 6. He has been cared for by appellant and her husband, and they have had exclusive control of him. The boy's parents were, until about one year ago, residents of this district, but for the past eight years have exercised no authority or control over him. About one year ago, the boy's parents removed to another district, in consequence of which the board now claims that the boy has become a nonresident of the district and, therefore, properly chargeable for tuition. It appears that the appellant expects to retain the custody of the boy until his majority, and the boy's natural parents so understand the fact to be.

No answer has been interposed. It seems clear to my mind that the boy has been a resident of the district for the past eight years, and continues to be. His residence has not been, and can not now be determined by that of his parents, but rather by the fact that he has actually become a member of the appellant's family by adoption, and subsequent maintenance and place of abode. This is clearly not a case where the child has been brought into the district solely for the purpose of securing school advantages.

The appeal is sustained. The board of education of union free school district no. 6, town of Manlius, county of Onondaga, is hereby directed to admit Clarence Hale to the privileges of the public school, free of charge for tuition.

3945

In the matter of the appeal of James Brooks and Melvina B. Brooks v. the board of education of union free school district no. 2, town of Ellington, county of Chautauqua.

Where the local school authorities determine that a child is a nonresident of the district, their decision will be sustained upon an appeal, unless, by a preponderance of evidence, the contrary is shown to be true.

Decided December 30, 1890

Draper, *Superintendent*

This is an appeal from the action of the respondent in depriving Kate M. Brooks, a grandchild of the appellants, of the privileges of the school in said district, on the ground that she was not a resident thereof, and because the appellants refused to pay tuition.

The appellants allege that the parents of the child reside out of the State and are not keeping house, and that she is living with them for an indefinite period with the consent of the parents, and that they have undertaken to provide her with board, clothing and medical attendance.

The respondent insists on the other hand, that the parents of the child are abundantly able to provide for her, and that she is only staying at her grandfather's temporarily and for the purpose of attending the school.

The papers in the case are voluminous, and the statements of the parties are very conflicting. I have read all that has been said on each side, with care. No question is more difficult to determine than that of residence, for it turns upon the intent and purposes of interested parties. The determination of the trustees to the effect that the child is a nonresident, must be upheld unless it is shown by a preponderance of evidence that the contrary is true.

After considering all that the appellants say in this case, I find myself unable to believe that this child has come to live with her grandparents permanently. There are numerous indications that that is not the fact. At all events the appellants fail to make out a case which would justify me in overruling the action of the trustees.

The appeal is, therefore, dismissed.

4536

In the matter of the appeal of Joseph S. Tiernan v. board of education of union free school district no. 1 of the town and village of Camden, Oneida county.

The consent by parents that their minor son may be employed for an indefinite term of time by a person is not an emancipation of such minor son from their parental control but only a consent revocable at their pleasure that such minor may perform services

for such person. The residence of such minor with such person in a school district other than that in which his parents reside does not entitle him to attend school in the district in which his employer resides free.

Decided March 9, 1897

George J. Skinner, attorney for appellant
A. C. Woodruff, attorney for respondent

Skinner, *Superintendent*

This is an appeal by the appellant in the above-entitled matter from the decision of the respondent therein, refusing to permit one Thomas Rourke to attend the school in union free school district no. 1 of the town and village of Camden, Oneida county without the payment of tuition.

The main ground of this appeal, on the part of the appellant, is that said Rourke resides in such district and is entitled to attend the school therein free.

The respondent has answered the appeal and alleges that said Rourke is not a resident of said district and, under its rules, is required to pay tuition.

The respondent alleges that the appellant is not the real party in interest, and is not injured by its decision in refusing to permit Rourke to attend the school without payment of tuition, and the appeal herein should be dismissed. It also contends that the appeal herein should be dismissed upon the ground that the appeal herein was not brought within thirty days after the rendering of the decision complained of, and that appellant has failed to state in his appeal any excuse for such delay, as required by the rules of practice relating to appeals taken to the State Superintendent of Public Instruction.

It appears from the papers filed in this appeal, that the appellant is the pastor of St John's church in the village of Camden; that Thomas Rourke is a minor who was 18 years of age in June 1896; that the parents of said Rourke are living and reside in the town of Amboy, Oswego county, upon a farm; that said Rourke was somewhat delicate in health and did not desire to work on the farm, and on or about February 4, 1896, an arrangement was entered into between the appellant and Rourke, with the consent of the parents of Rourke, by which Rourke was to work for the appellant in Camden and receive for such work his board, lodging, clothing and washing from appellant, and a salary for services performed by Rourke as sexton. It does not appear that anything was stated by any of the parties to the arrangement in relation to Rourke's attending school, and it is not alleged by the appellant that he ever agreed to send Rourke to school or to permit him to attend school, or to furnish Rourke his schooling, or to educate Rourke.

The appellant not having agreed to send Rourke to school or to educate him, I fail to see how he is injured by the respondent refusing to permit Rourke to attend the school free, on the ground that he was not residing in the district, and in demanding payment of tuition.

Under the rulings of this Department no person can sustain an appeal unless he is aggrieved, that is, injured in his rights by the act or decision of which he

complains. There should be some real grievance, some positive and serious injury sustained, to justify a resort to this Department for redress. Appeals will be dismissed when the real party in interest is not represented.

It appears that the appellant is not the real party in interest. Admitting, for the purpose of argument only, that the appellant has sustained some positive and serious injury, the contention of the respondent that the appeal herein was not brought within the time required by the rules and practice relating to appeals to the State Superintendent of Public Instruction, is well taken. It appears that the said Rourke commenced to attend the school in Camden on February 4, 1896; that on that day he filled a registration card in which he stated his name, and his age as 17 years; that he was a nonresident; that his parent or guardian was James Rourke, whose post office address was Williamstown, N. Y., and delivered the card to the acting principal; that a short time after such delivery of the card he requested the acting principal for permission to correct the statements on the card, and was informed by such principal that he could not let Rourke have the card, and that he would have to report it to the school board; that Rourke was registered as a nonresident pupil and continued to attend the school until the close of the school year 1896–97; that during such term the question of whether Rourke was or was not residing in said district was discussed by, and a correspondence had upon the subject between, the appellant herein and the principal and members of the board, and bills for the tuition of Rourke were sent to him, and to his father and to the appellant, but none of said bills were paid; that when the school opened for the school year of 1896–97 Rourke again attended and continued to do so until on or about September 25, 1896, when the board of education determined and directed, in substance, that he should no longer be permitted to attend the school until he had paid tuition therefor to that date, namely: for all prior attendance at the school, and for the first half of the then term of the school, and such determination was communicated to said appellant and to Rourke; that at a meeting of the board of education held on October 5, 1896, one Fitzgerald, a counselor at law, appeared on behalf of said Rourke and another pupil, and upon an affidavit of Rourke, asked the board to admit Rourke to the school as residing in the district and without payment of tuition; that after discussing the matter such board decided that Rourke should not be admitted to the school except on payment of all tuition in arrears and for the then present term, and not otherwise; that such decision of such board was promptly communicated to said Fitzgerald; that after such decision of such board Rourke did not attend at the school until the commencement of the winter term, but during such attendance he was not received as a pupil but as a visitor, and on about December 11, 1896, was removed from said school by a constable for disturbing the school; that a copy of the appeal herein was served upon such board of education on January 7, 1897, and such appeal, with proof of such service was filed in this Department on January 9, 1897; that no satisfactory excuse is rendered in the appeal for the delay in taking such appeal. Admitting, for the purpose of argument only, that the appellant herein is the real party in interest, and that his appeal herein was

taken in time, I am of the opinion, upon the facts established by the proofs filed herein, that said appeal should be dismissed upon the merits.

The burden is upon the appellant to sustain his appeal by a preponderance of proof, and in this he has failed.

I rule and decide that said Thomas Rourke was not, on February 4, 1896, nor at any time between February 4, 1896, and January 7, 1897, residing in union free school district no. 1, town and village of Camden, Oneida county, within the meaning of the provisions of the Consolidated School Law.

The said Rourke was, on February 3, 1896, and on January 7, 1897, and still is, a minor, and his parents are living and residing in the town of Amboy, Oswego county, and for anything that appears in the proofs herein, are able and willing to support, care for and educate their son.

Under the laws of this State and the decisions of its courts, parents are under obligation to support their children and are entitled to their services during their minority. They may relinquish this right and authorize those who employ their children to pay them, and such payment will be a bar to a recovery by the parents; but they may revoke such license and receive the earnings themselves. Residence, domicile and inhabitancy, though not in all respects and for all purposes convertible terms, mean generally the same thing. The domicile of a minor follows that of his father, and remains until he has acquired another, which he can not do until he becomes of age. This rule, however, is subject to qualifications if the minor has been emancipated from parental control or adopted into a new family. The law will sometimes imply an emancipation from parental control, as when the father compels his minor child to go abroad to earn his own livelihood, or neglects to support him, or consents that such child may go abroad and earn his own livelihood.

The affidavits presented on the part of appellant allege that said Rourke "is a resident" of union free school district no. 1 of Camden; that his parents have "emancipated" him from their parental control, etc. These statements are merely the conclusions of the respective affiants and they do not state facts that authorize such conclusions. The understanding or agreement alleged by the appellant was made between the appellant and said Rourke only, and is one of hiring for an indefinite term of time, and revocable at any time by the parties thereto or any one of them. The consent of the parents thereto was simply a bar to recovery by them for the services performed by their minor son for the appellant, unless their consent to such employment should be revoked by them. The proofs herein fail to show that the parents of Rourke have emancipated him from their parental control, that is, consented that he may go abroad generally, and earn his own livelihood, or in the common phrase, "given him his time"; but their consent was that he might be employed by the appellant.

The proofs herein do not establish an adoption of said Rourke by the appellant, nor that the appellant stands in the relation of either a parent or guardian to Rourke; on the contrary their relations are that of master and servant.

It appears from the affidavit of Mrs. D. D. Van Allen, the preceptress in said union free school, that in the month of January 1896, said Rourke came to such school to try the Regents examination; that in conversations had between the appellant and principal, D. D. Van Allen, in January 1896, which Mrs Van Allen overheard and in which she took part, the appellant stated that Rourke was coming to Camden to attend the school and get an education, and asked both Mr and Mrs Van Allen to look after him. The appellant does not deny such allegations of Mrs Van Allen.

It further appears that Rourke came to Camden on February 3, 1896, and on February 4, 1896, entered such school and continued to attend the school until the close of the school year 1895–96 notwithstanding his agreement to perform labor and services for the appellant; that a bill for the tuition of Rourke was sent to his father, and his mother, as stated by her in an affidavit filed herein, without the knowledge of her husband, not wishing to be made any trouble and fearing that there would be trouble if the bill was not settled, handed $7 to the appellant herein with the request that appellant pay said bill of tuition, and she was informed by appellant that it was not necessary to pay tuition on account of Thomas, as he was a resident pupil, and thereupon with her consent, the $7 was applied by appellant upon pew rent; that at several times in the fall and winter of 1895 the father of said Rourke, in conversation with one Henry S. Owens, stated that "he was going to send his son Thomas away and give him an education as that was about all he could do for him." It does not appear that the father of Thomas Rourke was unable pecuniarily to educate his son, and it does appear that he was willing to give him an education. It appears that notwithstanding the services to be performed for appellant, said Rourke was able to attend the school in Camden, substantially as regularly as though he was but a boarder in the home of the appellant.

I am of the opinion that the purpose for which said Rourke came to Camden in February 1896, was to attend the school in union free school district no. 1 of the town and village of Camden, and not for the purpose of procuring employment by which to support himself.

The appeal herein is dismissed.

4855

In the matter of the appeal of Fred D. Carr v. board of education of school district no. 9, city of Corning, Steuben county.

Where a minor has been emancipated by his parent or parents from parental control or with the consent of his parent or parents has been adopted into a new family such minor may elect in what school district he may reside and thereby becomes entitled to attend the school in such district without payment of tuition.

Decided April 13, 1900

E. C. English, attorney for appellant

Page, Tully & Ferris, attorneys for respondent

Skinner, *Superintendent*

This is an appeal from the decision of the board of education of school district 9, city of Corning, Steuben county, in refusing to permit the appellant to attend the schools of such district without the payment of tuition.

The pleadings herein consist of the appeal, answer of the board of education, and reply of the appellant.

The contention of the appellant is that since September 1, 1898, he has resided in said school district, and is entitled to attend the schools therein without payment of tuition. The contention of the respondent is that the appellant, since September 1, 1898, has not resided in said school district and, therefore, is not entitled to attend the schools therein without payment of tuition.

The proofs filed herein show that the appellant is between 17 and 18 years of age and his father is now residing in the town of Southport, Chemung county; that in the year 1898 the father of the appellant resided in the town of Caton, Steuben county; that in the summer of 1898 the father of the appellant emancipated the appellant from his parental control, and thereupon the appellant took up his residence with his uncle, Charles A. Carr, in the city of Corning, and in school district 9 of said city; that in the fall of 1898 the said Charles A. Carr was appointed by the surrogate of Steuben county, the general guardian of the appellant; that in the fall of 1899, by reason of the sickness of his said uncle and aunt, the appellant commenced boarding at the house of Mrs H. H. Frazee, 15 East First street in said city and school district; that the appellant commenced to attend the school in such district on or about December 6, 1896, and on December 5, 1899, he was informed by the superintendent of schools of said district that the board of education wished him to say to appellant that it will treat the appellant as a nonresident, and payment of tuition must be made; that E. C. English, the attorney of the appellant herein, on December 11, 1899, paid the sum of $4.50, and on February 5, 1900, the further sum of $4.50 for tuition of appellant, both of said sums being paid under protest.

The courts of this state hold that the residence of a minor is that of his parents or parent, if living, unless such minor has been abandoned by his or her parents and compelled to support himself or herself, or unless such minor has been emancipated from parental control, or, with the consent of the parents, the minor has been adopted into a new family.

I am clearly of the opinion, from the proofs established in this appeal, that the appellant was, in the summer of 1898, emancipated by his parents from their parental control; that the appellant had thereupon the legal right to elect where he should reside, and in the fall of 1898 became a resident within school district 9, of the city of Corning, and is still a resident therein.

I am also of the opinion that the payment, under protest, to the respondent of the aggregate sum of $9, on demand of the respondent for tuition, does not estop the appellant from insisting that he is entitled to attend such school free.

The appeal herein is sustained.

It is ordered:

That the board of education of school district 9, city of Corning, be, and hereby is, directed to admit the appellant, Fred D. Carr to the privileges of the schools under its charge without the payment of tuition.

It is further ordered:

That said board of education, without unnecessary delay, refund to the appellant herein, or to his attorney, E. C. English, the sum of $9 which the proofs herein establish was paid to it as tuition for the appellant in December 1899 and February 1900.

4460

In the matter of the appeal of Franklin D. Morgan and another v. board of education of union free school district no. 4, town of Winfield, Herkimer county.

Where a minor, with the consent of her father, resides with a family in a school district such residence with such family, being in accordance with the request and wish of her deceased mother, *held* that it is not a temporary arrangement in order to secure the advantages of the school in the district, but on the contrary is intended to be permanent, and, under a long line of decisions of this Department, such minor is a resident of the school district and entitled to attend the school therein without the payment of tuition.

Decided June 24, 1896

J. D. Beckwith, attorney for appellants
Smith & Thomas, attorneys for respondents

Skinner, *Superintendent*

The appellants in the above-entitled matter appeal from the action and decision of the respondents in refusing to admit one Mary L. Lane, a child of school age residing with the appellants, into the school of union free school district no. 4, town of Winfield, Herkimer county, without the payment of tuition.

From the papers filed herein the following facts are established:

That the appellant, Franklin D. Morgan, is a resident of union free school district no. 4, town of Winfield, Herkimer county, and a freeholder and taxpayer therein, and the appellant, Rose R. Morgan, is his wife; that prior to August 28, 1895, there resided in South Framingham, state of Massachusetts, one Charles D. Lane and his wife Hulda Lane and a daughter Mary L. Lane, then about 11 years of age, and another daughter older than said Mary; that prior to said August 28, 1895, said wife of Charles D. Lane was ill, and informed the appellants that if anything happened to her, and her little girls became motherless, the appellants were to have said Mary as their own; that said Hulda Lane thereafter died, and on August 29, 1895, said Mary came to the residence of the appellants in said school district to reside with them, and still is residing with them; that on August 28, 1895, said Charles D. Lane, the father of Mary L. Lane,

executed and delivered to the appellants herein a paper of which the following is a copy, namely: "South Framingham, Mass., August 28, 1895. This is to certify that I, Charles D. Lane, father of Mary L. Lane, do give to F. D. Morgan and wife said Mary L. Lane, for the sole purpose of making a home for said child so long as it may be satisfactory to all parties concerned; said F. D. Morgan and wife to maintain, support and care for her as their own child, and her relatives not to interfere at all in regard to the same. Charles D. Lane." That since said August 29, 1895, the said Mary L. Lane has resided with the appellants, and has made her home with them, and has been maintained, supported and cared for by them as their own child, and they intend in good faith to maintain, support and care for her in the future as their own child; that the said Mary did not come into said district for the purpose of attending the public schools therein, and that appellants are abundantly able to properly maintain, support and care for her; that during the most of the time the said Mary has so resided with the appellants, and until about May 1, 1896, she has attended the school in said district free; that on or about the last Saturday of April 1896, the respondent herein, at a meeting, passed a resolution to the effect that said Mary L. Lane be refused admission to the public schools in said district gratuitously, and thereafter, and on or about Wednesday of the following week the president of the respondent notified the appellant of said action of respondent, and that the said Mary would be sent home from school the next morning unless her tuition was paid, and thereupon the appellants kept her at home and brought the appeal herein.

Annexed to the answer of the respondent are the affidavits of Z. I. Downing and Ann Thomas. The said Downing alleges that in or about the month of December 1895, or January 1896, he had a conversation with the appellant, Rose R. Morgan, in which she said to him that she and her husband had not adopted the said Mary L. Lane and did not know as they would keep her, and expected and intended to return her to her father; that the said Ann Thomas alleges that on or about the month of February 1896, she had a conversation with the said Rose R. Morgan at and in which she said that she and her husband did not intend to keep said Mary much longer; did not know how much longer she would stay, and did not know whether she would stay a day, week or month, and they expected and intended to return her to her father. The appellants in their reply to said answer deny that they do not intend to keep said Mary with them or make her residence there permanent, and deny, that they contemplate, and have for some time contemplated, returning her to her father, and alleged that they intend in good faith to maintain, support and care for the said Mary in future as their own child, and make a home for her, all of which they are better able to do than is her father; that the appellant, Rose R. Morgan, denies that she said to said Downing that she and her husband did not know as they would keep said Mary and expected and intended to return her to her father, and she denies that in or about the month of February 1896, she stated to Ann Thomas that she and her husband did not intend to keep said Mary much longer, but expected and intended to return her to her father.

Annexed to said reply is an affidavit of the said Mary L. Lane, in which she alleges, in substance, that she is 12 years of age, and since August 29, 1895, has lived and made her home with the appellants herein; that during all that time they have cared and provided for her a good, comfortable home and treated her as their own child, and that she came to them with the intention of making her home with them and not for the purpose of attending the public school in West Winfield; that neither of the appellants ever, in any manner, stated to her that they had any thought or intention of sending her back to her father or away from them; but she has always understood from both of the appellants that she was to make her permanent home with them, and that they regarded her as one of their family and considered her as though she was their own child.

In the appeal of Alfred C. Thayer v. board of education of union free school district no. 1, Chateaugay, Franklin county, no. 3769, decided by Superintendent Draper March 23, 1889, he said: "I think the facts as sworn to by the appellant and the girl, and which are not successfully controverted, bring the case within numerous decisions of the Department and entitle her to the privileges of the school. The decisions have always inclined to the side of liberality. If a child of school age moves into a district for the sole purpose of securing the benefits of the school in the district, and intends to remain there temporarily, it is to be deemed a nonresident and required to pay tuition fees. But when it comes into the district to take up its abode permanently therein, even though its parents may be living, it is entitled to the school accommodations of the district. The residence of a minor child is presumed to be with its parents, but it may be elsewhere with their consent. It is shown that in the present case the child is living with the appellant by and with the consent of her parents, and the proof is strong that it is not a mere temporary arrangement in order to secure the advantages of the school; but, on the other hand, is intended to be permanent. This clearly brings the case within a long line of decisions which would give her the right to attend the school."

In the case at bar it is shown that the said Mary L. Lane, a minor, took up her residence permanently on August 29, 1895, in union free school district no. 4, town of Winfield, with the appellants, upon the consent of her father, in writing, and in accordance with the wish and request of her mother, now deceased; that it is not a temporary arrangement in order to secure the advantages of the school, but, on the contrary, is intended to be permanent; that under that state of facts, which are not successfully controverted by the respondent, she is a resident of said school district, and gives her, under a long line of decisions of this Department, the right to attend the school in said district.

The appeal herein is sustained.

It is ordered, That the board of education of union free school district no. 4, town of Winfield, Herkimer county, be and it is hereby directed to receive into the school of said district the said Mary L. Lane, a resident of said district, and to the privileges of the schools under the charge of said board free, as other scholars of school age, residing in said district, are received therein under the school law.

4526

In the matter of the appeal of Asa L. Orcutt v. board of education of union free school district no. 1, town of Bath, Steuben county.

Where a minor, for the purpose of attending school in a school district other than that in which his or her parents reside, engages to perform services for his or her board while attending such school, such minor does not become a resident of such school district within the provisions of the school law, so as to entitle him or her to attend the school in such district free.

Decided December 31, 1896

Francis E. Wood, attorney for appellant

Skinner, *Superintendent*

During the summer of 1896 one John Bulkley, a resident of a school district adjoining union free school district no. 1, town of Bath, Steuben county, asked the appellant herein, Asa L. Orcutt, a resident of said union free school district no. 1, if he (the appellant) wanted the services of a girl in his family to work for her board and to go to school; that his (Bulkley) daughter, Lizzie Bulkley, desired to go to school, but that he had a large family and could not afford to board her and permit her to attend school, and did not require her services in his family, and wished to find some place where she could enter some family that did need her services, and thus be able to further educate herself as she desired; that he had not been able to find a place within the school district in which he resided where they needed a girl, and would like to have the appellant take her; that the appellant did need the services of a girl in his family, and agreed with Bulkley that his daughter should become a member of his family and render such services as she could; and was to receive support and be permitted to attend school in the district; that on or about September 1, 1896, said Lizzie Bulkley came to the family of the appellant under the aforesaid arrangement; that on or about October 1, 1896, the principal of the school in district no. 1 informed the respondent herein that Lizzie Bulkley, a nonresident of such district, was living in the family of the appellant, and the appellant claimed that she was a member of his family, and that the respondent had no authority to charge for her tuition; that on November 14, 1896, a committee consisting of two members of the board of education was appointed to inquire into the facts of the residence of said Lizzie; that said committee had interviews with the appellant, and John Bulkley, the father, and Lizzie Bulkley; that it was agreed by the three persons that there was no time specified in which Lizzie was to stay with appellant, but only so long as the parties were suited; that the father stated he could take his daughter away from the family of appellant at any time, and that his daughter could leave such family if she became dissatisfied; that the appellant stated that his wife did not like to stay alone evenings, and that he had to keep some one to stay with her; that upon a report of such facts being made by the committee a motion was adopted by the board of education, the respondent, that Lizzie Bulkley be charged tuition as a nonresi-

dent pupil of district no. 1; that the sum of $2 was fixed for tuition of said Lizzie for the full term of 1896, and she was notified that on default of the payment of such tuition she would be excluded from the school of the district; that the appellant paid said sum, protesting against the authority of the respondents to require such payment of tuition.

From such action and decision of the respondents the appellant has appealed to me. The respondents have answered the appeal. It is conceded that Lizzie Bulkley is a minor of the age of 17 years.

Under the laws of this State the residence of a minor is that of his or her parents, if living, unless such minor has been emancipated from parental control or adopted into a new family.

It is not claimed that John Bulkley has emancipated his daughter Lizzie from his parental control, nor that the appellant has adopted her into his family.

Cases have occurred and are likely to occur, in which, from the facts established, a minor may, for school purposes, become a resident in a school district other than that in which his or her parents reside, without any legal emancipation from parental control, or adoption into a new family, but this, under the facts established, is not one of such cases.

Under the school law the trustees of school districts must admit into schools of their district all persons over 5 and under 21 years of age residing in their districts respectively, free, and that they may admit pupils residing out of their districts upon such terms as they may prescribe.

I decide that Lizzie Bulkley was not, in September, October and November 1896, residing, within the provisions of the school law, in union free school district no. 1, town of Bath, Steuben county.

The appeal herein is dismissed.

3764

In the matter of the appeal of Charles S. Baker v. the board of education of the city of Jamestown.

Public schools should be free to all children of the district to receive any branch of instruction therein for which they are qualified. A practice of allowing a teacher in the school building to furnish instruction to certain children upon the payment of tuition, either to the board of education or to the teacher individually, disapproved.

Decided February 16, 1889

Draper, *Superintendent*

The appellant alleges that, for many years heretofore, the board of education of Jamestown has charged tuition fees to resident pupils in the academic department of the public schools; that, at the beginning of the present year, this practice was discontinued except as to the commercial department, and music, drawing and painting; that, since the beginning of the winter term of

1888–89, the board has furnished instruction in bookkeeping free to resident pupils who learn their lessons and do their writing outside of the commercial rooms, going to said rooms for recitation only; but that to pupils who have the use of the rooms, the supervision of the teacher and all the facilities of the commercial department, a tuition fee of $5 per term is charged. He then alleges that his son, Henry S. Baker, a boy 14 years of age, applied for admission to the commercial department on or about the 4th day of December 1888, and was denied admission unless the tuition fee for the previous term was first paid. He thereupon appeals from this refusal and asks that the board be directed to admit his son to the privileges of the commercial department free of cost.

The appellant submits a pamphlet containing the annual report of the board for the year 1887–88, together with its announcement for 1888–89 which, upon page 65, announces that a charge for tuition will be made against resident pupils for certain branches, including the commercial department.

The board of education, in answer, admit that the appellant is a resident of Jamestown and sends children to school, and that tuition fees have been charged to residents in the academic department previous to the present year, since the beginning of which the practice has been discontinued. They deny that they have charged any fees against resident pupils for instruction in the commercial department or in music, drawing or painting during the present school year. They allege broadly that no charge is now made against resident pupils for instruction in any of the departments of the schools. They specifically deny that Henry T. Baker has been refused admission in the commercial department, and allege that during the present school term he has at all times been free to avail himself of all the privileges of said department without charge for tuition, and without any condition imposing the payment of tuition for any previous term.

The board in their answer furthermore say that, since 1865, it has been customary to charge tuition fees against all pupils in the academic department; that they supposed they had a legal right to do so; that the practice was never questioned until the last summer; that they have since investigated the matter and have been advised that they have no such right, and that accordingly the practice has been discontinued; and that the announcements for the year 1888–89 were made before that conclusion and determination was arrived at.

The board also say that they have allowed the teacher in bookkeeping to receive and instruct private pupils in bookkeeping, and other studies pursued in the commercial department, and that this has been done in the school building, and that they have allowed said teacher to collect pay for such special services.

I have been particular to state the claims of the parties fully. There is really no conflict among them, if we assume that Mr Baker believes that what the board says is private, and special instruction in bookkeeping is a part of the regular instruction of the school. I have no doubt of the bad policy of thus permitting the use of schoolrooms for private work, and have but little

doubt of it being an exercise of power by the board in excess of their legal right. Any such proceeding must inevitably lead to misunderstandings and complications, of which the one now presented is but an illustration. The board is correctly advised and has acted wisely in discontinuing the old practice of charging tuition fees against resident pupils in certain departments or branches of study. The law does not intend that public school officers shall maintain any branches of study not free to all resident pupils qualified for receiving instruction therein. It will be well to remove the last vestige of the system which has heretofore obtained in Jamestown by discontinuing even the present practice, to which allusion is made.

The allegations of the board fully and completely deny those of the appellant. He has been misled. To succeed in his appeal upon the state of facts which he now presents, it would be necessary for him to show that the special instruction to which reference is made, and which is denied to his son, was maintained at public expense. This he does not, and probably can not, do.

The appeal is dismissed.

UNION FREE SCHOOL DISTRICTS

DIVISION, DISSOLUTION

5193

In the matter of the appeal of Paul King a resident taxpayer of union free school district no. 1 of the towns of Hadley and Luzerne, Saratoga and Warren counties, from the decision of the board of education of said district in refusing to call a special meeting.

The principle that a majority shall rule applies to school district affairs. When a majority of the voters of a school district have fairly and legally determined the course to be pursued in the management of its affairs it is the duty of the minority to gracefully acquiesce in such determination and to render such assistance as shall promote the educational interests of the entire district.

The state is directly interested in every school within its borders. It can not consent to the destruction of a strong efficient school, meeting fully the needs of a community for the purpose of establishing two of inferior grade neither of which does meet such needs.

Decided July 17, 1905

William T. Moore, attorney for appellant
Frank Gick, attorney for respondents

Draper, *Commissioner*

On June 13, 1905, the appellant herein and fifteen other resident taxpayers of this district petitioned the board of education to call a special meeting of the district to determine whether application shall be made as provided by law for the dissolution of said union free school district. The board of education, at a meeting held June 25, 1905, refused to call the special meeting prayed for in such petition. Section 32 of title 8 of the Consolidated School Law provides that it shall be the duty of a board of education to call such special meeting when application therefor, signed by fifteen resident taxpayers of the district, is presented. At such meeting the proposition to dissolve must receive a two-thirds vote of those present and voting. If such proposition received the required two-thirds vote a certified copy of all the proceedings must be filed with the school commissioner having jurisdiction. The school commissioner possesses discretionary power in approving such proceedings. If he refuses to approve the proceedings the district can not be dissolved and another meeting of the district can not be called for such purpose within a period of three years. If the commissioner approves such proceedings and the district is dissolved the whole matter, on appeal, may be reviewed by the Commissioner of Education who may affirm the action taken or set such action aside and restore the union free school district.

A union free school district has decided advantages over a common school district. A union free school district may establish an academic department. A common school district can not establish such department. A union free school district of sufficient school population and sufficient taxable property to maintain an academic department should not be permitted to dissolve unless some substantial reason exists for taking such action. This district has 246 children of school age according to its report for the year ending July 31, 1904. During the same year it had an enrollment in its schools of 237 pupils. Its assessed valuation is $267,350.

The district, therefore, has sufficient strength numerically and financially to maintain a good school of academic grade. During the past year the district has authorized an expenditure of $23,300 for the purchase of a new site and the erection of a new schoolhouse. A district liability has been incurred in the purchase of a site which would create an embarassing condition to say the least if the district should be dissolved. The truth is that the desire to dissolve this district is of recent origin. No thought of such action, no necessity for it, could have existed until recently or the district within the current school year would not have appropriated $23,300 for a new site and a new building.

This union free school district was organized a few years ago by the consolidation of two common school districts. The Hudson river was the dividing line between these two districts and therefore divides the present union free school district into two parts. The union free school district also contains two villages. On one side of the river is the village of Hadley and on the other side of the river is the village of Luzerne. The board of trustees consists of seven members. Four of these reside in Luzerne and three in Hadley. The Luzerne portion of the district has the greatest population. Each of these two villages wanted the schoolhouse site located within its boundaries. A site was designated by a special meeting on the Luzerne side of the river. The Hadley portion of the district was dissatisfied with this action. A long and bitter controversy, detrimental to the social and educational interests of the community, has been the result. Owing to this controversy five appeals have been brought to this Department within the last year.

The principle that a majority shall rule applies to school district affairs. When a majority of the voters of a school district have fairly and legally determined the course to be pursued in the management of its affairs it is the duty of the minority to gracefully acquiesce in such determination and to render such assistance as shall promote the educational interests of the entire district.

So many appeals have been before me from this district during the past year that all phases of the school troubles therein are thoroughly understood. It is my desire to settle all these questions without delay and in the hope that the people of this community shall work harmoniously to build up a strong school instead of trying to destroy the efficiency of the one they now have.

In view of the information which this Department possesses we may reasonably conclude that it is impossible to obtain a two-thirds vote in favor of the

dissolution of this district. It is quite improbable that even a majority vote can be obtained in favor of such proposition. If a two-thirds vote should be obtained in favor of dissolution it would be in direct opposition to the best educational interests of the district and should not be permitted. In the management of their local affairs school districts should be accorded the greatest independence possible and consistent with sound educational policies. The State is directly interested in every school within its borders and it encourages every locality to maintain a school of the highest grade possible. It can not consent to the destruction of a strong efficient school, meeting fully the needs of a community, for the purpose of establishing two of inferior grade, neither of which does meet such needs.

The contention of the respondents that the petition for a special meeting was not presented in good faith but for the purpose of delaying action in the erection of a new building and for complicating the situation as much as possible appears to be sustained. Taking all the conditions prevailing in this district into consideration I think the board of education acted entirely within their legal rights and in accordance with the best educational interests of the district and of the state, in refusing to call the special meeting for which petition was filed. The board should be, and is, sustained.

The appeal herein is dismissed.

3526

Joseph C. Parks, Edgar Brown, Amasa Bates, Richard J. Robinson and William J. Cooper, as trustees and members of the board of education of union free school district no. 6, of the town of North Greenbush v. an order of Lewis N. S. Miller, school commissioner, dated January 11, 1886, and from an order of said school commissioner, together with Thomas J. Neville, supervisor, and John J. Sullivan, town clerk of the town of Greenbush, dated January 30, 1886, dividing the territory and altering the boundaries of said district.

A school commissioner possesses the power to alter or change the boundaries of a union free school district.

In the absence of proof to the contrary, the presumption is that the commissioner acted with sound discretion and for the educational interests of the territory affected, by an alteration of school district boundaries.

Decided September 2, 1886

Draper, *Superintendent*

This is an appeal from an order of Lewis N. S. Miller, school commissioner of the second district of Rensselaer county, made upon the 11th day of January 1886, whereby a portion of union free school district no. 6, of the town of North Greenbush, was set off from said district no. 6, and attached to district no. 2 (which is a common school district) of the town of Greenbush, and also from an

order of the said school commissioner and the supervisor and town clerk of the town of Greenbush, made upon the 30th day of January 1886, to the same effect as the first mentioned order.

There are two distinct questions in this case:

1 Whether a school commissioner has the power to alter or change the boundaries of a union free school district; and

2 If he has the power, whether it was properly and judiciously exercised in this case, so as to promote the best interests of education in the locality affected

The power of a school commissioner to alter a union free school district is earnestly contested by the appellants. It was ably urged upon the argument that by enacting the legislation providing for the formation and organization of union free schools, and for the government thereof, and particularly in the enactment of chapter 210 of the Laws of 1880, providing for the dissolution of union free school districts, the Legislature showed its intention to leave it altogether to the residents of the district, to determine whether or not they would have a union free school district, and also to deprive school commissioners from exercising over these districts the powers which they possess in relation to common school districts. The question is an important one. Although I find cases where the Department has sustained commissioners in making orders affecting the boundaries of union free school districts, and one case, at least, where the Department has overruled a commissioner in refusing to make such an order and directed him to make it, I do not find that the power of commissioners to make the order has been raised before the Department, or that it has ever assumed to determine that question.

It has been the policy of the State from its earliest history to confer upon the school authorities the power to divide the territory of the State into districts of such convenient size as would enable the inhabitants of each district to manage their affairs in their own way, subject to the general oversight and supervision of the State Department, and also to alter and modify districts at pleasure according to the development of the territory or changes in population. By section 1 of title 6 of chapter 555 of the Laws of 1864, the duty of making such divisions and alterations is imposed upon the school commissioners in their respective commissioner districts. The statutes, providing for the changing of common school districts into union free school districts, leave it to the inhabitants of any district so laid out, or of adjoining districts cooperating together, to determine whether or not they will establish a union free school, and become a union free school district, and, upon their determining to do so, they are invested with certain enlarged powers and privileges. The purpose of this is obvious. The union free school system contemplates and provides for a school of high grade with an academic department. The management of such a school requires a system more complex than that of a common school district. The people who desire, and set up such a school, are ordinarily the people to be safely intrusted with the complex machinery requisite to the management thereof. It evidently was the intention of the Legislature to enable the inhabitants of any locality to establish

schools of a grade and character suited to their circumstances and wants, and to invest such inhabitants with the powers necessary to the government of such schools, but the statutes which do this contain no suggestion of an intention to modify the general and long settled regulations for the division of all the territory of the State into districts of such size and form as the authorities charged with the general supervision of education should deem best adapted to promote the interests of the same.

The act providing for the dissolution of union free school districts is urged by the appellants as a legislative construction of the statutes providing for the formation of such districts. It is said that if school commissioners possess the power to change the boundaries of union free school districts, then there was no legislative act necessary to enable them to dissolve such districts. I do not think so. The power to regulate the shape and size of a district is distinct from the power to determine the grade of the schools, and the system of government within the district. The first power is with the commissioner, the last with the inhabitants of the district. Of course, both must act pursuant to law. The act for the dissolution of union free school districts is only to enable them to change back from a union free school, and its system of government to a common school district, and its way of doing business. It does not touch the subject of boundaries. It was an essential element in the general plan to enable any district to have the kind of school government it wants. Without it the people who had voluntarily determined to organize a union free school would be enabled to get rid of such system, even after they had demonstrated, by experiment, that they could not successfully maintain it. To obviate this difficulty, and to make the plan complete, chapter 210 of the Laws of 1880 was enacted.

To hold that school commissioners have not the power to divide or add to a union free school district would be to change the entire policy of the State from its earliest history, in reference to the school district system. It is not conceivable that the Legislature would have expressed its intention to do this by the use of any equivocal language, or that it would have left the authority for so important and far-reaching a step to rest only upon inference or implications; I am, therefore, constrained to hold that the commissioner making the order appealed from in this case had the power to make it.

This precise question has been before the courts in this State. In the case of The People, etc., ex rel. the board of education of union free school district no. 2, town of Onondaga v. James W. Hooper, school commissioner, etc., one of the ablest of our general terms in a well-considered opinion delivered by the presiding judge, held that the school commissioner possessed the power to alter or divide a union free school district.

Having arrived at the conclusion that the commissioner had the power to make the order which he did, and knowing of no objection being raised as to the regularity of the proceedings, the only question remaining is as to whether the commissioner acted with sound discretion and for the educational interests of the territory affected. It is to be presumed that he did so act, in the absence of proof

otherwise. There is no such proof. On the contrary, a careful examination of the papers and exhibits submitted, makes me of the opinion that the educational interests of the district affected will be best subserved by upholding the order of the commissioner for the following considerations:

1 The district affected lies wholly in the town of Greenbush. Heretofore it has been connected with a district, the balance of which lies wholly in the town of North Greenbush. The order of the commissioner attaches this portion to a district lying wholly in the town of Greenbush. The best results have not been attained in districts lying in different towns, and it has always been the policy of the State to encourage the formation of districts so far as may be, within the limits of a single town. A marked illustration of the unwisdom and indeed frequent injustice of disregarding town lines in the formation of school districts is found in the present case. The assessed valuation of real estate in the town of Greenbush is shown to be at full value, while in North Greenbush such valuation is only 48 per cent of the real value. The result of this is that the people in the territory now set off have been taxed for the support of the schools more than twice as much as their neighbors in the same school district.

2 The schoolhouse in the district to which the territory in question has been annexed is nearer and more conveniently located to the inhabitants of the district than is the schoolhouse in the district from which it is set off.

3 The evidence shows that the people in the district affected desire to be set off as ordered, and it is the duty of the school authorities to respect such desire so far as reasonably practicable.

In view of these considerations, the appeal must be dismissed, the stay of proceedings granted by me upon the 29th day of April 1886, must be revoked, and the orders respectively appealed from affirmed.

5460

In the matter of the appeal of David C. Warner and another from the acts and decisions of the board of trustees of the village of Endicott and Erwin B. Whitney, school commissioner for the second district of Broome county.

Division of union free school district. It is only where the entire territory of a village is within a union free school district that the board of trustees of such village is authorized by subdivision 1 of section 130 of the Education Law of 1909 to call a special meeting of the electors of such village to determine whether such village shall be separated from another village and established as a union free school district. Such section does not apply to the village of Endicott.

Decided June 23, 1910

Thomas A. McClary, attorney for appellants
Frank M. Hays, attorney for respondents

Draper, *Commissioner*

The appellants are members of the board of education of union free school district no. 1, town of Union. Such district comprises nearly the entire portion of the territory of the incorporated villages of Union and Endicott. The trustees of

the village of Endicott called a special meeting of the voters of such village to determine whether that portion of such union free school district comprising such village should not be separated from such district and form a separate union free school district with limits corresponding with the limits of such village. Such meeting was duly held and a proposition in favor of such separation was adopted. The school commissioner of the second commissioner district of the county of Broome thereupon called a special meeting of the new district to elect members of a board of education for such district. The appellants appealed from the action of the trustees in calling such special meeting and also from the action of the school commissioner in calling a special meeting for the election of members of the board of education of the new district.

The only question involved in this appeal is as to the interpretation of subdivision 1 of section 130 of the Education Law as amended by chapter 140 of the Laws of 1910. It is agreed by both the appellants and respondents that the entire territory of the village of Endicott is not within the union free school district no. 1. A small portion of the territory of the village is within school district no. 2 of the town of Union. The respondents contend that the portion without the district is so small that it would be unjust to compel a strict compliance with the terms of the statute. The statute provides that "the board of trustees of any village whose entire territory is within such district may call a special meeting of the voters" to determine as to whether such village shall be separated. It is only where the entire territory of the village is within a school district that the board of trustees of such village may call such a special meeting. In the absence of a compliance with these requirements the board of trustees has no jurisdiction. It is not sufficient to show that there has been a substantial compliance with these requirements. It must be held that the section referred to does not apply to the village of Endicott and that therefore the action taken by the trustees of such village, and the subsequent action by the school commissioner, were illegal. The appeal is therefore sustained.

It is hereby ordered, That all the acts of the board of trustees of the village of Endicott in calling a meeting of the electors of such village to determine whether such village shall withdraw from union free school district no. 1, town of Union, and form a separate union free school district and the acts of the special meeting held for that purpose on the 7th day of May 1910 in voting upon a proposition to separate from such union free school district and form a new union free school district, are hereby set aside and declared of no effect.

It is hereby further ordered, That all the acts of Erwin B. Whitney as school commissioner of the second commissioner district of Broome county, in designating such village of Endicott as a union free school district no. 19 of the town of Union, and in calling for a special meeting of the inhabitants of such union free school district no. 19, town of Union, for the purpose of electing a board of education for such district, and the acts of the meeting of the electors of such district held on the 2d day of June 1910, in electing members of a board of education of such district and in transacting other business at such meeting, are hereby set aside and declared of no effect.

4381

In the matter of the appeal of Charles H. Brown v. Walter S. Allerton, school commissioner, first commissioner district Westchester county.

In an appeal taken from the action of a school commissioner vacating a preliminary order made by him for the alteration of two union free school districts by setting off certain territory from one of the districts and annexing it to the other, it appearing that one of said districts had an outstanding bonded indebtedness; *held*, that the commissioner properly vacated his preliminary order, the school law prohibiting him from altering or dividing any school district that had a bonded indebtedness outstanding.

Decided October 2, 1895

William P. Fiero, attorney for appellant
Jared Sandford, attorney for respondent

Skinner, *Superintendent*

On April 27, 1895, Walter S. Allerton as school commissioner of the first commissioner district of Westchester county, made upon application by petition, a preliminary order, setting off certain lands and territory therein described, from union free school district no. 3, town of East Chester, Westchester county, annexing the same to union free school district no. 2, town of East Chester, Westchester county; that the trustees or board of education of said district no. 3, refused to consent to said alteration; that said order was not to take effect as to said district no. 3, until the 31st day of July 1895; that on May 20, 1895, after a hearing had been had, said commissioner vacated said preliminary order made by him on said April 27, 1895.

The main ground on which said commissioner set aside said order of April 27, 1895, was that as said district no. 2 has a bonded indebtedness outstanding, amounting to several thousand dollars, under the school law such district could not be altered or divided.

The appellant, Brown, appealed from said order of May 20, 1895.

John Fisher and others, members of the board of education of union free school district no. 3 have answered said appeal.

The fact is established by the papers presented in this appeal that said union free school district no. 2 had on April 27, and May 20, 1895, a bonded indebtedness outstanding amounting to $4000.

By section 30, article 5, title 8, of the Consolidated School Law of 1894, chapter 556 of the Laws of 1894, it is enacted that school commissioners, having jurisdiction, may alter any union free school district whose limits do not correspond to those of any incorporated village or city, in the manner provided by title 6 of said act; but no such district shall be altered or divided upon which there is an outstanding bonded indebtedness.

Title 6 of said Consolidated School Law of 1894, relates to school districts; the formation, alteration and dissolution thereof.

Section 6, of said title 6, enacts that a school commissioner, having jurisdiction, may alter the boundaries of any union free school district whose limits

do not correspond to those of any city or incorporated village; in like manner as alteration of common school districts may be made as therein provided; but no school district shall be altered or divided which has any bonded indebtedness outstanding.

This Department has uniformly decided that the slightest change of the boundaries of a school district is an alteration of said district.

Under the preliminary order of April 27th certain territory was set off from said union free school district no. 3, and annexed to union free school district no. 2. Said order, or any order confirmatory thereof, would alter the boundaries of said district no. 3, and would as surely alter the boundaries of said district no. 2. The alteration of the boundaries of said district no. 2 by said school commissioner, is prohibited by the provisions of the Consolidated School Law of 1894, above cited, so long as said district has any bonded indebtedness outstanding.

Commissioner Allerton very properly vacated his preliminary order of April 27, 1895.

The appeal herein is dismissed, and the order of said commissioner of May 20, 1895, vacating his said preliminary order of April 27, 1895, appealed from, is confirmed.

4253

In the matter of the appeal of Andrew J. French and others, board of education of union free school district no. 25, Lenox, Madison county v. Lincoln A. Parkhurst, school commissioner, second commissioner district of Madison county, and others.

Where a school commissioner or school commissioners make a preliminary order altering the boundaries of certain school districts without the consent of the trustees of some one or more of the districts, and a local board is held and a hearing had by the parties interested and such local board by a tie vote fails to confirm the preliminary order, said order will be void and of no effect, and the whole proceedings will fall. A preliminary order is *inchoate* and of no effect whatever until confirmed by the local board. The remedy of the parties aggrieved by the failure of the local board to confirm the preliminary order, is not by appeal to this Department but by commencing the proceedings anew.

Decided June 27, 1894

R. J. Fish, attorney for appellants

Crooker, *Superintendent*

On and prior to December 26, 1893, there was a school district known as union free school district no. 25, situated in the town of Lenox, county of Madison, and within the second commissioner district of Madison county, of which Daniel Keating was then the school commissioner. There was also a school district known as joint union school district no. 8, situated in the town of Vernon, Oneida county, and town of Lenox, Madison county, and within said second

commissioner district of Madison county and the second commissioner district of Oneida county; that Fred. E. Payne was then the school commissioner in said second commissioner district of Oneida county.

That on said December 26, 1893, the said school commissioners, Keating and Payne, made a first or preliminary order upon the consent in writing of the trustees or members of the board of education of said union free school district no. 25, town of Lenox, Madison county, the trustees of said joint union school district no. 8, of Vernon, Oneida county, and Lenox, Madison county, having refused to consent, altering the boundaries of said school district by setting off certain lands described in said order from said joint union school district no. 8, and annexing the same to said union free school district no. 25, said order to take effect on March 27, 1894.

That said school commissioners, by a paper signed by them and dated December 28, 1893, addressed to the trustees of said school districts, gave notice to such trustees of said order made by them on December 26, 1893, altering said districts, and of the filing of said order in the offices of the town clerks of the towns of Vernon and Lenox, respectively, and a copy of which order was annexed to said notice; and also notified said trustees that on January 10, 1894, at ten o'clock in the forenoon of that day, at the office of R. J. Fish, in Oneida, in said town of Lenox, they (said commissioners) or their successors, would attend and hear objections to said order and said alterations; said trustees were also notified that they might request the supervisor and town clerk of the town or towns within which their school district did wholly or partly lie, to be associated with said commissioners or their successors at such time and place for the purpose of confirming or vacating said order.

That on January 10, 1894, Lincoln A. Parkhurst, school commissioner for the second commissioner district of Madison county, the successor in office of said Keating, one of the commissioners who made said first or preliminary order, and Frederick P. Peirce, school commissioner for the second commissioner district of Oneida county, the successor in office of said Payne, the other one of the commissioners who made said first or preliminary order, met at the office of said R. J. Fish, in the village of Oneida, and at said time and place also appeared Francis Stafford, supervisor, and R. R. Niles, town clerk of the town of Lenox, Madison county, and James Brown, supervisor, and Ora Judson, town clerk of the town of Vernon, Oneida county, who were associated with said Commissioners Parkhurst and Peirce, and together formed a local board to hear objections to the said alterations of said school district, and to decide upon the matter. That said local board heard the statements, proofs and arguments presented upon both sides of the matter, and proceeded to vote upon a motion duly made and seconded, that said first or preliminary order made on December 26, 1893, by said Commissioners Keating and Payne be confirmed, with the following result, namely, Messrs Parkhurst, Stafford and Niles voted to confirm said order and Messrs Peirce, Brown and Judson voted against confirmation.

The appeal herein is taken by the board of education of union free school district no. 25, Lenox, Madison county, from said action and decision of said local board, and the appellants ask that said first or preliminary order of December 26, 1893, be confirmed by me and that the alterations of said school districts as described in said order be made.

By title 6 of the Consolidated School Act of 1864 and the amendments thereof the power and authority to form, alter and dissolve school districts are given to school commissioners. The jurisdiction of a school commissioner to form, alter or dissolve school districts extended only over his own commissioner district. When it becomes necessary for him to act in this matter over territory extending beyond the limits of his commissioner district he must act jointly with the other commissioner or commissioners.

Section 2 of title 6 provides that "with the written consent of the trustees of all the districts to be affected thereby he may, by order, alter any school district within his jurisdiction and fix by said order a day when the alteration shall take effect."

Under this section a school commissioner who has received the written consent of the trustees of all the districts to be affected may proceed to alter any school district or districts within his jurisdiction by drawing, signing and filing his order, making such alteration or alterations and reciting in such order that such consents have been given, and such written consents should be attached to and made a part of such order. The order made under this section (2) must be filed in the office of the clerk of the town or towns in which the school district or districts affected by such order is or are situated, and said order when so made may take effect immediately, or at some future day, as the school commissioner making such order may, in his judgment, consider the best time for all interested.

When such an order is made, signed and filed under the provisions of said section 2 the alteration of the school district or districts, as stated therein, becomes operative, fixed and completed on and from the date or period named in said order when it should take effect, and said district or districts are in fact and in law altered and changed pursuant to the terms of said order without any further order, action or proceeding in said matter by said school commissioners or any other.

A joint district can be altered under said section 2 by the joint action or order of the school commissioners, or a majority of them, in whose districts the school district or districts to be altered lie. Any person conceiving himself aggrieved in consequence of any decision made by any school commissioner by such order as aforesaid, altering any school district or districts, or school commissioners altering any joint school district or districts, under the provisions of said section 2, may appeal to the Superintendent of Public Instruction from said order; and said Superintendent may dismiss the appeal and confirm the order or sustain the appeal and vacate the order.

If the trustees of any district to be effected *refuse* to consent to an order by any school commissioner, or of the school commissioners, or a majority of them, in the alteration of a joint district, the course of procedure is different from that under said section 2. (See sections 3 and 4 of title 6, school laws.)

Under said sections 3 and 4 the school commissioner or commissioners or a majority of them, may, although the trustees of any such district refuse to consent, make and file with the town clerk or town clerks, his or their order making the alteration, but reciting such refusal, and directing that the order shall not take effect, as to the dissenting districts or district, until a day therein to be named, and not less than three months. As it is impossible, in a great majority of cases, to make the same order take effect at different times, this Department has uniformly held that the commissioner or commissioners should fix a date when the *whole* order will take effect, which date shall not be less than three months from the date of said order. It will be seen that the object of filing such order is not to put on record a completed act, but to enable interested persons to ascertain the character of the proposed alterations in time to be heard concerning them. After such order is made and filed, it is the duty of the commissioner or commissioners, making such order, to give at least a week's notice in writing to the trustees of all the districts affected by the proposed alteration, and such notice must state that he has, or they have, made an order of alteration and reciting such order, and that at a stated time and place within the town in which either of the districts to be affected lies, he or they will hear the objections to the alteration. Section 4 also provides that the trustees of any district to be affected by such order may request the supervisor and town clerk of the town or towns within which such district or districts shall wholly or partly lie, to be associated with the said commissioner or commissioners. Such notice of the time and place of hearing should also inform such trustees that they may request such supervisor and town clerk to be associated with such commissioner or commissioners. The trustees, having received such notice, *may* request the supervisor and town clerk of the town or towns in which their respective districts lie to be associated with the commissioner or commissioners at the time and place mentioned in said notice for the hearing of objections, and such request should be in writing and each supervisor and town clerk should present such request with proof of service to the commissioner or commissioners, so as to establish their jurisdiction to act. Such commissioner or commissioners and town officers attending form what is commonly known as the "local board." The absence of the town officers from the board will not prevent the commissioner or commissioners from acting, or invalidate the proceedings taken by him or them at the time fixed for the hearing of objections, otherwise regular; but if the commissioner or commissioners do not attend, the town officers are not authorized by law to make any order in the premises, and the preliminary order must fall. If the commissioner or commissioners fails or fail to attend at the time appointed he or they may give notice, specifying another day and place of meeting not later than three months

after the final notice. The proofs and arguments for and against the proposed alteration are to be made before the board, each member of which has a vote upon the question of confirming or vacating the preliminary order of the commissioner or commissioners, and if they decide by a majority vote to vacate such order the whole matter terminates with such decision, the whole proceedings fall and such preliminary order is void and of no effect. If said board, however, decides by a majority vote to confirm said preliminary order it becomes necessary for the commissioner or commissioners to make and file the final or confirmatory order, or the order of alteration. *The board does not make the alteration;* this the commissioner or commissioners must do, the board uniting with them in the order, such order reciting the first or preliminary order and all proceedings taken thereafter, including the actions of the local board and concluding with the final order or alteration made by the commissioner or commissioners. A record of the action of the local board must be filed with and recorded by the town clerk of the town or towns in which the district or districts to be affected shall lie.

It clearly appears that in the alteration of school districts, under sections 3 and 4 of title 6 of the school law (that is, where all the trustees of the districts affected do not consent) that the first or preliminary order made by the commissioner or commissioners is *inchoate* and of no effect whatever until the same has been duly confirmed by the local board, and that the alteration of the district or districts is made *by the confirmatory order only;* that when the local board fails by a majority vote to confirm the first order, the first order will be void and of no effect, and the whole proceedings fall.

Superintendent Draper said, in appeal no. 3512, decided July 24, 1886, upon the presentation of the question as to when or by which order the alteration takes effect (in proceedings under sections 3 and 4, title 7), "A long line of decisions upon this point, in which the effect of the two orders, provided for in cases similar to the one here, are ably discussed, strengthens me in the conclusion that the preliminary order provided for in section 3 is *inchoate* and of no effect whatever until the same has been duly confirmed as provided for in section 4. . . . The confirmatory order is the one by which the alteration of the districts is affected, and the first order, merely preliminary, being in fact but one step in the procedure for the alteration, and if not followed by the subsequent statutory requirements, it is void."

I concur with the views of Superintendent Draper.

In the appeal herein there is no dispute as to the fact relative to the proceedings taken by Commissioners Keating and Payne, nor is there any claim but that their proceedings and that of the local board were regular and in conformity to the provisions of the school law. The vote of the members constituting such local board upon a motion that the first or preliminary order of said Commissioner Keating and Commissioner Payne be confirmed, was a tie, three members voting for and three against the motion, and hence the motion was lost, and the local board failed to confirm said first or preliminary order; no con-

firmatory order, or any order making said alterations was or could be made, and said first or preliminary order became void and of no effect, and the entire proceedings relative to the alteration of said school districts went down. The tie vote was as effective in defeating the motion to confirm the first order as though a clear majority of the members of said local board had voted against the motion.

The contention on the part of the appellants herein is, that by the action of the local board it was practically a decision refusing to confirm the order of Commissioners Keating and Payne, and that under section 1 of title 12 of the school law, an appeal would lie to me from such action, and that otherwise there would be no remedy in such a case. This contention is not well taken. Had the local board made a confirmatory order, that is, an order altering said districts in the manner stated in the preliminary order of Commissioner Keating and Commissioner Payne, an appeal would lie to me under section 1 of title 12 of the school law. The failure to adopt the motion to confirm such preliminary order was practically the adoption of a motion not to confirm, or to vacate such preliminary order, and such preliminary order thereby became void and of no effect, the whole proceedings for the alteration of such districts went down and no appeal therefrom to me would lie. The parties favoring such alteration have a remedy, to wit, by the commencement anew of proceedings to alter. Assuming, however, for the purpose of argument, that the local board did decide not to make an order altering said district and that an appeal would lie to me from such decision, I am of the opinion, upon the facts presented in this appeal, that there was no undue exercise of discretion and power on the part of said board, which authorizes the interposition of this Department.

It appears that joint district no. 8, towns of Vernon, Oneida county, and Lenox, Madison county, has an aggregate assessed valuation of about $412,000 with 220 children of school age; that it has two schoolhouses and that although there is no academic department in the school conducted in said district, such schools are of a fair grade; that said district is abundantly able financially, to furnish ample school facilities for all scholars within its limits; that under the school law the voters of the district and its trustees have full authority to furnish such facilities, and it does not affirmatively appear that there is any want of disposition on their part to do so; that there is in said district a tract of land known as the "Jenkins farm" containing about eighty acres, of the aggregate assessed valuation of about $51,000, and upon which there are residing about twenty-four children of school age; that it was proposed by the order of Commissioners Keating and Payne to set off from said district and annex to district no. 23, of Lenox, Madison county; that said children, if said territory was set off, would have substantially the like distance to travel in attending school that they now travel; that if such transfer should be made it would reduce the aggregate assessed value of the property in joint district no. 8, by one-eighth, and leave the district about twenty children for which to provide school facilities; that aside from the persons residing on said Jenkins farm, no other residents of the district are in favor of such transfer. It appears that union free school

district no. 25, of Lenox, has an aggregate assessed valuation of about $1,400,000, with about 900 children of school age; that it has two large school buildings, with an academic department; that it is abundantly able, financially, to furnish ample school facilities for all scholars within its limits, as well as such nonresident pupils as may desire to attend the schools therein. It appears that the proceedings to acquire additional territory by the addition of the Jenkins farm were instituted by the board of education of said district no. 26. It is apparent that said district would be financially benefited by the proposed alteration of the district, and that said joint district no. 8 be *financially injured,* but it is not apparent that the educational interests of either district would be promoted thereby, or of any considerable number of pupils of school age residing in either district.

It may be that some alteration of the boundaries of said districts may be made that would be advantageous to the educational interests of both districts; but I am convinced that the alterations as proposed in the preliminary order of Commissioners Keating and Payne would not produce such a result. The appeal here should be dismissed.

Appeal dismissed.

4170

In the matter of the appeal of Charles Kneale, trustee, school district no. 2, Horseheads, Chemung county, v. John T. Smith, school commissioner, Chemung county.

While it is the settled policy of this Department to favor the consolidation of weak and inefficient districts it is not its policy to dissolve a strong district against the almost unanimous wish of the district, such district being able to maintain, and which has maintained and is ready to maintain a good school, and consolidate the territory with that of another strong district requiring the taxable property of the dissolved district to bear the burden of three-tenths of a bonded indebtedness of $17,000 of the district to which the territory of the dissolved district is annexed and in the creation of which indebtedness the dissolved district had no voice and in addition to paying three-tenths of the increased annual expense incident to conducting the school; *held,* that an appeal from an order of a school commissioner, dissolving and annulling school district no. 2 of the town of Horseheads and directing that the territory comprising said annulled and dissolved district be annexed to union free school district no. 10 of the town of Horseheads, be sustained and the order of the commissioner vacated.

Decided April 21, 1893

Reynold, Stanchfield & Collin, attorneys for appellant
W. L. Daily, attorney for respondent

Crooker, *Superintendent*

This is an appeal from the order of John T. Smith, school commissioner of the only school commissioner district of Chemung county, dissolving and annulling school district no. 2 of the town of Horseheads; and also from an

order of said Smith dissolving and annulling said school district no. 2, and directing that the territory comprising said annulled and dissolved district be annexed to, consolidated with and made a part of union free school district no. 10, of the town of Horseheads; and that said union free school district be composed of the territory described in said order, and also from the order of the said Smith and the supervisor and town clerk of the town of Horseheads, confirming said former orders of said Smith.

From the proofs presented it appears:

That in January 1892, there existed in the town of Horseheads, Chemung county, a common school district known as district no. 2, of which district the appellant herein was the sole trustee. That said district was organized many years since and comprises within its boundaries territory within and without the corporate limits of the village of Horseheads, in the town of Horseheads. That said district owns a schoolhouse site of about an acre and one-half in extent, well fenced, the surface of the ground well cleaned and cared for, and which site is situated substantially in the center of said district. That upon said site is a wooden schoolhouse, erected in 1863, and built over and repaired in 1883, at an expense of about $1800; said schoolhouse is well constructed, in good repair, and properly painted, and of sufficient capacity to seat seventy scholars. That there are 70 children of school age residing in said district, and the average attendance at the school therein is about 50, said attendance increasing in numbers annually. That the teachers employed in said school are normal school graduates, and that a school has been maintained in said district each year, for at least the period prescribed by the school laws, for many years. That the total assessed valuation of property liable to taxation in said district for the year 1891, was the sum of $184,298.94, and the tax levied in said district for school purposes was the sum of $1 per thousand, the amount of tax being $186.37. That said district is free from debt.

That in January 1892, there existed in said town of Horseheads, a union free school district known as district no. 10. That said district was constituted many years since and comprised within its boundaries territory within and without the corporate limits of the village of Horseheads, in the town of Horseheads. That in 1890, said district purchased a lot of land known as the Sayer lot for a school site, said lot being situated on the westerly boundary line of said district, and in 1891, erected a schoolhouse thereon and furnished the same. That said new schoolhouse was occupied for school purposes on January 1, 1892. That the sum of $20,000 was voted for the construction and furnishing of said schoolhouse to be paid in ten equal annual instalments, with interest payable annually. That said schoolhouse contained ample accommodation for the different departments of said school, including an academic department, and the pupils attending the same, and said school building was sufficient to accommodate pupils of the district for years to come. That in January 1892, the bonded indebtedness of said district was about the sum of $17,000. That the total assessed valuation of property liable to taxation in said district for the year 1891, was the sum of

$444,768, and the rate of taxation for school purposes was the sum of $14.70 per thousand, the amount of tax being $6538.74. That in 1891, the number of children of school age residing in the district was about 470, and the average attendance at said school was about 338 of resident, and 27 of nonresident pupils. That the decrease in attendance of pupils between 1873 and 1890 was 109. That on January 29, 1892, John T. Smith, school commissioner of the only school commissioner district of Chemung county, made his order dissolving said district no. 2 of the town of Horseheads, in said county, and declaring the same dissolved and annulled, said order to take effect on May 20, 1892, and which order was made without the consent of said school district; and which order was filed with the town clerk of the town of Horseheads. That on said January 29, 1892, the said School Commissioner Smith made another order dissolving and annulling said school district no. 2, and ordering and directing that the territory comprising said annulled and dissolved district be annexed to, and consolidated with, and made a part of, union free school district no. 10, of said town of Horseheads; and that said union free school district be composed of the territory described in said order; and that said consolidated and altered district be known as union free school district no. 2 of the town of Horseheads, said order to take effect on May 20, 1892; and which order was filed in the office of the town clerk of the town of Horseheads. That on said January 29, 1892, said Commissioner Smith gave notice, in writing, to the trustees of district no. 2, and union free school district no. 10, that on February 11, 1892, at 10 o'clock a. m., at the town hall, in the town of Horseheads he would attend and hear the objections to the said proposed dissolution, alteration and consolidation; and that said trustees were at liberty to request the supervisor and town clerk to be associated with him on such hearing. That on February 10, 1892, the said school commissioner, the supervisor and town clerk of the town of Horseheads met, pursuant to notice, the trustee of district no. 2, and the trustees of district no. 10 being present, and said hearing was adjourned to March 29, 1892, and on that day further adjourned to April 6, 1892. That hearings were had before said local board on April 6th and 8th, and concluded on April 25, 1892. That at said hearing the trustees of said districts were present and represented by counsel and a large number of witnesses were examined. That on April 26, 1892, said local board made its order confirming said orders of said Commissioner Smith and said order was filed with the town clerk of the town of Horseheads.

That on May 7, 1892, a special meeting of said district no. 2 was held and said meeting authorized and directed its trustee to appeal from said orders of Commissioner Smith and said confirmatory order, and that on or about May 12, 1892, the appeal herein was brought.

That from the testimony taken in the said hearing before the local board it was established:

That the schoolhouse in district no. 2 is one mile and thirty-three-one-hundredths from the schoolhouse in district no. 10 and that the scholars residing in the western portion of the district no. 2 would be required to travel from two

to two and one-half and three miles to reach the schoolhouse in district no. 10. That the roads scholars would be required to travel are, in the spring and fall, wet and muddy, and in the winter are badly drifted with snow; that there is an absence of sidewalk thereby rendering it necessary to use the roadway. That such scholars, to attend said schoolhouse in district no. 10, would be required to cross three railroads, namely, the New York, Lake Erie and Western twice, in one place there being three tracks, and in the other two; the Northern Central with four tracks at the place where the highway crosses it; and the Delaware, Lackawanna and Western with two tracks. That said roads are trunk lines, doing a large business, with numerous trains passing and repassing daily. That with one exception, the overhead crossing of the Delaware, Lackawanna and Western, all said railroads intersect the highway at grade, but such overhead crossing is where the road crosses the tracks of the Northern Central. That the three roads leading from various portions of district no. 2 to the schoolhouse in district no. 10 at one point or another crosses said railroad tracks. That for the younger and smaller scholars of district no. 2 the distance to reach the school in district no. 10 is too great for them to walk; that it would be to a great degree dangerous to send them alone across the railroad tracks, and it is not feasible to arrange conveyances for their transportation.

That the inhabitants and taxpayers of school district no. 2 are practically a unit in opposition to the dissolution of said district and its consolidation with district no. 10 and are desirous of mantaining their district organization and the school therein as they have done for a great many years. That no meeting of the inhabitants of said district no. 2 was called or held to take into consideration the question of the consolidation of said district with said district no. 10, nor does it appear that any proposition was made by district no. 10 to district no. 2 for such consolidation, at least, none prior to January 1892, and before said district no. 10 had purchased its new school site, constructed a new schoolhouse and incurred an indebtedness, of which some $17,000 is outstanding.

The question presented upon the appeal is whether it was advisable for the respondent to make the orders appealed from, and in making such orders he exercised a wise discretion.

While it is the settled policy of the Department of Public Instruction to favor the consolidation of weak and inefficient districts, it is not its policy to dissolve strong districts abundantly able to maintain, and which have maintained and are ready to maintain, good schools, and consolidate the territory with that of other strong districts. Fifty years ago Superintendent Young held: "The Superintendent of Public Instruction will reverse an order of a town superintendent annexing one district to another, where the inhabitants of either are opposed to the union, and have sufficient means for the support of a school, it being an abuse of discretion." He states in his decision: "It appears that sufficient importance has not been given to the facts that the inhabitants of district no. 2 almost unanimously remonstrated against the proposed union; that they have every necessary facility within themselves, as at present organized, to

sustain a good school; that for several years past they have done so, and that they do not need any accession of territory, taxable property or inhabitants; that school district no. 19, so far as wealth and children of the proper age to attend school are concerned, is far more able to keep up an efficient organization than district no. 2; but, in the absence of such consent, and especially in the face of a determined and unanimous opposition to such arrangement on the part of one of the districts proposed to be united, a consolidation could, in the judgment of the Department, only prove detrimental to the cause of education, and subversive of the best interests of all concerned."

In appeal no. 3904, decided August 29, 1890, by Superintendent Draper, he states in his decision: "The principal reason alleged by the appellants in support of their appeal is that their children will have to go much farther to school. It is admitted on all sides that they would certainly have to go a half mile farther than at present, and that, in some instances, children would have to go two miles and a half to reach the school in district no. 2.

Both districts are reasonably strong, both in the number of residents and in the value of property. No. 2 is much the stronger. The number of children attending school in this district last year was 122, and the assessable valuation was $342,500. The number of pupils registered in no. 3 last year was 29, and the assessable valuation $78,900. Thus, at present, no. 2 stands in no need of the annexation of no. 3, and it seems to me that no. 3 is sufficiently strong to maintain proper school accommodations. This being so, I think it follows that the question upon the desire of the majority of the residents of district no. 3, so far as there has been any expression of the desire of such majority, has been opposed to the consolidation or annexation. It seems to me advisable, therefore, that the order of the commissioner should not be upheld."

The counsel for the respondent cites the decision of Superintendent Draper in appeal no. 3847, in support of the orders appealed from. The facts in that appeal are different from those presented in this appeal. In no. 3847 the incorporate village of Cambridge was entirely within the limits of the two districts; the trustees of both districts consented to the consolidation; there was no claim that any patron of the school would be seriously inconvenienced in consequence of distance from school building; that, on a vote of the inhabitants of both districts, 270 were in favor and 110 opposed to consolidation; that the buildings used for school purposes in both districts were old, and without any of the modern improvements for heating and ventilating, and ill adapted for school purposes.

From the papers presented in this appeal I am unable to see how the educational interests in district no. 2 will be promoted by a confirmation of the orders appealed from. If such orders are confirmed the inhabitants of district no. 2 will be forced, against their unanimous wish, into a union with district no. 10, thereby compelling their children to travel a much longer distance to attend school, many of them over roads in bad condition and across railroad tracks, and requiring the taxable property to bear the burden of three-tenths of a bonded indebted-

ness of $17,000 of district no. 10, in the creation of which they had no voice, in addition to paying three-tenths of the increased annual expense incident to conducting the school. While their educational interest will not be promoted, it is apparent that financially their burden will be increased. Nor do I see how the educational interests of district no. 10 are to be promoted by the confirmation of said orders; but it is apparent that, financially, it will be benefited by the addition of $184,298 to the taxable property of the district, without any substantial increase in the annual budget of the district.

The counsel for the respondent state in their brief that "the board of education (of district no. 10) has been diligent and persistent in establishing a good union free school in the village." Upon such brief is set out a letter from Superintendent Draper, under date of March 27, 1891, in reply to a letter from the clerk of said board, of March 18, 1891. The letter set out upon the brief is an opinion to the effect that if inhabitants are brought into a district by annexation, and enjoy the benefits of the new school building, there is no valid reason why they should not bear their share of taxation which will fall upon the district for the purpose of paying bonds which have been issued for the purpose of constructing the new building.

The letter to Superintendent Draper, to which his is a reply, is not set out; but by a reference to such letter on file, it appears that the board of education was, in March 1891, contemplating enlarging the limits of district no. 10. The letter states: "What we propose to do is to enlarge our district so as to take in at least that portion of the adjoining district which is within the corporate limits of the village. . . . This plan, to the board of education, and a large number of the residents of the adjoining district, seems practicable, and what ought to be done if there is no legal objection to this course." The letter then submits the question as to whether the residents of the territory annexed would be liable to be taxed for the bonds issued. To the latter question Superintendent Draper replied, but his letter is silent as to the question propounded relative to the annexation of territory. It would seem, from the letter of March 18, 1891, that the board of education, not satisfied with having established a union free school in district no. 10, was contemplating action by which district no. 2 would be forced to receive the benefits of such a school, when the school law leaves the formation of a union free school district entirely to the qualified voters of the territory proposed to be included in such district.

Upon the papers presented in the appeal, I am of the opinion, and it seems to me advisable, that the appeal herein should be sustained and the orders appealed from vacated.

The appeal is sustained.

It is ordered, That the order made herein by John T. Smith, school commissioner of the only school commissioner district of Chemung county, on January 29, 1892, dissolving school district no. 2, of the town of Horseheads, Chemung county, to take effect on May 20, 1892; and the order made by said Commissioner Smith on January 29, 1892, dissolving and annulling said school district no. 2

and ordering and directing that the territory comprising said annulled and dissolved district be annexed to, consolidated with and made a part of union free school district no. 10, of said town of Horseheads; and that said union free school district be composed of the territory described in said order; and that said consolidated and altered district be known as union free school district no. 2 of the town of Horseheads, said order to take effect on May 20, 1892; and said order made on April 26, 1892, by said Commissioner Smith, and the supervisor and town clerk of said town of Horseheads, composing the local board, confirming said two orders of said Commissioner Smith, each of which orders was filed in the office of the town clerk of the town of Horseheads, Chemung county, are, and each of said orders is, hereby vacated and set aside.

4451

In the matter of the appeal of Alexander H. De Clercq and Charles O. Niles, as trustees of school district no. 7, town of Cazenovia, Madison county, from decision of local board in the matter of the alteration of school district no. 7, and union free school district no. 10, town of Cazenovia, Madison county.

Where it clearly appears that the essential, if not the only, ground of an order taking territory from one school district and annexing it to another is for the purpose of the equalization of the valuation; *held,* that to confirm such order would be contrary to public policy and the rulings of this Department. While the equalization of valuations may properly be an element for consideration in the alteration of school districts it should not be the controlling one. If a wealthy school district desires to obtain a part of the territory of a comparatively weaker district for the sole purpose of benefiting such wealthy district financially and such desire is sanctioned by this Department, the result will be a constant struggle for the annexation of such territory and the people and the school system would be endlessly involved in controversies in consequence thereof.

Decided May 18, 1896

E. N. Wilson, attorney for appellants
M. H. Kiley, attorney for respondents

Skinner, *Superintendent*

On or about December 24, 1895, Lincoln A. Parkhurst, school commissioner of the second commissioner district of Madison county, on the consent in writing of the trustees, constituting the board of education of union free school district no. 10 of the town of Cazenovia, Madison county, the trustees of school district no. 7 of the town of Cazenovia, Madison county, having refused to consent, made a preliminary order altering the boundaries of said school district no. 7, and consequently altering the boundaries of said union free school district no. 10, by setting off certain territory in said order described from said district no. 7 to said district no. 10, and which order was to take effect on April 15, 1896. That on said December 24, 1895, said School Commissioner Parkhurst gave notice in writing to the trustees of said districts nos. 7 and 10 of said order, and that on January 7, 1896, at 10 o'clock in the forenoon, at the office of H. J. Rouse in

Cazenovia, he or his successor will attend and hear objections to said order and proposed alterations, and that said trustees might request the supervisor and town clerk of the town in which said school districts were situated to be associated with him or his successor in hearing such objections and confirming or vacating said order. That the trustees of union free school district no. 10 requested the supervisor and town clerk of the town of Cazenovia to be present at such hearing and to be associated with the school commissioner of the second commissioner district of Madison county in hearing objections and in deciding to confirm or vacate said order. That on January 7, 1896, at the time and place mentioned in said notice there were present Commissioner Parkhurst, Supervisor Cook and Town Clerk Rouse, comprising the local board and Trustees De Clercq and Niles, representing district no. 7, and Trustees Irish and Loyster, representing district no. 10, when said hearing was adjourned to January 15, 1896, and on that day further adjourned to January 30, 1896. That on January 30, 1896, witnesses were sworn and examined before said local board, and subsequently, said testimony having been duly considered, said local board, by the affirmative vote of each member thereof, confirmed said preliminary order of said School Commissioner Parkhurst.

From said preliminary order and the action of the said local board confirming the same, Trustees De Clercq and Niles of said district no. 7 have appealed, and annexed to said appeal is a copy of the testimony taken before said local board.

The respondents herein, School Commissioner Parkhurst, Supervisor Cook and Town Clerk Rouse, have filed a statement in which they concur in the facts, maps and exhibits served upon them by the appellants herein.

It appears from the papers filed herein that prior to December 24, 1895, the territory comprising school district no. 7, of Cazenovia, consisted of farming lands, excepting a portion thereof containing about 150 acres of land, described in said preliminary order of Commissioner Parkhurst, adjoining Cazenovia lake, upon which territory there have been erected summer residences, owned by ten or twelve persons; that the aggregate assessed valuation of said district was $222,675, and there were thirty-six persons therein who are taxed, eight of whom reside upon the 150 acres proposed to be taken from said district, and none of them have children; that of the twenty-eight taxpayers not residing upon the said 150 acres, there are only five or six having children attending school; that the aggregate assessment of ten of said twenty-eight taxpayers, having the lowest assessment, is $2500, leaving the remaining eighteen to pay the bulk of the taxes, and of these but three have children attending the school; that the tax assessed in the district for school purposes is .1055 on $100; that the schoolhouse of the district is conveniently located for all parts of the district, and in good condition and well furnished, and containing an organ, chart, maps, globes, a library of 245 volumes, etc., etc.; that three terms of school of twelve weeks each have been maintained in the school year; that there were forty-one children of school age in the district, with a registration of twenty-six, and an average daily attendance of about twenty-one.

That union free school district no. 10 of the town of Cazenovia embraced within its boundaries a large portion of the village of Cazenovia, which village has a population of about 1800, and had an aggregate assessed valuation of $846,061; that the number of children of school age residing therein was 397, of which 327 were registered, and eight teachers were employed in the schools therein.

It also appears that there were but two children of school age residing upon the 150 acres of land proposed to be set off from district no. 7 to district no. 10, namely, the children of one Dean, a tenant upon the property of L. M. Ledyard, which children attend school in district no. 10.

It is conceded that the aggregate assessed valuation of the parcel of 150 acres, proposed to be set off from district no. 7 to district no. 10 is $133,700, which would leave in district no. 7 an aggregate assessed valuation of $88,975, and increase that of district no. 10 to the sum of $977,761.

It is clear that if the action of the local board and the order of Commissioner Parkhurst be affirmed, the tax rate for school purposes in district no. 7 would be increased from .1055 on $100 to about 30 cents on $100, or about three times as much, while that in district no. 10 would be diminished.

No proof is made herein that any qualified voter or taxpayer in said district no. 7 has requested that said parcel of 150 acres, or any part of said district be set off into said district no. 10, not even Dean, the tenant, who sends his two children to the school in district no. 10. On the contrary it appears that said voters and taxpayers, including the owners of the parcel of the 150 acres proposed to be set off, are opposed to the alteration of district no. 7 as set out in the order of Commissioner Parkhurst. Of the witnesses produced and examined before the local board all but one, H. F. Ludlow, a member of the board of education of district no. 10, were opposed to the proposed alteration, and each testified that he knew of no one in district no. 7 who was in favor of said alteration. The witnesses opposed to said alteration of district no. 7 stated as the grounds of their opposition that it would not be for the best interests of the school in the district and would result in shortening the term of the school in the school year, and greatly increase the rate of taxation for school purposes in the district.

H. F. Ludlow, the sole witness examined on behalf of the said alteration, was asked, "If the proposed alteration is made, what effect would it have on school district no. 7, in your judgment, as an educator?" and answered, "It would make it cost more; it would depend on the character of the people." To the question, "What effect would it have on no. 10?" he answered, "It would help, financially." It is not shown that the said order has been made for the convenience or benefit of residents of district no. 7, or of the residents of the territory affected, nor will it enlarge their school privileges. The residents of district no. 7 and of the territory therein to be affected protest against it. The only party who desires the alteration is the board of education of union free school district no. 10, which district will be benefited, financially, by having added to it property of the aggregate assessed valuation of $133,700.

While in comparison with a great number of school districts in the State,

and of twelve of the districts in the town of Cazenovia, district no. 7 is financially strong, it is, as compared with union free school district no. 10, a weak district. Said district no. 7 is largely a farming community and was so when said district was formed. The parcel of 150 acres proposed to be annexed to district no. 10 has increased in value by reason of the summer residences erected thereon and the decoration of the grounds connected with such residences. District no. 10 embraces within its boundaries a large portion of the village of Cazenovia, a village increasing yearly in business and wealth.

It is against the settled policy of this Department to allow property to be transferred from a comparatively weak district to a stronger one when it is not clearly shown that it will give better school facilities and increased convenience to the persons occupying the transferred territory. The only children of school age residing upon the territory sought to be transferred are the two children of the tenant Dean, and he sends, by choice or preference, said children to the school in district no. 10. This Department has held that the mere choice or preference of a resident to send his children to a school out of the district in which he resides, rather than to one in his district, is not sufficient reason for transferring him or his lands. In the hearing before the local board the witness, Ludlow, put in evidence a statement of the aggregate assessed valuation of the twelve other school districts in the town of Cazenovia as proof that, if the proposed order of Commissioner Parkhurst became effective, the aggregate assessed valuation of district no. 7 would then be in excess of eleven of the other districts in said town.

It seems clear that the essential, if not the only ground of the said proposed order of Commissioner Parkhurst, for annexing said territory to district no. 10 was for the purpose of the equalization of valuations.

This Department has held that while the equalization of valuations may properly be an element for consideration in the alteration of school districts it should not be the controlling one.

Superintendent Draper, in a decision rendered by him on November 13, 1886, said: "In any event I am not prepared to give sanction to the proposition that school districts should be changed only for the purpose of equalization of valuations." I concur in such decision of Superintendent Draper.

In my opinion, if a wealthy school district desires to obtain a part of the territory of a comparatively weaker district for the sole purpose of benefiting such wealthy district financially, and said desire is sanctioned by this Department, the result will be a constant struggle for the annexation of such territory, and the people and the school system would be endlessly involved in controversy in consequence thereof.

To confirm said preliminary order and the action of the local board herein would be contrary to public policy and the rulings of this Department.

The appeal herein should be sustained, and the said preliminary order and the action of said local board confirmatory thereof, vacated and set aside.

The papers filed herein do not show that any confirmatory order was made, signed and filed. After the action of said local board the school commissioner

should have made and filed a final order, or the order of alteration. The action of the local board did not make the alteration; the preliminary order was inchoate, and of no effect whatever until it was duly confirmed by the local board; the confirmatory order makes the alteration, and the school commissioner should have made such order reciting therein the preliminary order, and all the proceedings taken thereafter, including the action of the local board, and concluding with the final order of alteration made by the school commissioner, the said local board uniting with him and signing such confirmatory or final order.

The appeal herein is sustained.

It is ordered, That the said preliminary order made by said School Commissioner Parkhurst, dated on or about December 24, 1895, and the action or decision of the said local board, on or about January 30, 1896, confirming said preliminary order, be, and the same are, and each of them is, hereby vacated and set aside.

In the matter of the appeal of Winfield S. Gardner v. Charles F. McNair as school commissioner second commissioner district of Livingston county.

School commissioners have the power, under the provisions of the Consolidated School Law of 1894, and the rulings of this Department, to alter the boundaries of union school districts; but *no* school district can be *divided* that has any bonded indebtedness outstanding. Union school districts when duly established, under the provisions of title 8 of the Consolidated School Law of 1894, and the acts amendatory thereof, can not be dissolved by school commissioners, but only in the manner prescribed in sections 32 to 41 of article 5, title 8 of the Consolidated School Law of 1894.

Decided October 27, 1900

Skinner, *Superintendent*

This is an appeal from the refusal of Charles F. McNair, as school commissioner of the second commissioner district of Livingston county, to divide or alter the boundaries of union school district 4 (joint) Groveland and Sparta, Livingston county.

The appellant alleges as the grounds for bringing his appeal that such refusal will deprive the inhabitants of a large part of such district of school privileges in said district; also, on the ground of the expediency of such proposed alteration. The respondent, McNair, has answered the appeal, and to such answer the appellant has made a reply, and to such reply the respondent has made a rejoinder.

It appears that on April 15, 1899, at a meeting duly called and held, of the qualified voters of joint school district 6, Groveland and Sparta, and of school district 4, Groveland, Livingston county, under the provisions of article 1, title 8 of the Consolidated School Law of 1894, and the acts amendatory thereof, by the affirmative vote of a majority of the voters present and voting, it was determined that said school district be consolidated by the establishment of a union school therefor and therein; that said meeting duly elected three trustees of such union school district; that subsequently Scott L. McNinch, the then school com-

missioner of the first commissioner district of Livingston county and Samuel L. Whitlock, the then school commissioner of the second commissioner district of Livingston county, by an order made by them designated the union school so established as "union free school district 4, joint Groveland and Sparta"; that September 21, 1899, a certified copy of the proceedings taken relative to the establishment of said district was filed in the Department of Public Instruction at the Capitol in the city of Albany; that October 21, 1899, an appeal was taken to the State Superintendent of Public Instruction by A. B. Mann and others from the proceedings of said meeting held April 15, 1899, relative to the establishment of said union school, and February 9, 1900, said Superintendent, by his decision 4842, dismissed such appeal.

It further appears that May 26, 1900, the trustees of said union school district met for the purpose of considering certain proposed alterations of said district and signed a consent that said district be altered or divided, and thereafter it should be bounded and described as set forth in a writing signed by them; that such paper was afterwards delivered to Commissioner McNinch of the first district, and Commissioner McNair of the second district; that Commissioner McNinch, June 5, 1900, upon his part, consented that an order be entered altering or dividing such district as asked for by such trustees; that Commissioner McNair, June 5, 1900, refused in writing, to indorse such application for an alteration or division of such district.

It further appears that on said June 5, 1900, said union school district 4 (joint) Groveland and Sparta, had an outstanding bonded indebtedness.

From the proofs herein I am satisfied that the proposed alteration or division of such union school would be in effect, a dissolution of said district, and if it could be legally made, would in effect establish two districts with nearly the like boundaries of the two districts existing prior to the consolidation of such districts by the establishment of a union school therein at the meeting held April 15, 1899.

School commissioners have the power, under the rulings of this Department and the provisions of the school law, to alter the boundaries of union school districts.

Section 6 of title 6 and section 30 of article 5, title 8 of the Consolidated School Law of 1894, and the acts amendatory thereof, expressly give such power. But no school district shall be *divided* which has any bonded indebtedness outstanding.

It is in proof that when Commissioners McNinch and McNair were requested to *divide* said union school district, the district had an outstanding bonded indebtedness, and hence, such commissioners could not divide the district.

I am satisfied that the alteration or division of said district, as asked for by the trustees, was not an ordinary alteration by taking a parcel *or* parcels of land from the district and uniting such parcel or parcels to some other district or districts, but was in fact a scheme to reinstate the two districts as they severally existed prior to their consolidation April 15, 1899, that is, dissolving such union school district.

The union school districts when duly established under the provisions of title 8 of the Consolidated School Law of 1894, and the acts amendatory thereof, can not be dissolved by the action of school commissioners, but only in the manner prescribed by sections 32 to 41 of article 5, title 8 of the Consolidated School Law of 1894.

The appeal herein is dismissed.

5036

In the matter of the appeal of Herman Cole v. Loyal L. Davis as school commissioner, first commissioner district of Warren county.

Under the provisions contained in section 9 of title 6 of the Consolidated School Law of 1894, as amended by chapter 264 of the Laws of 1896, a school commissioner has power to dissolve a common school district within his commissioner district, and to unite *a portion of the territory,* theretofore forming the district dissolved, to an adjoining union free school district; and from the residue of the territory of the district dissolved to form new districts, without applying for or obtaining the consent of the trustees of the district dissolved, or of the union free school district.

Decided November 7, 1902

Charles F. King, attorney for appellant
Loyal L. Davis, attorney in person

Skinner, *Superintendent*

This is an appeal from the following named orders made by Loyal L. Davis as school commissioner of the first commissioner district of Warren county, namely, order dated September 2, 1902, to take effect immediately, dissolving school district 14, Queensbury, Warren county, and annexing all the territory theretofore forming said district 14, lying within the village of Glens Falls, to union free school district 1, Queensbury, forming school districts 21 and 22, Queensbury; from the territory theretofore forming district 14, lying outside of the village of Glens Falls; directing the records etc., of said former district 14 to be filed with the clerk of the town of Queensbury; ordering the first meeting of new district 21 to be held at the schoolhouse therein September 13, 1902, and the first meeting in new district 22 to be held at the residence therein of James H. Storey, September 13th; amending the boundaries of union free school district 1; describing the boundaries of each of said districts 21 and 22.

An order dated September 5, 1902, correcting the boundaries of district 22, and a further order dated September 13, 1902, correcting the boundaries of district 22, were made.

The main grounds alleged by the appellant for bringing his appeal are, that no consent or consents of the trustees of former school district 14, and of union free school district 1, were made or obtained by Commissioner Davis prior to making the orders appealed from; that the action of Commissioner Davis in making the orders appealed from were illegal and contrary to the provisions of the Consolidated School Law.

The pleadings herein are quite voluminous, consisting of the appeal, the answer of Commissioner Davis, the reply of the appellant, and the rejoinder of Commissioner Davis.

A large portion of the pleadings herein relates to the condition of the schoolhouse in former district 14; the action of the qualified voters therein, relative to improving its condition; the order of Commissioner Davis condemning it, and the failure of the district to take measures for the construction of a new schoolhouse.

In my opinion the questions presented by the pleadings for my decision and consideration are, first, had Commissioner Davis authority, under the provisions of the Consolidated School Law, to make the orders appealed from; and, second, did Commissioner Davis wisely exercise such authority in making said orders.

Under title 6 of the Consolidated School Law of 1894, and the acts amendatory thereof, the school commissioners of the State have power to form, alter and dissolve school districts, except to dissolve a union free school district. (See sections 32–41, article 5, title 6 of said Consolidated Law.)

Sections 2, 3 and 4, as amended by section 4, chapter 264 of the Laws of 1896, provide for the alteration of common school districts. Section 6, as amended by section 5, chapter 512 of the Laws of 1897, provides for the alteration of union free school districts whose limits do not correspond to those of any city or incorporated village, in like manner as alterations of common school districts may be made as therein provided (that is, under sections 2, 3 and 4 of title 6), and also provides, with the written consent of all the districts to be affected, for the dissolution of one or more common school districts adjoining any union free school district other than one whose limits correspond to those of any city or incorporated village, and annex the territory of said districts so dissolved to such union free school district. The amendment made to section 6 by chapter 512 of the Laws of 1897, consisted in striking out the words "altered or" before the word "divided."

Section 50, article 5, title 8 of the Consolidated School Law of 1894, contained the like provisions as in section 6 of title 6, and the amendment of section 30 by chapter 540 of the Laws of 1897 was in striking out the words "altered or" before the word "divided" as section 6, title 6, was amended by chapter 512 of the Laws of 1897.

Section 9, as amended by section 4, chapter 264 of the Laws of 1896, provides "Any school commissioner may dissolve one or more districts, and may from such territory form a new district; he may also unite a portion of such territory to any existing adjoining districts."

This Department has held, under the provisions of said section 9, as amended by chapter 264 of the Laws of 1896, that any school commissioner has the authority to dissolve one or more school districts, *other than union free school districts,* within his commissioner district, without obtaining the consent of the trustee or trustees of such district or districts, and from the territory of the district or districts so dissolved to form a new district or districts, or unite a *portion* of such district or districts so dissolved to any existing adjoining district or

districts, whether such district or districts are common or union free school districts, and without the consent of the trustee or trustees of the district to which such portion is so united.

This Department has held that in the dissolution of a school district under such section 9, of title 6, the commissioner *can not unite all the territory* theretofore comprising such dissolved district to any adjoining union free school district, without first obtaining the consent in writing of the trustees of such union free school district.

I am of the opinion that Commissioner Davis, under the provisions of section 9 of title 6, as amended by chapter 264 of the Laws of 1896, had full power and authority to dissolve school district 14, Queensbury, Warren county, and unite a portion of the territory theretofore forming said district to union free school district 1, Queensbury, and from the residue of the territory of the dissolved district to form new districts 21 and 22, without applying for or obtaining the consent of the trustees of former district 14, or the trustees of union free school district 1.

From the facts established herein, as to the condition of school affairs, and especially the condition of the schoolhouse in former district 14, and the neglect of the qualified voters therein to take affirmative action to improve such conditions, Commissioner Davis wisely exercised the power and authority given him in making the orders appealed from.

Under the uniform rulings of this Department, and the instructions issued by me to school commissioners in the formation, alteration and dissolution of school districts, when a school district is dissolved the commissioner should describe in an order dissolving a district, the boundaries of such district, giving an accurate description. In an order made adding territory to a school district such order should contain an accurate description of such territory. In the order of Commissioner Davis, dated September 2, 1902, dissolving school district 14, he omitted to give an accurate description of the territory comprising such district; and in such order annexing a portion of former district 14 to union free school district 1, Queensbury, he omitted to give an accurate description of the territory so annexed.

School Commissioner Davis is hereby directed to amend said order of September 2, 1902, by inserting therein an accurate description of the territory theretofore forming said district 14; and by inserting therein an accurate description of the territory annexed to union free school district 1, Queensbury.

The appeal herein is dismissed.

It is ordered that the order made by me herein, on September 30, 1902, upon the petition of the appellant herein, staying all proceedings of Commissioner Davis, and of the trustee or trustees of school districts 21 and 22, Queensbury, and of each of them, under and pursuant to the orders of such commissioner, appealed from, be stayed, and which order was filed with the clerk of the town of Queensbury, be and the same is hereby vacated and set aside.

UNION FREE SCHOOL DISTRICTS

ORGANIZATION

4046

In the matter of the appeal of James E. McCane and others v. a special school meeting in districts nos. 1 and 3 of the town of Indian Lake, held for the purpose of forming a union free school district.

The establishment of a union free school district will be vacated on the following grounds: first, that a majority of voters in one district is opposed; second, that the number of children in the united district is not sufficient to make a graded school; third, that some of the children will be required to travel too great a distance to attend school.

Decided January 9, 1892

Robert Imrie, attorney for appellant
L. C. Aldrich, attorney for respondent

Draper, *Superintendent*

This is an appeal from a meeting held September 15, 1891, in districts nos. 1 and 3 of the town of Indian Lake, in the county of Hamilton, at which it was determined to form a union free school district. The vote was very close, being 42 in favor of the project to 39 against. Of the persons who voted from district no. 1, 33 were in favor of the project and 24 against. Of the voters from no. 3, 9 were in favor and 15 against. The assessable valuation of district no. 1 is about $47,000, and of district no. 3 about $21,000. There are 49 children of school age in district no. 1, and 28 children of school age in no. 3. The districts are very large in extent of territory, and they are very unfortunately situated as to shape, the territory of district no. 3 extending halfway around that of no. 1.

I have concluded to sustain the appeal for the following reasons:

1 The decided majority of voters in one district is opposed to the union. This district will feel that it has been imposed upon and badly treated if it is forced into the alliance. The result would be endless controversy and ill feeling in the new district.

2 The number of children in the united district who will attend the school is hardly sufficient to make a graded school. If that be so, then there would be no compensation for the union.

3 Some children would have to go a much longer distance to school. The distances are greater than they should be now.

If the people of the united district could be substantially harmonious in favor of the proposition, I should be glad of it, but under all the circumstances of the case, with opinions so nearly divided and with one district strongly opposed, it seems to be inadvisable.

The appeal is therefore sustained and the action of the meeting of September 15th is held to be of no effect.

3980

In the matter of the appeal of A. H. Penny and Wesley H. Squires v. school districts nos. 5 and 19, town of Southampton, county of Suffolk.

The electors of two school districts in meeting assembled voted to consolidate the districts by establishing a union free school therein. The chairman who presided ruled in an arbitrary and unparliamentary manner. A majority for consolidation was secured without due deliberation and public discussion. The extent of the territory consolidated is nearly five miles wide and of about the same length, and many pupils of the schools would be greatly inconvenienced in consequence of the distances required to be traveled to reach the school. Proceedings set aside.

Decided May 20, 1891

Nathan D. Petty, attorney for appellant

Draper, *Superintendent*

This is an appeal from the action of meetings held upon the 2d day of April 1891, and the 10th day of April 1891, for the purpose of voting upon the formation of a union free school district in the two districts above named.

After carefully reading the voluminous papers in the case, and hearing the parties orally, I have come to the conclusion that the best educational interests of the territory affected will be promoted by sustaining the appeal and setting aside the action appealed from. While there was something of a majority apparently in favor of the consolidation of the districts, I think there is good evidence that such majority was obtained without any deliberation or public discussion of the question involved. Evidence is not wanting that the chairman of the meeting resorted to arbitrary and unparliamentary practice for the purpose of preventing a free expression of the opinions of persons present. It is also apparent that some persons voted without the right to do so. Neither of the districts affected is very strong either in population or in assessable property. Both are quite large in extent of territory. Proof is submitted that, if the districts were to be united, the consolidated school district would be more than five miles in extent from north to south, and nearly that distance from east to west. The result would be that some children would have to go much farther to school than children ought to be compelled to go, while the strength of the districts is not such as to raise the presumption that a union graded school would be maintained which would be sufficient compensation for the disadvantages suffered.

Moreover, there is a state of unrelenting bitterness and animosity prevalent in the districts affected, such as I have scarcely seen exceeded in any previous case. This would be carried into the organization of the new district if such an organization were to be effected, and would operate to the disadvantage of the enterprise for a considerable length of time.

In view of these facts, I think the appeal should be sustained, and the action appealed from overruled and declared to be of no effect.

3947

In the matter of the appeal of E. C. Birdseye and others v. school districts nos. 5 and 9, town of Paris, county of Oneida.

Proceedings of a meeting of electors, held to determine whether a union free school should be established, set aside when it is conclusively shown that a sufficient number of illegal votes was cast with the majority, which was small, to have produced a result which would have been otherwise had only qualified voters participated.

Decided December 30, 1890

Draper, *Superintendent*

The appellants, legal voters of school districts nos. 5 and 9, town of Paris, Oneida county, allege that at a meeting of the electors of said districts held pursuant to notice, to determine if a union free school should be established, a large number of the inhabitants attended and participated in the vote upon the question of the establishment of a union free school, resulted as follows: for, 126, against, 131; that a large number of votes was cast against the proposition by persons who were not qualified to vote — a sufficient number to defeat the proposition which otherwise would have been carried.

No answer has been interposed, and the evidence presented by the appellants stands uncontradicted.

I conclude, therefore, that there was not a fair and clear expression of the legal electors given at the meeting appealed from, and therefore set aside and declare the proceedings of the meeting of no effect.

The trustees of districts nos. 5 and 9, Paris, Oneida county, are hereby ordered and directed to give notice within twenty days from this date, of a meeting of the legal voters of the districts to determine the question whether a union free school shall be established or not.

The appeal is sustained.

3982

In the matter of the appeal of Barbara Moore and others, from the proceedings of a joint meeting in school district no. 7, in the town of Pembroke, and school district no. 9, in the town of Batavia, county of Genesee, held for the purpose of forming a union free school district.

Appeal from the proceedings of a meeting which decided by a very close vote to consolidate districts by the establishment of a union free school therein, sustained where the opposition thereto is strong and much bitterness of feeling concerning the action is prevalent, and the evidence of irregularities too numerous to be excused in view of the slender majority secured for consolidation.

Decided June 22, 1891

H. B. Cone, attorney for appellants
James A. LeSeur, attorney for respondents

Draper. *Superintendent*

This is an appeal from the action of a meeting held in the above-named districts, on the 14th day of February 1891, for the purpose of forming a union free school district. There were 179 votes cast at said meeting. The proposition to form a union free school district was declared carried by a majority of but 3. It is claimed that some persons voted in favor of the proposition who were not entitled to vote. It is shown that a considerable number of persons in the district received no notice whatever of the meeting. It is also claimed that there were some irregularities in the proceedings and some arbitrary action on the part of the presiding officer. It is made to appear that each of the districts affected is abundantly able to support a separate school. A majority in value of the property assessed is opposed to the coalition. A new schoolhouse was built in district no. 7 in 1881, and a new one was also built in district no. 9 in 1886, the former cost $1100 and the latter $1300. District no. 7 is in the town of Pembroke, and no. 9 is in the town of Batavia. A union of the districts would, therefore, form a union district lying partly in two towns. The new district is shown by the map to be an oddly shaped one, having something of the shape of an hour glass, small in the middle and large at the ends. It is also made to appear that, if the meeting is to be upheld, many children would have to go from a mile and a half to two miles to school, and upon roads that are at times impassable. It is shown that, at a meeting held subsequently to the one referred to, a clear majority was developed in opposition to the proposed union.

In view of these considerations, I think the appeal ought to be sustained. There are grave doubts as to whether the action appealed from was reached with such legal regularity as to permit of its being upheld. But aside from that question, it is clearly manifest to me that there is so strong opposition to the union, and so much bitterness of feeling concerning it prevalent in the territory affected, that it would be impossible to secure that cooperation of effort which is essential to the success of educational work in the district. The majority by which the action appealed from was secured, is too slender, the irregularities too numerous, and the opposition too strong to justify it. From all that I can gather, after a careful examination of the papers, and after hearing counsel, I am forced to the conclusion that a decided majority of the voters of the territory affected are opposed to the project. If this is so, it ought not to be upheld. If it is not so, that fact may be ascertained by a renewal of the proceedings and through another meeting at some future time.

The appeal is sustained and the action of the meeting of February 14, 1891, is declared to be of no effect.

3988

In the matter of the appeal of John Dickson and others v. school district no. 2 of the town of Andes, county of Delaware.

Action of a district school meeting at which a majority voted against the establishment of a union free school, will not be disturbed upon an appeal. A person whose right to vote is questioned should be challenged when the vote is offered, and the oath administered by the chairman of the meeting.

Decided July 27, 1891

Barner Johnson, attorney for appellants
C. M. Shaw, attorney for respondents

Draper, *Superintendent*

On the 13th day of March 1891, a meeting was held in the above-named district for the purpose of determining whether or not a union free school district should be organized. The proofs show that the matter had been much discussed in the district for some weeks prior to the time of the meeting, and that opinions were much divided. In consequence of this the meeting was largely attended. The selection of a chairman and secretary was satisfactorily effected. It was agreed that the meeting should proceed to ballot upon the question of establishing a union free school district. Tellers were appointed and all electors in favor of the organization of a union free school district, voted a ballot bearing the words "for resolution," and those opposed cast ballots bearing the words "against resolution." At the conclusion of the balloting, the tellers canvassed the ballots, and reported that 180 had been cast in all, 90 of which were in favor of the resolution to form a union free school district, and 90 of which were against said resolution. The chairman thereupon declared that the resolution had been lost, as it had not received a majority of all the votes cast.

The appellants now bring the matter up for review, and insist that 15 persons whom they name, voted against the resolution, when they were not entitled to vote at all. They therefore ask the Superintendent to declare the resolution adopted. The respondents, in reply, present the affidavits of 15 persons, to whose right to vote objection is made, attempting to show that they were entitled to vote, and in addition the respondents name 15 persons who, they claim, voted in favor of the proposition, when they were not entitled to vote.

The affidavits of these other 15 persons are presented by the appellants, attempting to show their qualifications.

I can not assume to declare the proposition to have been adopted upon such proofs as are submitted. The meeting proceeded with deliberation and regularity, so far as I can see. It had the right to take the vote in the way it did. The resolution for the formation of a union free school district required the majority of all the legal votes cast. Upon the face of the tellers' report, it did not receive such majority. It is too late to attack the right of persons to

vote after the meeting has adjourned. If persons who offered to vote had no right to do so, objection should have been made on the spot. No objection seems to have been offered. Moreover, before a union free school district shall be organized in this district, the friends of the movement should be able to show a clear and undisputed majority in favor thereof at a district meeting. In view of the above considerations, the appeal is dismissed.

3766

In the matter of the appeal of Charles H. Robie, Jerome H. Freeman and others v. school district no. 1, of the town of Bath, in the county of Steuben.

At a meeting of the inhabitants of a school district, held to determine whether a union free school should be established therein, 154 persons appeared, by the poll list kept thereat, to have voted upon the proposition.

The canvass of the ballots cast, however, revealed the fact that 76 votes were cast for the proposition, and 75 against it, and one ballot was blank.

A question was raised as to the right of one person to vote who voted.

No satisfactory explanation is offered as to the discrepancy between the number of names upon the poll list and the number of ballots actually counted.

There was no such majority of the legal voters present and voting as the statute contemplates.

Proceedings of the meeting set aside, and another meeting recommended.

Decided March 5, 1889

Reuben E. Robie, attorney for appellants
Miller & Nichols, attorneys for respondents

Draper, *Superintendent*

It seems that the meeting was held in the above-named district, on the 16th day of October 1888, for the purpose of determining whether a union free school district should be formed within the limits of said district. The appellants are opposed to the formation of the union free school district; they allege that the notice of such meeting was not in full compliance with the terms of the statute relating thereto; they also allege various irregularities in the proceedings of the meeting, and they particularly claim that a majority of the qualified voters of the district present and voting at the said meeting, did not vote in favor of the formation of a union free school district. It seems that after the meeting had been organized by the selection of a chairman and secretary, two tellers were appointed for the purpose of receiving and counting the votes cast, and the meeting then proceeded to vote upon the question by written ballot, those in favor of the proposition writing "for" upon their ballots, and those opposed writing "against." During the progress of the balloting, some question arose as to the right of one Edward Gerue to vote. At the conclusion of the balloting, it was announced that 154 votes had been polled; after the counting of the ballots it was announced that 76 votes had

been cast in favor of the proposition, 75 against it, and one blank. No satisfactory explanation is offered as to the discrepancy between the number of names on the poll list and the number of ballots actually counted.

After carefully reading the claims and proofs of the respective parties, I come irresistibly to the conclusion that there was no such majority of the legal voters of the district present and voting in favor of the proposition to establish a union free school district as the statute contemplates, and am confident that the interests of the district will be best subserved by holding another meeting at which the question shall be again submitted. I think it is incumbent upon the persons favoring the establishment of the union free school district, either to show that they received a majority of the 154 votes, or to show that there were less than that number actually cast, and this they fail to do. Reaching this conclusion upon the principal question raised by the appellants, it is unnecessary to consider some other questions which are involved in the case.

The appeal is sustained.

3899

In the matter of the application of Charles Melius and others v. George H. Curreen, D. Oscar Dennison and George H. Burch, as members of the board of trustees of school district no. 1, of the town of Greenbush and East Greenbush, county of Rensselaer.

A meeting for the purpose of determining whether a union free school should be established in a school district, was attended with much disorder and unparliamentary proceedings. A subsequent meeting immediately followed, at which it was decided to establish a union free school. Evidence was produced that about two hundred persons present at the time fixed for the meeting were opposed to the change, while but ninety favored the change. *Held,* that it being clearly demonstrated that the change was opposed by a large majority, the action of the minority can not be upheld.

Decided August 5, 1890

B. Frank Chadsey, attorney for appellants
Robert G. Scherer, attorney for respondents

Draper, *Superintendent*

For a year or more there has been much controversy in the district above named concerning the organization of a union free school district, and the matter has previously been presented to the Department. By direction of the Superintendent a special meeting was held on the evening of July 14th last to determine the question. Two meetings are alleged to have been held upon that evening. The first one decided against the formation of a union free school district, the friends of the proposition claiming that they were clearly in the majority, and that the will of the majority was thwarted and defeated by the trustees of the district as at present constituted, and their adherents proceeded to organize a second meeting after the adjournment of the first one, and at

such meeting it was determined by a nearly unanimous vote, to establish a union free school. This meeting then proceeded to elect nine trustees of such union free school district. The appellants were elected trustees. As such, they have demanded of the old board of trustees that all property of the district in their hands be delivered to the new board. The old board has refused to so deliver.

This proceeding is an application to the Department to require them to deliver all property of the district to the new board.

The determination of this application must turn upon the question as to whether the proceedings of the second meeting above referred to could be upheld. Because of the long agitation of the subject and the near proximity of the district to the Capitol, I have taken the testimony of witnesses presented by the respective parties as to the transactions of the evening of July 14th. Five witnesses were sworn upon each side. From this testimony, I am satisfied that the first meeting held upon that evening was characterized by boisterous conduct and confusion to so great a degree as to render any of its transactions wholly ineffectual, as a matter of law. The room was crowded. The meeting was called to order promptly on the arrival of the hour, by Mr Dennison, one of the members of the board of trustees, who was strongly opposed to the change in the form of the district organization. He at once entertained a motion that Mr Curreen, another one of the trustees, and likewise opposed to the change in the district organization, be made chairman. It was moved on the other side that Mr Melius, one of the appellants, be made chairman. Mr Dennison only put the question on the election of his associate, Mr Curreen. There were prompt and emphatic demands from all parts of the house for a count. He refused to recognize these, and declared Curreen elected. There was great noise and confusion. Curreen at once assumed the chair. A resolution was offered in favor of changing the form of the district organization. An amendment was proposed that the sentiment of the meeting was opposed to such a change, and had entire confidence in the old board. The chairman put this amendment to the house. There was a yell on each side, and he declared the amendment adopted, and failed to put the original motion. Immediately, the chair entertained a motion to adjourn, declared it carried and the meeting adjourned.

These proceedings occupied but a very few moments of time, and were characterized by the utmost noise and confusion. I have had no difficulty in coming to the conclusion that there was no legal force or effect in these proceedings, and that this alleged meeting must be held to be altogether inoperative and without result.

I have carefully considered the question as to whether the proceedings of the second meeting should be upheld. Much of the testimony taken upon the inquiry to which I have hereinbefore referred, was to the effect that there were something like three hundred persons present in the room at the time the meeting was called, and while the boisterous proceedings above referred to took place, and that there were only about one hundred persons present at the second meeting. This scarcely looked as though a clear majority of all the qualified

electors in the district who went to the meeting, were in favor of the organization of a union free school district. It was, therefore, left to the respective parties in interest to go behind the proceedings, and show by the affidavits of individual electors that they were present upon the night in question; that they were qualified electors in the district, and that they favored or opposed the proposed change in the district organization. A week was afforded for procuring these affidavits. I am now presented with the affidavits of more than two hundred persons who swear that they are qualified electors in the district; that they were present at the meeting, and that they opposed the change. I am likewise presented with the affidavits of ninety persons, that they were qualified electors, were present at the meeting and favored the change. Each side has been allowed twenty-four hours to scrutinize the names presented by the other, and to show that there was false swearing, if such was the case. While each side objects to a few names, perhaps six or eight, presented by the other, there is no valid explanation offered for the marked disparity in numbers. I am, therefore, obliged to conclude that a decided majority of the electors present upon the night in question were opposed to the organization of a union free school district, and have to regret that they did not see the importance of securing an expression of their opinions in an orderly and valid manner.

The second meeting could be upheld only upon the ground that it was made to appear that a decided majority of all electors who attempted to attend the school meeting were in favor of the change, and that their purposes were thwarted and overthrown by unseemly and unlawful conduct. The burden of proof upon this question was clearly upon the appellants. They must show it affirmatively in order to succeed. This they have not been able to do.

It follows that the application must be denied.

4267

In the matter of the appeal of Smith E. Slocum and others, from proceedings of special meeting of school districts nos. 5 and 6, town of Ontario, Wayne county, held April 18, 1894, establishing a union free school district.

The provisions of the school law relative to the consolidation of two or more adjoining common school districts by the establishment of a union free school therefor and therein in force in April 1894, did not require that the call, signed by fifteen or more persons from each of said districts, should be a joint call and addressed to the trustees of all the districts, nor that the trustees of the districts should give a joint notice of the meeting pursuant to the call; and separate calls, signed by the persons residing in the separate districts, the statute only requiring that such persons should unite in a call, and that the trustees should unite in giving notice of the meeting, that is, concur, consent or act in concert in calling such a meeting; that in a meeting so held all acts and proceedings other than such as are mentioned in section 5 of the title relating to union free school districts of the school law in force in April 1894, are void and of no legal effect.

Decided October 2, 1894

S. B. McIntyre, attorney for respondent

Crooker, *Superintendent*

This appeal is taken from the action and proceedings of a special meeting held in Ontario village, Wayne county, on April 18, 1894, to take action upon the proposition to consolidate common school districts nos. 5 and 6, town of Ontario, Wayne county, by the establishment of a union free school in said district.

A copy of the appeal was served on June 2, 1894, and the appeal filed in this Department on June 4, 1894. Various grounds of appeal are alleged, the material ones being in substance as follows: that the said meeting was not called or assembled in accordance with the statutes in such cases made and provided; that the question whether said district should be consolidated was not submitted as a separate question; that the vote upon the resolution was not correctly taken nor truly recorded; that persons not legally qualified to vote at such meeting were permitted to vote; that the trustees or members of the board of education were not elected by ballot. An answer to the appeal has been interposed and to such answer a reply has been made, and to the reply a rejoinder. The papers in the appeal are voluminous. Much, however, that is contained therein is not relevant to the question involved in the decision of the appeal.

The following facts are established:

In the year 1894, and prior to April 18th of said year, there existed in the town of Ontario, Wayne county, two common school districts, numbered respectively 5 and 6; that one B. H. Hoag was trustee of district no. 5, and one J. C. Howk trustee of district no. 6; that under date of March 27, 1894, a call in writing addressed to said Hoag, as trustee of said district no. 5, was signed by twenty-seven residents of said district no. 5 entitled to vote at any school meeting of said district, requesting such trustee to cause a special meeting of the voters of said district to be called to meet with the voters of school district no. 6 of said town, provided the trustees of said district no. 6 will agree to such meeting, to consider and decide the question of uniting the above-mentioned districts in a union free school district and erecting a suitable building therefor; that under said date of March 27, 1894, a call in writing, addressed to said Howk, as trustee of said district no. 6, was signed by forty-five residents of said district no. 6 entitled to vote at any school meeting of said district, requesting said trustee to cause a special meeting of the voters of said district to be called to meet with the voters of school district no. 5 of said town, provided the trustee of said district no. 5 agree to such meeting, for the purpose of considering and deciding the question of uniting the above-mentioned district in a union free school district and erecting a suitable building therefor; that the aforesaid calls, so signed as aforesaid, were together presented to and left with Hoag and Howk, as such trustees, at a meeting of said two trustees, and that said two trustees together agreed to call a special meeting of the two districts in conformity to such two calls; and that said two trustees, under date of April 10, 1894, each issued a notice, each signed by him as trustee of his

district; that a joint meeting of the inhabitants of his district (5 or 6) entitled to vote thereat, together with the qualified voters of district no. 5 or 6, would be held at the Baptist church in Ontario village on Wednesday, April 18, 1894, at 1 o'clock p. m., for the purpose of determining by a vote of such districts whether a union free school should be established therein in conformity to the provisions to that end of chapter 555 of the Laws of 1864 and the amendments thereof; that in each of said notices was sufficiently set forth the qualifications of the inhabitants entitled to vote at such meeting; that said notices of such special meeting were duly and legally served upon the inhabitants of each of said districts respectively qualified to vote at such meeting.

That on April 18, 1894, a special joint meeting of the inhabitants of said school districts nos. 5 and 6, qualified to vote thereat, was held at the Baptist church, in Ontario village, pursuant to the aforesaid notices; that one William Payne was elected chairman, in which election 154 persons participated, and C. J. Nash and E. J. Howk were elected secretaries; that the call for the special meeting was read, and a paper signed by residents of district no. 5 protesting against the action of the trustee of said district in calling the joint meeting without first securing the consent of a majority of the voters thereof, and protesting against any joint action being taken at that time was read; that one R. Johnson offered the following resolution: "*Resolved,* That a union free school be established within the limits of district no. 5 in the town of Ontario, county of Wayne, State of New York, and school district no. 6 in said town, pursuant to the provisions of chapter 555 of the Laws of 1864, and the amendments thereof; and that a suitable schoolhouse be erected in the district so formed at a point not to exceed five rods east or west of a line running north and south through the north end of the stone wall which runs north and south upon lands of David Craven, and which wall is located about 20 rods west of David Craven's house," and J. S. Bennett moved its adoption. Unanimous consent was given to Mr Johnson to amend said resolution so as to read "not to exceed 10 rods," instead of "5 rods"; the original call of the inhabitants of district no. 5 to trustee Hoag for a special meeting with the voters of district no. 6 was read; that a vote by ayes and noes was taken upon the adoption of the resolution offered by Mr Johnson, the whole number of votes cast being 106, of which 99 were for 7 against said resolution; that the following resolution was adopted by acclamation:

"*Resolved,* That we proceed to elect a board of trustees, consisting of nine members, to be divided into three classes consisting of three members each. The members of the first class shall be the first three elected, who shall hold office until one year from the next annual school meeting. The members of the second class shall be the second three elected, and who shall hold office until two years from the next annual school meeting, and the members of the third class shall be the third three elected, and who shall hold office until three years from the next annual school meeting"; that F. J. Peer, George Klock and P. F. Osborn were nominated as the three trustees of the first class, and a motion

was made and carried that if no other names are placed in nomination that the secretary cast a ballot for said Peer, Klock and Osborn, and thereupon the secretary cast a ballot for said persons and the result of such ballot was announced; that J. S. Brandt, William Payne and E. J. Howk were nominated as the three trustees of the second class, and a motion made and carried that if no other names are placed in nomination that the secretary cast a ballot for said Brandt, Payne and Howk, and thereupon the secretary cast a ballot for said persons, and the result of such ballot was announced; that R. Johnson, B. Hoag and Charles Harris were nominated as the three trustees of the third class, when Mr Johnson declined, and J. H. Pratt was nominated in place of Mr Johnson, and thereupon a motion was made and carried that if no other names are placed in nomination the secretary cast a ballot for said Pratt, Hoag and Harris, and the secretary cast a ballot for such persons and the result of said ballot was announced. It further appears that at said meeting certain resolutions were presented and adopted relating to the purchase of a schoolhouse site, and the erection of a schoolhouse thereon, at a cost not exceeding $8000, and that said sum be raised in instalments, etc., etc., after which the minutes of the proceedings of said meeting were read and adopted and the meeting adjourned. A copy of the calls, notices for said special meeting and of the minutes of said special meeting, duly certified by the chairman and secretaries of the said meeting, were received by me on May 3, 1894.

The formation of a union free school district in the consolidation of two or more common school districts by the establishment of a union free school therefor and therein is a statutory proceeding purely, and if the local authorities comply substantially with the provisions of law relating thereto, the statute itself creates the union free school district, so that no discretion rests with the Superintendent of Public Instruction to determine the expediency or the advisability of the action taken; it is a matter entirely within the power of the inhabitants of the territory of the proposed district, qualified to vote at school meetings therein. The provisions of title 9 of the Consolidated School Act of 1864, and the amendments thereto, were in force at the time of the action and proceedings relative to the consolidation of said school districts nos. 5 and 6, town of Ontario, Wayne county, by the establishment of a union free school therefor and therein, and the sole question for me to decide in this appeal is, whether or not said action and proceedings were substantially in accordance with the provisions of sections 1, 2, 3, 4 and 5 of said title 9.

By section 1 of title 9 of said act, whenever fifteen persons entitled to vote at any meeting of the inhabitants of any school district in the State shall sign a call for a meeting, to be held for the purpose of determining whether a union free school shall be established therein, in conformity to the provisions of said title 9, *it shall be the duty of the trustees of such district,* within ten days after such call shall have been presented to them, to give public notice that a meeting will be held for such purpose as aforesaid, etc., etc. If the trustees shall refuse or neglect to give such notice the Superintendent of Public Instruction may authorize and direct any inhabitant of said district to give the notice.

Section 2 of title 9 of said act prescribes the manner in which the notices of the special meetings mentioned in sections 1 and 4, title 9, shall be given.

By section 4 of title 9, whenever *fifteen* persons, entitled as aforesaid *from each of two or more adjoining districts,* shall *unite* in a call for a meeting of the inhabitants of such districts, to determine whether such districts shall be consolidated by the establishment of a union free school therefor and therein, it shall be the *duty of the trustees of such districts,* or a majority of them, to give like public notice of such meeting, at some convenient place within such districts and as central as may be within the time and to be published and served in the manner set forth in the second section of title 9, in each of such districts, and the Superintendent of Public Instruction may order such meeting under the conditions and in the manner prescribed in the first section of title 9. Said section does not prescribe any form for the call for such meeting, nor for the notice of such meeting. It does not state that the persons of the two or more districts shall join in one call for a meeting, nor that the trustees of the districts shall *join* in one notice of the meeting pursuant to the call; it states that the fifteen persons from each of two or more adjoining districts shall *unite,* that is, concur, consent or act in concert, in calling for such a meeting, and that trustees shall give *like* public notice of the meeting, that is, such trustees concurring, consenting or acting in concert in calling such meeting.

I am of the opinion that the inhabitants of said districts nos. 5 and 6 of Ontario, united, within the meaning of section 4, above cited, in a call for a meeting to consider the question of establishing a union free school therein, and that the trustees of said districts united in calling such a meeting.

I am also of the opinion that the notice of such meeting was given as prescribed in section 2 of title 9 of said section. By section 5 of title 9 of said act whenever such meeting, as is provided for in sections 1 and 4 of said title, is held, such meeting shall be organized by the appointment of a chairman and secretary, and it may be adjourned from time to time by a majority vote provided that such adjournment shall not be for a longer period than ten days; that at such meeting when there are present not less than fifteen persons entitled to vote thereat shall by the affirmative vote of a majority present and voting determine to establish a union free school in said district, *pursuant to such notice;* it shall be lawful for such meeting to proceed to the election, by ballot, of not less than three nor more than nine trustees, who shall, by the order of such meeting, be divided into three several classes the first to hold until one, the second until two, the third until three years from the next annual meeting of the district, except in the cases provided for in section 6 of title 9; that said trustees and their successors in office shall constitute the board of education of and for the union free school district for which they are elected, and a designation of the number of said district shall be made by the school commissioner having jurisdiction; three copies of the call and minutes of the meeting, duly certified by the chairman and secretary thereof, shall be made and transmitted and deposited, one with the school commissioner, one with the town clerk and one with the

Superintendent of Public Instruction; but if at such meeting the question of the establishment of a union free school shall *not* be decided in the affirmative then all further proceedings at such meeting, except a motion to reconsider or adjourn, shall be dispensed with, and no such meeting shall be again called within one year thereafter.

Said section 5 also provides that when the trustees so selected shall enter upon their office the office of any existing trustee or trustees shall cease except for the purposes stated in section 11 of title 6 of said school act, namely, to provide for and pay the debts of said former district or districts. This Department has held that trustees or members of the board of education of such union free school district enter upon their office *at once* upon their election under said section 5.

The said meeting of April 18, 1894, having been duly called, had no authority, under the school law, to transact any other business than that specified in the notice of such meeting and mentioned in said section 5 of title 9. Said meeting adopted by the affirmative vote of a majority present and voting, not less than fifteen persons qualified to vote thereat being present from each of said district nos. 5 and 6, that a union free school be established within the limits of said districts 5 and 6 of the town of Ontario, Wayne county, pursuant to the provisions of chapter 555 of the Laws of 1864, and the amendments thereof. It is true that, coupled with the resolution to establish such union free school and make a part thereof, were matters relating to the erection of a suitable schoolhouse in said district. The appellants contend that the said resolution was invalid by reason of the including therein the matters relating to the schoolhouse, and that thereby a free and unbiased expression of the will of the voters present was prevented. The contention is not tenable and is not sustained by the proofs. The voters at the meeting were not misled and no request was made to divide the resolution. Said voters had no authority at said meeting to act upon the question of a schoolhouse, and so much of the resolution as relates to the schoolhouse is but an expression of opinion by the voters of no legal ability and surplusage. The appellants also contend that the question of establishing a union free school in said districts 5 and 6 and thus consolidating said districts into a union free school district should have been submitted to the separate votes of the voters of said districts respectively. The contention is not tenable. If at said meeting of April 18, 1894, there were present not less than fifteen persons from *each* of said districts, qualified to vote thereat, a majority of those present and voting from both of the districts could lawfully determine that a union free school should be established. In appeal no. 4178, decided by me July 6, 1893 (see page 154, of volume 1 of my report of 1894) I held that title 9 of the Consolidated School Act does not require that the resolution establishing a union free school district should receive a majority of the votes of *each of the districts;* but that if at least fifteen of the voters of each district are present at the meeting, a majority of the qualified voters from both districts present and voting in favor of the resolution is a compliance with the provisions of said title.

The appellants also contend that no ballot of the voters present was taken upon the election of any of said trustees. This contention is not well taken. At said meeting of April 16, 1894, after it had determined to establish a union free school district, it also determined that said district (formerly districts 5 and 6) should have nine trustees, and divided said trustees into three classes, the first three to be elected to serve one year, the second three to be elected to serve two years, and the last three to be elected to serve for three years; that thereupon three persons were nominated for the first three to be elected, and a motion adopted that if no other persons be nominated that the secretary cast a ballot for the three so nominated, and no other persons being nominated the secretary cast a ballot for said three persons and the result of such ballot was announced; that a like course was pursued in the election of the other six persons for such trustees. I am of the opinion that the nine trustees were elected *by ballot* as required by section 5 of title 9 of the Consolidated School Law. The qualified voters of a district present and voting have the right of expressing their choice for trustees by their ballots; but where only one or more persons, if composing a class, are put in nomination for the office of trustee, and there is no objection made by any voter, and it is the unanimous wish of the qualified voters expressed at the meeting by their votes that the secretary of the meeting shall cast his one ballot for such person or persons so nominated for such office, such person or persons are elected by ballot.

No proof has been presented by the appellants to sustain the allegations in their appeal that the vote upon the resolution to establish a union free school was not correctly taken nor truly recorded; nor that persons not legally qualified to vote at such meeting were permitted to vote thereat. All proceedings had and taken at said meeting of April 18, 1894, relating to the construction of a new schoolhouse at any point named, or the purchase of a schoolhouse site, or the erection of a schoolhouse upon said site at a cost of $8000, and that said sum be raised in instalments, etc., were, and each of them was, void and of no binding effect, the said meeting not having the authority, under section 5 of title 9 of said Consolidated School Act, to take any action except upon the matters specified in the call for said meeting and permitted to be taken under said section 5.

I find and decide that the special meeting of the inhabitants of school districts nos. 5 and 6 of the town of Ontario, Wayne county, qualified to vote at school meetings, held at the Baptist church in Ontario village on April 18, 1894, for the purpose of determining whether a union free school should be established within said districts in conformity to the provisions to that end of chapter 555 of the Laws of 1864, and the amendments thereof, was duly and legally called and held. That at said meeting it was duly and legally determined by the affirmative vote of a majority present and voting, that a union free school be established within the limits of district no. 5, in the town of Ontario, Wayne county, State of New York, and school district no. 6, in said town, pursuant to the provisions of chapter 555 of the Laws of 1864, and the amendments thereof. That by said determination, under the provisions of said chapter 555 of the Laws

of 1864, and the amendments thereof, said school districts nos. 5 and 6, town of Ontario, Wayne county, became and were consolidated as one district, to wit, union free school district no. —, of the town of Ontario (the school commissioner having jurisdiction of the district to make the designation). That at said meeting nine trustees of said district were duly and legally elected, and divided into three classes, the first three elected to hold for one year, the second three elected to hold for two years, and the last three elected to hold for three years from the first Tuesday of August next following. That the said nine trustees so elected entered at once upon their office, and the office of any then existing trustee or trustees in said districts, nos. 5 and 6, or either of them, ceased, except for the purposes stated in section 11 of title 6 of said chapter 555 of the Laws of 1864, and the amendments thereof.

That all actions and proceedings had and taken at said special meetings, after the organization thereof, except that relating to the establishment of a union free school and the election of trustees, and adjourning were and are void and of no legal effect.

The appeal herein is dismissed.

4306

In the matter of the appeal of Henry F. Chadeayne and Henry W. Chadeayne from proceedings of a special meeting, held on October 20, 1894, in school district no. 5, town of Cornwall, Orange county.

Where in a common school district a call is duly signed by at least fifteen qualified voters of the district, for the trustees of the district to call a meeting, to be held for the purpose of determining whether a union free school shall be established therein, and such notice is issued by the trustees and a meeting duly held at which no action is taken upon any resolution to establish a union free school therein, and such meeting is adjourned and the adjourned day being Sunday, no meeting was held thereon, all proceedings theretofore had and taken, went down. That a subsequent call for such a meeting and then notice of a meeting made by the trustees thereon, and the action of the meeting held pursuant to such notice in the establishment of a union free school in such district, was legal and valid.

Decided December 21, 1894

H. W. Chadeayne, attorney for appellant

Crooker, *Superintendent*

On or about August 7, 1894, a call, signed by eighteen qualified voters in school district no. 5, town of Cornwall, Orange county, for a meeting of the qualified voters of said district, to be held for the purpose of determining whether a union free school should be established therein, was received at the annual school meeting, held in said district on August 7, 1894, read and placed on file; on August 9, 1894, the trustees of said school district gave public notice that in compliance with a call of fifteen or more persons entitled to vote at any meeting

of the inhabitants of said district, that a meeting of the inhabitants of said district entitled to vote thereat, would be held at the school house on the 30th day of August, at 7.30 p. m., for the purpose of determining by a vote of such district whether a union free school should be established therein; that said notice did not set forth the qualifications of the inhabitants entitled to vote at such meeting; that on said August 30, 1894, a meeting of said district, pursuant to said notice, was held and organized by the choice of one Emslie as chairman and one Ashworth as secretary; that the call for said meeting was read, and also a protest of Henry F. Chadeayne, and thereupon the said meeting adjourned for ten days; the meeting did not convene on the day to which it was adjourned, said adjourned day being Sunday, September 9, 1894, and said meeting went down; that on or about September 20, 1894, eighteen qualified voters of said school district signed a call, addressed to the trustees of said district, for a special meeting of the qualified voters of the district to be held in the schoolhouse for the purpose of determining whether a union free school should be established therein in conformity with the provisions of title 8, article 1 of chapter 556 of the Laws of the State of New York, passed May 8, 1894; that said call was received by the trustees of said district, and thereupon, on September 22, 1894, said trustees gave public notice that in compliance with a call of fifteen or more persons entitled to vote at any meeting of the inhabitants of said district, a meeting of the inhabitants of said district, entitled to vote thereat, would be held at the schoolhouse on the 20th day of October 1894, at 7.30 p. m., for the purpose of determining, by a vote of such district, whether a union free school should be established therein in conformity with the provisions to that end of chapter 556 of the Laws of 1894; that the qualifications of the inhabitants entitled to vote at such meeting were sufficiently set forth in said notice; that the notice of said meeting was duly given as required by the provisions of chapter 556 of the Laws of 1894; that on October 20, 1894, at 7.30 p. m., the voters of said district, pursuant to said notice of the trustees, dated September 22, 1894, assembled at the schoolhouse and organized the meeting by the choice of Holland Emslie as chairman, and W. H. Ashworth as secretary. The call was read and the fact that fifteen persons entitled to vote were present, and proof of due service of the notice of the meeting was made; that a resolution in writing was presented to the meeting that a union free school shall be established within the limits of district no. 5, in the town of Cornwall, pursuant to the provisions of chapter 556 of the Laws of 1894, and a motion made that the resolution be adopted; that a protest signed by H. F. Chadeayne, one of the appellants herein, to the holding of said meeting, or any action thereat, was presented to said meeting, but no action was taken thereon; that a ballot was taken upon said resolution to establish a union free school in said district which resulted in 83 votes being cast, of which 58 were in favor and 25 against said resolution; that seven persons were elected by ballot to compose the board of education of said district, three of which were elected for three years, two for two years and two for one year, and thereupon said meeting adjourned.

The appellants herein appeal from the action and decision of said special meeting of October 20, 1894, and from all the acts and proceedings of the trustees of said common school district relative to a union free school done prior to said meeting, and allege various grounds for said appeal.

An answer to said appeal has been made.

The principal grounds alleged in the appeal are, in substance: first, that all the notices and proceedings based upon the call of September 20, 1894, are illegal and void because a legal call presented and filed August 7, 1894, was, and is still pending, and two calls may not exist within one year; second, that the notice of the meeting called for October 20, 1894, was not served in accordance with the provisions of title 8 of the Consolidated School Law; third, that the three trustees of said district did not meet and act upon the call of September 20, 1894, presented to them, and in issuing their notice of a meeting to be held on October 20, 1894.

The establishment of a union free school within a common school district is a statutory proceeding, and if the provisions of the school law are substantially complied with, the statute itself creates such union free school and district, ipso facto.

The proofs presented herein show that on August 7, 1894, a call signed by fifteen or more qualified voters of said school district no. 5, for a special meeting of said district, to be held for the purpose of determining whether a union free school should be established therein, was presented, not to the trustees of the district, but at the annual school meeting held in said district on August 7, 1894, was received and read at the meeting and ordered on file; that on August 9, 1894, said trustees, assuming it was their duty to act under said call, issued a notice for a special meeting of the district to be held at the schoolhouse therein, on August 30, 1894, for the purpose of determining whether a union free school should be established therein; but the qualifications of the inhabitants entitled to vote at such meeting were not set forth in said notice; that said notice was duly served and a meeting thereunder was held on August 30th, which after organizing and after the reading of the call and a protest of Henry Chadeayne, the meeting adjourned for ten days; that the day to which the meeting was adjourned being Sunday, September 9, 1894, said adjourned meeting was not held and said meeting went down and said call, the notice of meeting thereunder, and all proceedings had and taken at said meeting, went down with said meeting, and the situation of affairs in said school district relative to the establishment of a union free school therein, commenced by said call, was, after September 9, 1894, as if no call for a meeting for said purpose had ever been made therein; that when the call to the trustees, made and signed on or about September 30, 1894, was presented to the trustees, no other call existed or was pending and in life in said district. The trustees of said district did not refuse to give notice of a meeting upon the call of August 7, 1894, nor did they neglect to give the same for twenty days, but on the contrary, on August 9, 1894, within two days, gave notice of a meeting pursuant to said call, and hence if said first call was still existing

and valid the Superintendent of Public Instruction would not have power to authorize and direct an inhabitant of said district to give notice of a meeting thereunder. The contention of the appellants that a call for a meeting having been made, and notice of such meeting having been made thereunder, and such meeting held, another call, notice and meeting can not be legally had within a year thereafter, is not tenable. Under title 8 of chapter 556 of the Laws of 1894, it is enacted, that when at any such meeting the question as to the establishment of a union free school *shall not be decided in the affirmative, etc., etc.,* no such meeting shall be again called within one year thereafter. The meeting held on August 30, 1894, took no action whatever upon the question of the establishment of a union free school, but adjourned, and the inhabitants did not meet on the adjourned day, and the meeting went down. Said meeting not having acted upon the question of establishing a union free school, the provision of the school law, that no meeting shall be again called within one year thereafter, does not apply. It requires a vote upon the question at the meeting and that vote must negative the establishment of the union free school, to prevent any meeting being called and held for determining the question within one year thereafter, under said school law.

The answer to the appeal herein has annexed thereto the affidavit of one Torrey that at least twenty days prior to October 30, 1894, five copies of the notice of the special meeting to be held on said October 20, 1894, were posted by him in five public places in said district; and there is also annexed to said answer the affidavit of one MacCann, a taxable inhabitant of said district, that he served, prior to September 26, 1894, upon every other inhabitant of said district, qualified to vote, notice of said meeting to be held October 20, 1894, in the manner required by the school law. The appellants have not replied to such affidavits, nor required permission to reply thereof.

While in the performance of the duties of their office, trustees of school districts are required to meet as a board, under article 1, title 8 of the Consolidated School Law of 1894, where a call signed by fifteen persons entitled to vote at school meetings of a district for a meeting to be held for the purpose of determining whether a union free school shall be established therein is presented to said trustees, they have no discretion in the matter, but it becomes their duty to give notice of the meeting in pursuance to such call, and no meeting of the board is necessary.

I find and decide, That the call of fifteen or more qualified voters of said district for a special meeting of the qualified voters of said district, to determine whether a union free school should be established therein, dated September 20, 1894, was a legal call; that the notice of a special meeting of said district, to be held October 20, 1894, made by the trustees of said district, pursuant to said call, was a legal notice, and that said notice was duly and legally served upon the qualified voters of said district; that said special meeting held in pursuance of said call and notice was duly and legally called and held; that the action and proceedings had and taken at said meeting were legal, and that a union free school in and

for said district was duly and legally established by the action and proceedings of said meeting.

The appellants have failed in establishing their appeal and such appeal should be dismissed.

The appeal herein is dismissed.

4305

In the matter of the appeal of Julius M. Hitchcox and others from proceedings of a special meeting held on October 5, 1894, in school district no. 1, town of Canisteo, Steuben county.

The provisions of title 8 of the Consolidated School Law of 1894, relating to union free school districts, do not require that in the call and notice of the meeting, provided for in section 1 of said title, shall contain any other statement that said meeting is called for the purpose of determining whether a union free school shall be established therein, and does not require that said call and notice shall refer to the chapter, article or title of the law under which said proceedings are authorized. Where the call and notice of meeting stated that such meeting was to be held for the purpose of determining whether a union free school should be established within the district in conformity with the provisions, to that end, of chapter 555 of the Laws of 1864, and the amendments thereof, and at the meeting a resolution was adopted to establish a union free school in the district in conformity with title 8 of chapter 556 of the Consolidated School Law of 1894, such action was a substantial compliance with the provisions of title 8, chapter 556 of the Laws of 1894.

Decided December 18, 1894

Frank H. Robinson, attorney for appellants
A. H. Burrell, attorney for respondent

Crooker, *Superintendent*

On or prior to September 15, 1894, fifteen and upwards, to wit, 281 of the inhabitants of school district no. 1, town of Canisteo, Steuben county, entitled to vote at any school meeting of the inhabitants of said school district, signed a call for a meeting to be held in said district for the purpose of determining whether a union free school shall be established therein, in conformity with the provisions, to that end, of chapter 555 of the Laws of 1864, and the amendments thereof, and said call was duly delivered to William D. Carter, the sole trustee of said district; that on or about September 15, 1894, said Trustee Carter, pursuant to such call, issued a call for a special meeting of the inhabitants of said district entitled to vote at any meeting of the inhabitants of said school district, to be held at the schoolhouse on the 5th day of October next at 7.30 o'clock in the afternoon, for the purpose of determining by a vote of such district whether a union free school should be established therein in conformity with the provisions, to that end, of chapter 555 of the Laws of 1864, and the amendments thereof; that the qualifications of the inhabitants entitled to vote at such meeting were sufficiently set forth in such notice; that on October 5, 1894, a special meeting of said school district

was held pursuant to said notice of Trustee Carter, and was organized by the choice of James Roblee as chairman and four clerks, with James N. Osincup, the clerk of said school district, and also four inspectors of election; a resolution was presented that we change school district no. 1 of the town of Canisteo, Steuben county, State of New York, to a union free school with a board of education, in conformity with title 8 of chapter 556 of the Consolidated School Law of 1894; that a ballot was taken upon said resolution, said ballots being printed as follows: for the resolution or against the resolution, to change school district no. 1, Canisteo, New York, to a union free school district with a board of education, in conformity to title 8, chapter 556 of the Consolidated School Law of 1894; that before the ballot upon said resolution was taken an unsigned protest was presented by one W. R. Stephens against the legality or sufficiency of notice of the meeting, it having been called under and in conformity to the provisions of chapter 555 of the Laws of 1864, said law having been repealed, and the said meeting has not been called under the existing law, namely, chapter 556, Laws of 1894, title 8, and protesting against said meeting and the transaction of any business at said meeting; that by a vote said protest was laid upon the table; that the ballot upon the aforesaid resolution resulted as follows: whole number of votes cast, 530; for the resolution, 352; against the resolution, 178; majority for the resolution, 174; that the meeting then proceeded to ballot for members of a board of education, to consist of nine persons, three of whom to hold office for one year, three for two years and three for three years; that the ballot resulted in 250 votes being cast, of which Elijah Hollett, Harrison Crane and William P. Goff, for the term of one year, received 250 votes; A. H. Burrell and William Carter received 250, and William B. Taylor received 249, for the term of two years, and Daniel Tucker, J. E. Lyon and H. S. Beebe received 250 votes for the term of three years; that after the reading and approving of the minutes of said meeting the meeting adjourned.

The appellants herein have appealed from the action of Carter as trustee of said district in calling said special meeting, and from the action of said special meeting.

Various grounds are alleged in the appeal, the principal ones being that the call to the trustee for a special meeting and the notice of the trustee of the meeting specified that it was for the purpose of determining whether a union free school should be established in conformity to chapter 555 of the Laws of 1864, which law was repealed by chapter 556 of the Laws of 1894; that two ballot boxes and two poll lists were kept, and that the votes of persons not qualified to vote were received.

An answer has been made to the appeal. The formation of a union free school district is a statutory proceeding, and if the provisions of the statute are substantially complied with on the part of the local authorities, the statute creates the said district.

The proceedings to establish a union free school in common school district no. 1, town of Canisteo, were commenced since June 30, 1894, at which latter date the Consolidated School Law of 1894, chapter 556 of the Laws of 1894 went into

effect, and chapter 555 of the Laws of 1864, and the acts amendatory thereof, were repealed. The provisions in chapter 556 of the Laws of 1894, relative to the manner of proceeding to establish a union free school in a common school district, do not differ materially from those in chapter 555 of the Laws of 1864 and amendments, and such difference is mainly in regard to the length of time of notice, by trustees, of the meeting and of the method of service of such notice. Neither chapter 555 of the Laws of 1864, nor chapter 556 of the Laws of 1894, prescribes any form for a call of the inhabitants to the trustees for such meeting, nor of the notice of meeting by trustees pursuant to such call. If the call, signed by at least fifteen qualified voters of a common school district expresses the wish of the signers thereto that the trustees shall call a meeting to determine whether a union free school shall be established in said district, under the general school laws, it is a sufficient compliance with the law; and if the notice given by the trustees thereunder states the time and place such meeting is to be held, and that the meeting will be called upon to determine whether a union free school shall be established in the district under the general school law, and the qualifications of the inhabitants entitled to vote at such meeting shall be sufficiently set forth in the notice, such notice of the meeting is a sufficient compliance with the law.

The call and notice of the meeting from which the appeal is taken were undoubtedly drawn from the forms printed in the Code of Public Instruction of 1887 in the notes to the sections of the School Law of 1864, relating to union free schools, which were given as a guide to school district officers, and not as forms prescribed by any provisions of the school law.

It is clear that no one was misled by the call or notice of the meeting, and it is not alleged that the trustee did not cause such notice to be served as required by the provisions of title 8, chapter 556 of the Laws of 1894.

It appears that on October 6, 1894, at least fifteen of the qualified voters of said school district assembled and were present in accordance with the notice made by the trustee, and that such meeting was duly organized; that a resolution was presented that a union free school be established in said district in conformity to title 8 of chapter 556 of the Consolidated School Law of 1894; that a ballot was taken upon said resolution, and said resolution was adopted by a majority of 174. In taking such ballot two ballot boxes were used and two poll lists kept, and the appellants contend that such procedure was irregular. Title 8 of chapter 556 of the Laws of 1894 does not prescribe the manner in which a vote upon a resolution to establish a union free school in a common school district shall be taken. The meeting decided to ballot upon the resolution. Two ballot boxes were used and two poll lists kept for the purpose of facilitating the reception of the votes of the qualified voters. It is not alleged or proved that any person was aggrieved thereby. The appellants allege that persons voted at said meeting who were not qualified to vote under the school law. The appellants do not show that any person was challenged.

This Department has held that a party knowing a person to be unqualified, and permitting him or her to vote without challenge, will not be allowed to object to proceedings of the meeting because such unqualified person participated

in them. The rule is well settled that proceedings of a meeting will not be vitiated by illegal votes unless a different result would have been produced by excluding such votes. It lies upon the party objecting to show that fact. For aught that appears in the appeal herein the ballots cast by persons claimed to be not qualified voters were against the resolution. To warrant setting aside the vote upon said resolution, it must appear affirmatively that the resolution received a number of votes cast by persons not qualified to vote, which, if rejected, would have defeated the passage of the resolution. In case of an appeal to set aside the action of a school district meeting on the ground of illegal voting, or the disqualification of certain persons who voted, it is incumbent upon the appellant not only to allege such illegal voting or disqualification of such persons, but to show by evidence the lack of qualification in such terms as necessarily to exclude every presumption that the voter could be qualified under the provisions of section 11, article 1, title 7 of the Consolidated School Law of 1894. In this the appellants have failed.

The meeting was called for 7.30 p. m., the usual hour for school meetings to be called, and out of the 600 voters in the district 530 attended and voted, and the resolution to establish a union free school in said district received 352 votes.

In my opinion the provisions of title 8 of chapter 556 of the Laws of 1894, relative to the establishment of union free schools in common school districts, was substantially complied with; that the appellants have failed to establish their appeal herein and said appeal should be dismissed.

Appeal dismissed.

4178

In the matter of the appeal of John H. Gould and others from the decision of joint school meeting of district no. 7, Pembroke, and district no. 9, Batavia, Genesee county, consolidating said districts by establishing a union free school therein.

Where, in a meeting, held in two school districts pursuant to the joint call of the trustees of said districts for the purpose of determining by a vote of the qualified voters of such districts, whether a union free school shall be established therein and said districts consolidated and the notices of said meeting were posted less than twenty days prior to said meeting, but omission to post was not wilful and fraudulent and it appeared that the qualified voters of said districts respectively were personally served with notice of said meeting at least six days prior thereto the action of said meeting will not be set aside. Title 9 of the Consolidated School Law does not require that the resolution establishing such union free school should receive a majority of the votes of each of said districts, but at least fifteen of the voters of each district being present, a majority of the qualified voters present and voting, from both districts, in favor of said resolution, is a compliance with the provisions of said title.

Decided July 6, 1893

H. B. Cone, attorney for appellants
LeSeur & Lent, attorneys for respondents

Crooker, *Superintendent*

This is an appeal from the action of a school meeting held in the above-named districts on March 11, 1893, for the purpose of forming a union free school district.

It appears that there were present and voting at said meeting 188 persons, and that 102 votes were cast for the consolidation of the said two districts by the establishment of a union free school therein, and 86 votes were cast against such proposition, the proposition being carried by a majority of 16 votes.

It appears that on or about February 14, 1893, a petition signed by fifteen or more of the inhabitants entitled to vote at school meetings in each of the said school districts, respectively, of district no. 7 of Pembroke, and no 9 of Batavia, was presented to J. H. Dickenson, sole trustee of district no. 7 of Pembroke and John Moore, sole trustee of district no. 9 of Batavia, asking that a meeting be called and held for the purpose of determining by a vote whether said districts should be consolidated into a union free school district, in conformity to the provisions of chapter 555 of the Laws of 1864. That on or about February 21, 1893, in compliance with said request or petition, said trustees of said districts did call a meeting of the inhabitants of said districts, entitled to vote thereat, to be held at Seminary Hall, East Pembroke, on Saturday, March 11, 1893, at 2 o'clock in the afternoon for the purpose of determining by a vote of such districts whether a union free school shall be established therein, in conformity to the provisions to that end, of chapter 555 of the Laws of 1864, and the amendments thereof. That printed notices of said meeting, including the qualifications of voters at school meetings, were printed, and five copies thereof were posted in various conspicuous places in each of said districts, respectively, on February 22, 1893, seventeen days prior to said meeting, except that one of said notices was posted in district no. 9, on February 23, 1893. That the omission to post said notices, for at least twenty days prior to said meeting was not wilful and fraudulent, but was due to mistake of said trustees in fixing the time of said meeting on March 11th, in counting the days in the month of February as thirty-one instead of twenty-eight. That all of the legal voters of said districts, respectively, were personally served with notice of said meeting at least six days prior thereto. It is not claimed by the appellants that, if any voter of said districts or either of them was not served personally with a notice of said meeting, the ommission to give such notice was wilful and fraudulent.

Section 7 of title 7 of the Consolidated School Law of 1864, provides that the proceedings of no neighborhood or district meeting shall be held illegal for want of a due notice to all the persons qualified to vote thereat, unless it shall appear that the omission to give notice was wilful and fraudulent.

It appears that the said meeting held on March 11, 1893, was fully attended, 188 having voted. It is not claimed that any qualified voter in district no. 7, of Pembroke, was absent from the meeting, and it is claimed that but eight qualified voters in district no 9 of Batavia were absent. The resolution

to consolidate said districts by the establishment of a union free school therein was adopted by sixteen majority, and had the eight voters from district no. 9 of Batavia been present and voted against the resolution it would then have been adopted by eight majority. The appellants contend, as the principal ground of their appeal, that because the notices required by the school law to be posted in five conspicuous places in each of the said districts, for at least twenty days, were not posted but seventeen days, the action of said meeting should be set aside. The intent and object of the law is that the qualified voters of the said districts should have notice of the time, place and object of the meeting. The purpose of the law is to give every legal voter a full and free opportunity to cast his or her ballot for or against the proposition. It clearly appears that all of the voters of said two districts, respectively, had such notice, and all of said voters, with the exception of eight residing in district no. 9, of Batavia, were present at said meeting. It is seldom that at school meetings so large a proportion of the voters residing in the district or districts are present, as it appears were present at said meeting of March 11, 1893, and I am convinced that the notice of the meeting was ample and sufficient to all of the voters of said districts, and that no voter residing therein was misled or injured or prejudiced or absent from said meeting by the failure to post notices of said meeting at least twenty days prior to the time of holding the same. It appears, upon the argument and submission of the appeal herein, that in February 14, 1891, a meeting of the voters of said districts was held for the purpose of forming a union free school district; that 179 votes were cast, and the proposition to establish a union free school had a majority of 3 votes. For certain irregularities the action of such meeting, upon appeal, was declared of no effect. After the lapse of two years another meeting was held and a greater number of voters was present, and the majority for a union free school was larger. It is apparent the subject is one that has been discussed fully, and the voters of said district had full knowledge of the meeting of March 11th and attended, and that a majority of the voters of said district desire the establishment of a union free school therein.

The appellants have not shown that they are aggrieved, that is, injured, either by reason of the notices of the meeting for March 11, 1893, not being posted for at least twenty days prior to said meeting, nor by the action of said meeting in voting to consolidate said districts by the establishment of a union free school therein. All the voters of said districts had notice of said meeting, and all of such voters, excepting eight, were present at said meeting. There should be some real grievance, some positive and serious injury sustained, to justify an appeal to the Department. This Department, when asked to set aside the acts of school meetings or school officers, always inquires into the bona fides of such acts, whether the things done were such as it was proper to do; did they undertake to do them according to such knowledge as they had? Has any one been imposed upon or wronged? If irregularities have occurred will the greater hardship be imposed upon individuals and greater help be given

to the cause of education by setting aside or sustaining such acts? The grievance upon the part of the appellants herein by the action of said meeting of March 11, 1893, is that it decides to consolidate said districts by the establishment of a union free school therein, and that they are opposed to the establishment of such a school. This is not a real grievance, nor such serious injury as should justify an appeal to this Department, nor justify the Department, an appeal having been brought, to vacate and set aside the action of said meeting. The formation of a union free school district is a proceeding under title 9 of the Consolidated School Law, and is a matter entirely within the powers of the voters of the territory of the proposed district, and if its provisions are substantially complied with, the statute itself creates the union free school district, ipso facto, so that no discretion rests with the State Superintendent to determine the expediency or the advisability of the action taken.

The appellants contend that where there is a joint school meeting held, under sections 4 and 5 of title 9 of the Consolidated School Law, for the purpose of consolidating said districts by the establishment of a union free school therein, the decision establishing such union free school should not be upheld unless it shall be made to appear that there is a majority in each district in favor thereof. I am of the opinion that this contention is not tenable. Section 4 of title 9 provides that when fifteen persons entitled to vote, from each of two or more adjoining districts, shall unite in a call for a meeting of the inhabitants of such districts to determine whether such districts shall be consolidated by the establishment of a union free school therefor and therein, it shall be the duty of the trustees of such districts, or a majority of them, to give public notice of such meeting, at some convenient place within such districts and as central as may be, etc. The meeting held under the foregoing provisions is a meeting of the voters of the two or more districts mentioned in the call to take action on the proposition to consolidate such districts by the establishment of a union free school therefor and therein and not a meeting of the voters of the districts separately. Section 5 of title 9 relates to the proceedings to be taken and had at such meetings, as well as to proceedings at meetings held under sections 1 and 2 of title 9. All that is required by section 5 of title 9 is, whether the meeting is held under sections 1, 2 or 4 that fifteen of the legal voters shall be present, if the meeting is of one district, or fifteen voters from each district if the meeting is of two or more districts, and that a majority of those present and voting shall determine the proposition presented to the meeting. The word "district," used in the sentence in section 5, "by the affirmative vote of a majority present and voting, determine to establish a union free school in said district," means the district under the provisions of sections 1 and 2, or the joint or consolidated district composed of the two or more districts joining in the meeting called under section 4. Had the Legislature intended that at the meetings called and held under section 4, that there must be a majority of the voters present and voting at such meeting, residing in each of said districts, joining in the call to consolidate such districts by the establishment of a union free school therefor and therein, it would have so stated.

The appellants seem to apprehend that there is a scheme on the part of the respondents to acquire for the union free school district certain property known as "the Rural Seminary." Under the provisions of title 9 of the Consolidated School Law and the amendments thereof, boards of education of union free school districts have no power, without a vote of their respective districts, to purchase sites, change sites, designate sites, sell sites, or to purchase or construct schoolhouses or buildings, or additions to schoolhouses or buildings, or sell school buildings.

Upon the papers presented upon the appeal herein I am of the opinion that the appellants have failed to sustain their appeal and that the appeal should be dismissed.

Appeal dismissed.

4350

In the matter of the appeal of New York Central & Hudson River Railroad Company from proceedings of school meeting of districts no. 1 and no. 28, town of Verona, Oneida county, on December 20, 1894.

This Department has uniformly held that the establishment of a union free school in any common school district, or the consolidation of two or more common school districts by the establishment of a union free school therefor and therein, is a statutory proceeding purely. If the local school authorities comply with the provisions of the school laws of this State, relating to the establishment of such union free schools, the statute itself creates the union free school district ipso facto, so that no discretion rests with the State Superintendent of Public Instruction to determine the expediency or the advisability of the action taken.

Decided April 2, 1895

C. D. Prescott, attorney for appellant

Crooker, *Superintendent*

This is an appeal from the proceedings of a school meeting of the qualified voters of school districts nos. 1 and 28, town of Verona, Oneida county, held in school district no. 28, on December 20, 1894, in consolidating said districts by the establishment of a union free school therefor and therein.

The grounds of said appeal are in substance, first, that the request or call to the trustees of said districts for a meeting of the qualified voters of said districts for the purpose of considering the question of such consolidation, etc., was not signed by at least fifteen qualified voters of said districts nos. 1 and 28, that the said districts possessed all the requisites for the education of the persons of school age residing in said districts, and that there existed no reason or necessity for the consolidation of said districts by the establishment of a union free school therein.

An answer to the appeal has been made by the board of education of said union free school district.

The following facts are esta lished: That the appellant is a railroad corporation owning property subject to taxation for school purposes in said school districts nos. 1 and 28, in the town of Verona, Oneida county, and for the past six years has paid more than 50 per cent of the taxes for school purposes assessed and collected in said districts; that said school districts were formed and established before the railroad now owned and operated by the appellant, or any railroad, was built or operated within said districts; that on or prior to November 23, 1894, a call or request, addressed to the trustees of said school districts nos. 1 and 28, town of Verona, that they call a meeting of the inhabitants of said districts entitled to vote at district meetings, for the purpose of determining whether such districts shall be consolidated by the establishment of a union free school therefor and therein, and signed by at least fifteen persons entitled to vote at said meeting, was presented to the trustees of said districts, and on November 23, 1894, said trustees made and signed a notice for said meeting pursuant to said call or request, to be held in the schoolhouse in district no. 28, on December 20, 1894, at 2 p. m.; that said notice of said meeting was duly and legally given; that said meeting, pursuant to said notice, was duly held on December 20, 1894, and a resolution, consolidating said districts by the establishment of a union free school therefor and therein was adopted, and that Gottlieb Merry, W. C. Palmer, C. R. Frisbie, J. M. Ressigue, H. M. Stearns, J. D. Case and J. E. Tafft were duly elected to constitute the board of education of said union free school district.

It is alleged by the appellant that the statement in the notice for the school meeting of December 20, 1894, that a petition had been presented having attached the names of fifteen qualified voters of district no. 1 was not in fact true; and the appellant claims that at least two of them, namely, C. C. Bross and D. H. Dygert, were not qualified voters, and that the name of Joseph Archer was obtained without his intent to sign such call, and was used against his protest. That as to the allegation relative to C. C. Bross, there is annexed to the appeal the affidavit of Bross in which he states that about July 1, 1894, he moved from Utica to Verona and into school district no. 1, and rented a house and resided there until November 23, 1894, when he moved to Whitesboro; that he signed the call or request in September or October 1894, and does not nor did not know at the time he signed whether he was a legal voter in said district. Also annexed to the appeal is the affidavit of Sarah W. Stephens, in which she alleges that she is advised that W. C. Bross was not a resident of said district no. 1 at the time of signing the call, and never has been a legal voter in said district under the school laws of this State. Annexed to the answer is the affidavit of W. N. Peckham, who states that he is, and was, during the year 1894, the owner of a house and lot in said school district no. 1, and that on July 1, 1894, he rented said house and lot to said W. C. Bross, who occupied the same from July 1 to November 23, 1894, and paid the rent therefor; also the affidavit of J. E. Tafft, who states that he was an inspector of election at the general election in this State in November 1894, in the town of Verona, and which election district in which he was such inspector included the territory known as school district no. 1, and that said

W. C. Bross voted at such election as a resident of said election district. That as to the allegation relating to D. H. Dygert, the only proof on the part of the appellant to sustain it is an allegation in the affidavit of said Sarah W. Stephens that she is advised that D. H. Dygert was not at the time of signing said call a legal voter under the school laws of the State. Annexed to the answer herein is the affidavit of said D. H. Dygert, who states that during the year 1894 he has resided in said school district no. 1, and that on March 15, 1894, he leased 113 acres of land situate in said district for the term of three years, and since said March 15, 1894, he has been, and still is, in possession of said land. That as to the allegations relating to Joseph Archer, the only proof on the part of the appellant to sustain it is the allegation in the affidavits of said Sarah W. Stephens that she is further advised that the name of Joseph Archer to said call was obtained by deception, and after he learned the nature of the paper he insisted that his name be stricken from the call. Annexed to the answer herein is the affidavits of said Joseph Archer, who states that some time in October or November 1894, he signed a petition asking for a meeting to be called for the purpose of consolidating school districts nos. 1 and 28, of the town of Verona, and form a union free school district, and that since he signed his name for that purpose he has never requested that his name be taken off or erased therefrom.

I find and decide, That the said C. C. Bross and D. H. Dygert were, and each of them was, a qualified voter in school district no. 1, town of Verona, when they and each of them signed said call or request for a special meeting to determine whether said districts nos. 1 and 28 should be consolidated by the establishment of a union free school therefor and therein.

That as to the second ground upon which the appeal herein is taken I would state that this Department has uniformly held that the establishment of a union free school in any common school district, or the consolidation of two or more common school districts by the establishment of a union free school district therefor and therein, is a statutory proceeding purely, and if the local school authorities comply with the provisions of the school laws of this State relating to the establishment of such union free schools, the statute itself created the union free school district ipso facto, so that no discretion rests with the State Superintendent of Public Instruction to determine the expediency or the advisability of the action taken.

The appeal herein is dismissed.

4750

In the matter of the appeal of board of education of union school district no. 3, Ramapo, county of Rockland, v. Edward Corrigan, A. S. Zabriskie and A. N. Fellows as trustees of school district no. 3, Ramapo, county of Rockland.

When in any common school district a union school is legally established and a board of trustees is legally elected, or when two or more common school districts are consolidated by the legal establishment therein of a union school and the legal election of a

board of trustees for such union school district, such board of trustees are the legal successors of the trustees of such common school districts respectively, and legally entitled to the possession of the schoolhouses and property of such former common school districts, and to have and receive from the trustees of such former common school districts respectively, all moneys of such former districts raised by tax, or apportioned to them from the state school moneys, or derived from any other source, less the aggregate amount of all just debts, if any, due and owing at the time of the establishment of the union school district.

Decided February 28, 1899

Skinner, *Superintendent*

This is, in effect, an appeal by the board of trustees of union school district 3, Ramapo, Rockland county, from the refusal of Edward Corrigan, A. S. Zabriskie and A. N. Fellows, as trustees of the late common school district 3, Ramapo, Rockland county, to pay over to the appellant, or its treasurer, certain money in the hands of William Johnson as collector of said late common school district 3, which money the appellant claims said union school district 3 is entitled to receive.

To the appeal herein the respondents, Corrigan and Zabriskie, have filed their respective affidavits, together with the affidavits of William Johnson, collector, and Ira Green, truant officer.

The following facts appear to be admitted in the papers filed herein:

Prior to December 9, 1898, there existed a common school district, situate in the town of Ramapo, Rockland county, known as common school district 3, and which district had a board consisting of three trustees, namely, Edward Corrigan, A. S. Zabriskie and A. N. Fellows; that at the annual meeting held in such district on the first Tuesday of August 1898, the sum of $3090 was voted to be raised by tax for teachers' wages and other expenses for maintaining a school in the district for the school year of 1898–99, and a tax list assessing said sum upon the taxable property in the district, was subsequently made and delivered by said trustees, with their warrant, to William Johnson, collector of the district; that said collector collected various sums so assessed under said tax list and warrant, and paid certain orders drawn upon him by said trustees, and on January 31, 1899, said warrant was renewed for a period of thirty days; that on February 16, 1899, said collector had on deposit in the Paterson National Bank of Paterson, New Jersey, the sum of $1412.49 and in his hands the sum of $62.62, aggregating $1475.11 and there remained uncollected and unpaid of said tax the sum of $204.03, showing that since August 1, 1898, of the sum of $3090, voted to be raised by tax, the aggregate sum of $1410.86 had been collected by tax, and disbursed by orders drawn by said trustees for school purposes in said district.

It further appears that December 9, 1898, at a meeting of the inhabitants of said district, qualified to vote at school meetings therein, duly called and held under the provisions of article 1, title 8 of the Consolidated School Law of 1894, and the acts amendatory thereof, it was determined to establish a union school in said district, and thereupon said meeting elected the following persons, namely,

Albion Norris Fellows, Claude Gignoux, Everett Fredericks, Millard A. Hallett, J. J. Cullen, David H. McConnell, William H. Kearnan, Everett A. Cooper and Alfred S. Bush, as trustees of such union school district, so aforesaid established; that a certified copy of all proceedings relative to said meeting and of the proceedings taken at such meeting was filed with R. R. Felter as school commissioner of Rockland county, who duly designated such district as "Union free school district no. 3, town of Ramapo, county of Rockland," and another certified copy of such proceedings was duly filed in the office of the clerk of the town of Ramapo, and also another copy of such proceedings was duly filed with the Superintendent of Public Instruction, and which proceedings were approved by him January 3, 1899; that said board of trustees of such union school district duly organized and elected Albion Norris Fellows as president, Claude Gignoux as clerk, and Samuel A. Cochran as treasurer; that said Cochran, as treasurer, executed and delivered to said board of trustees, a bond for the faithful discharge of his duties as such treasurer, which bond was approved by such board; that no appeal has been taken from the proceedings of said special meeting held in common school district no. 3, Ramapo, in the establishment of such union school therein; that since December 9, 1898, said board of trustees of union school district 3 has had the charge and control of the schoolhouse and school property therein, and the management and control of the school maintained therein; that said board of trustees has been unable to pay the wages of the teachers due since December 9, 1898, or to pay any of the current expenses of said school since said date, by reason of there being no funds under the control of such board to pay the same; that the trustees of late common school district 3 of Ramapo or a majority of them, have failed and refused to pay over to the trustees of said union school district 3, Ramapo, or its treasurer, the school money under the control of the trustees of such former common school district 3, and in the possession of the collector of said district, which money, it is claimed, such union school district 3, is legally entitled to receive.

In section 5, article 1, title 8 of the Consolidated School Law of 1894, as amended by section 12 of chapter 264 of the Laws of 1896, it is provided that when at a school meeting, duly called and held in a school district under the provisions of article 1, title 8 of said school law, such meeting shall have determined to establish a union school in said district, such meeting shall elect by ballot not less than three nor more than nine trustees, who by the order of the meeting, shall be divided into three several classes, the first to hold until one, the second until two, and the third until three years, from the first Tuesday of August next following; that the trustees so as aforesaid elected, shall enter *at once* upon their offices, and the office of any existing trustee or trustees in such district, before the establishment of a union school therein, *shall cease,* except for the purposes stated in section 12, title 6 of said act.

Under section 12 of title 6 of said school law the only authority legally possessed by Messrs Zabriskie, Corrigan and Fellows as trustees of said district, before the establishment of the union school therein on December 9, 1898, was

to provide for and pay all the just debts of the district that had accrued prior to December 9, 1898.

On and after December 9, 1898, common school district 3 ceased to exist *in fact,* but continued to exist *in law,* but *only* for the purpose of providing for and paying all its just debts. The office of the three trustees of said common school district 3, before the establishment of the union school district therein, ceased to exist upon the election December 9, 1898, of nine trustees of said union school district, except for the sole and only purpose of providing for and paying all the just debts of said common school district existing on December 9, 1898.

This Department has uniformly held that the trustees of a union school district, elected at the meeting at which such union school was established, as provided in section 3, article 1, title 8 of the Consolidated School Law, are the legal successors of the trustees of the district before such union school was established and are legally entitled to the possession of the schoolhouse and property, and to have and receive from the trustees of such common school district all moneys of the district raised by tax, or apportioned to it from State school moneys, or derived from any other source, less the aggregate amount of all just debts, if any, due and owing at the time of the establishment of such union school.

It appears that the teachers in the school have been paid and the current expenses in conducting the school have been paid by Messrs Zabriskie, Corrigan and Fellows to December 9, 1898. It is not in proof whether there are *now* any just debts of common school district 3 outstanding. If there are, the aggregate amount will not exceed $30. No explanation is furnished to me herein why Messrs Zabriskie and Corrigan have not performed their duty in putting the trustees of union school district 3 in the possession and control of the school money to which such district is legally entitled.

The appeal herein is sustained.

It is ordered:

That A. S. Zabriskie, Edward Corrigan and A. N. Fellows, as trustees of former common school district 3, Ramapo, Rockland county, *forthwith* draw their order upon William Johnson as collector of such district, payable to Samuel A. Cochran, as treasurer of union school district 3, town of Ramapo, Rockland county, or his order, for the sum of $1412.49, being the sum of money in the Paterson National Bank of Paterson, New Jersey, deposited by said Johnson as collector, as aforesaid, and deliver said order to said S. A. Cochran, as such treasurer.

It is further ordered:

That said Zabriskie, Corrigan and Fellows, as such trustees, as aforesaid, *forthwith* ascertain and determine the aggregate amount of any just debts which were due and owing by such common school district 3, December 9, 1898, and which have not been paid, and draw their order or orders upon William Johnson as collector of such district in payment thereof.

It is further ordered:

That said Zabriskie, Corrigan and Fellows, as such trustees, as aforesaid, direct said William Johnson as such collector, as aforesaid, to proceed with all reasonable dispatch to collect the unpaid taxes upon the tax list delivered to him, with their warrant; and as often as he shall have collected the aggregate sum of $25, that he report the same to such trustees, and thereafter such trustees draw their order upon said collector, payable to the order of Samuel A. Cochran, treasurer of union school district 3, Ramapo, for the amount so collected, and deliver such order to said Treasurer Cochran.

3985

In the matter of the appeal of Patrick Collins and others from the proceedings of a joint meeting of districts 9 and 16, town of Johnsburgh, Warren county, held May 23, 1891.

The notice of a meeting of the electors of two school districts, called for the purpose of determining whether the districts should be consolidated by the establishment of a union free school therein, did not set forth the qualifications of voters, and was posted but ten days; *held,* irregular and fatally defective.

Decided July 3, 1891

A. Armstrong, jr, attorney for appellants

Draper, *Superintendent*

This appeal by electors of districts nos. 9 and 16, town of Johnsburgh, county of Warren, is from the proceedings of a joint meeting held May 23, 1891, at which it was voted to consolidate the districts by the establishment of a union free school therein. The appellants allege that the proceedings were irregular in these respects:

1 The trustees' notice for the meeting, a copy of which accompanies the papers, was defective. It did not set forth the qualification of persons entitled to vote at said meeting. The notice did not state that at least fifteen persons entitled to vote at school meetings from each district, requested the trustees to call the meeting.

2 The notice was posted but ten days.

3 The vote at the meeting upon the question of consolidation was not taken by ballot.

No answer has been interposed. The third objection is not tenable. The statute does not require a vote by ballot.

The other objections I must sustain. The irregularities set forth are fatal. The statute has not been complied with.

The appeal is sustained, and the action of the meeting of May 23, 1891, is declared void and of no effect.

4365

In the matter of the appeal of Hugh Campbell and others from action of school meeting held in district no. 5, town of Caledonia, Livingston county, on June 18, 1895.

Where the notice of a meeting, called by a trustee for the purpose of determining whether a union free school should be established therein, does not state the qualifications of the inhabitants entitled to vote at such meeting as prescribed by the school law, the proceedings of the meeting held under and pursuant to said notice will be void, and, upon appeal from the action and proceedings of said meeting, the same will be vacated and set aside.

Decided September 20, 1895

Skinner, *Superintendent*

This appeal is taken from the action of a school meeting held on June 18, 1895, in district no. 5, town of Caledonia, Livingston county, called by the trustees of said district to consider the matter of the establishment of a union free school in such district. The ground of the appeal, as alleged therein, is that the notice of such meeting did not specify the qualifications of the inhabitants entitled to vote at such meeting, as required by law.

An answer has been filed to said appeal and to said answer a reply and to the reply a rejoinder.

From the papers presented herein the following facts are established:

That a call or request signed by fifteen or more qualified voters of the district, that the trustees of the district call a meeting of the qualified voters of the district for the purpose of changing the district school to a union free school was presented to the trustees; that pursuant to said call or request the trustees of said district gave notice of a special meeting of all legal voters, for the purpose of voting on the question whether they would make such change or not, to be held in the schoolhouse on June 18, 1895, at 8 o'clock p. m.; that the qualifications of the inhabitants entitled to vote at such meeting were not set forth in said notice; that at the date specified in said notice of meeting at least fifteen persons claiming to be qualified voters of said district, assembled at the schoolhouse and a meeting was organized and a resolution adopted by a vote taken and ascertained by ballot to establish a union free school in said district; that a board of education was elected and the meeting adjourned.

The formation of a union free school district (that is, the establishment of a union free school in a common school district) is a statutory proceeding, and if the local authorities of a common school district comply with the provisions of article 1, title 8 of chapter 556 of the Laws of 1894, such statute creates the union free school district.

It appears that the trustees of school district no. 5, Caledonia, in their notice of a meeting of said district, to be held on June 18, 1895, did not comply with the provisions of said article 1, title 8 of said Consolidated School Law. By section 1 of article 1, title 8 of said law it is enacted that in the notice of the

meeting pursuant to the call or request of at least fifteen qualified voters of said district, they shall state the purpose of said meeting, the time and place where the meeting will be held, and that " the qualifications of the inhabitants entitled to vote at such meeting shall be sufficiently set forth in the notice aforesaid." Said trustees did not sufficiently set forth in said notice the qualifications of the inhabitants entitled to vote at such meeting. Said trustees stated in said notice that a special meeting " of all legal voters," etc., etc., would be held, but failed to set forth therein the qualifications required by the school law in section 11, article 1, title 7, of said law to be possessed by the inhabitants of said district to entitle them to vote at such meeting.

The form of notice given by said trustees should have been substantially as follows:

" The undersigned, trustees of school district no. 5, in the town of Caledonia, in compliance with a call of twenty persons entitled to vote at any meeting of the inhabitants of said district, hereby give notice that a meeting of the inhabitants of said district, entitled to vote thereat, will be held at the schoolhouse on June 18, 1895, at 7.30 p. m., for the purpose of determining by a vote of such district whether a union free school shall be established therein in conformity with the provisions to that end of title 8, of chapter 556, of the Laws of 1894."

The persons entitled to vote at such meeting are those who possess one or more of the following qualifications:

1 Every person of full age who is a citizen of the United States and a resident of the district, and who has resided therein for a period of thirty days next preceding the meeting at which he or she offers to vote, and who owns or hires, or is in the possession under a contract of purchase, of real property in such district liable to taxation for school purposes.

2 Every resident of the district, and who has resided therein for a period of thirty days next preceding the meeting at which he or she offers to vote, who is a citizen of the United States, 21 years of age, and who is a parent of a child of school age, provided such child shall have attended the district school (in the district in which the meeting is held), for a period of at least eight weeks within one year preceding such school meeting.

3 Every resident of the district, and who has resided therein for a period of thirty days next preceding the meeting at which he or she offers to vote, who is a citizen of the United States, 21 years of age, not being a parent, who shall have permanently residing with him or her a child of school age, which shall have attended the district school in said district for a period of at least eight weeks within one year preceding such school meeting.

4 Every resident of the district, and who has resided therein for a period of thirty days next preceding the meeting at which he or she offers to vote, who is a citizen of the United States, 21 years of age, who owns any personal property, assessed on the last preceding assessment roll of the town, exceeding $50 in value, exclusive of such as is exempt from execution.

No person shall be deemed to be ineligible to vote at said district meeting by reason of sex, who has one or more of the other foregoing qualifications.

Dated this day of , 1895.

[Signed] A. B.
C. D.
E. F.

Trustees of School District No. 5, Town of Caledonia

This Department has held that where the notice of a meeting, called by trustees for the purpose of determining whether a union free school shall be established therein, does not state the qualifications of the inhabitants entitled to vote at such meetings as prescribed by the school law, the proceedings of the meeting held under and pursuant to said notice will be void, and upon appeal from the action and proceedings of said meeting such proceedings will be vacated and set aside.

The appellants herein contend that the meeting held in said district on June 18, 1895, had not the lawful authority to elect a board of trustees or education for the reason that the notice of said meeting stated that the business of the meeting was to act upon the question of the establishment of a union free school in said district. This contention is erroneous and not tenable.

Section 5 of article 1, title 8, of the Consolidated School Law enacts what business shall be transacted at a meeting duly and legally called and held in any common school district under said article 1, title 8, of said law for acting upon the question of establishing a union free school therein. Said section 5 provides that if at such meeting it shall be determined to establish such union free school the meeting shall proceed to elect by ballot not less than three nor more than nine trustees, etc., etc.

Had the meeting of June 18, 1895, been legally called it had, upon determining to establish a union free school, the lawful authority then and there to elect a board of trustees or board of education of the union free school district as stated in said section 5.

The respondents herein contend that the appeal herein was not brought within the thirty days of the time of the holding of the district meeting, as required by the rules of this Department relating to appeals. This contention is not tenable. The appeal was received at this Department on July 18, 1895, but not having thereon or annexed thereto proof of service of a copy as required by said rules, was returned to the appellants for such proof, and on July 22, was filed in the Department. The time in which an appeal may be taken to the Superintendent of Public Instruction may be extended by him.

I decide that the said meeting held in said district no. 5, Caledonia, on June 18, 1895, was not duly and legally called and held for the reason hereinbefore stated.

The appeal herein is sustained.

It is ordered, That all proceedings had and taken at the school meeting held in school district no. 5, town of Caledonia, Livingston county, on June 18, 1895, be, and the same are, and each of them is, vacated and set aside.

UNION FREE SCHOOL DISTRICTS

COLLECTOR—TREASURER

5371

In the matter of the appeal of William H. Dempsey and Walter F. Jeffers as legal voters and taxpayers of union free school district no. 1, town of Eastchester, county of Westchester, from the action of a meeting of the board of education of such district, held on the 15th day of October 1907, in electing William J. Fisher treasurer of said district.

The plain meaning of any statute which makes an officer the custodian of a fund is that such fund shall be strictly held for the purposes for which it is created and shall not be otherwise used. The treasurer of a district should always keep the funds of the district separate and distinct and should never mingle such funds with his personal funds. This law is founded upon a moral obligation which prohibits all public officers from engaging in transactions which produce a conflict between official conduct and common honesty.

A board of education stands as a representative of the district and of the State and is bound to select as treasurer a person morally and intellectually qualified to perform the duties of such office. A board can not select as treasurer of the district a person whose unfitness was conspicuous and fully known to every member of the board. Such action is an abuse of the board's discretion and is subject to review by the Commissioner of Education under title 14 of the Consolidated School Law. The irregularities of a treasurer, his direct and constant violation of the statutes, his conversion of district funds to his personal use, his lack of competent system of keeping accounts, render him unfit and ineligible to such office.

Decided January 11, 1908

Frederick M. Clark, attorney for appellants
H. D. Lent & Michael J. Tierney, attorneys for respondent

Draper, *Commissioner*

William J. Fisher, respondent herein, has served as treasurer of union free school district no. 1, town of Eastchester, county of Westchester, for several years. On October 1, 1907, he was reelected to such office by the board of education by vote of three to two. Appellants are members of the board of education and they voted against the reelection of Mr Fisher. They bring this proceeding to vacate the action of the board in electing Mr Fisher. The ground upon which they predicate this proceeding is in substance that by reason of improper uses of large sums of district funds during his previous terms, by failure to make complete and accurate entries of funds received and by failure to receive and disburse the funds of his office as the statutes direct, he is disqualified to hold such office.

It is shown upon the record in this case that Mr Fisher received funds of the district on various dates between June 23, 1904 and March 30, 1906 amount-

ing to the sum of $2032.74 which he did not charge to himself as treasurer until September 10, 1906; and that he received $886.05 between March and June 1907 which he did not charge to himself until August 5, 1907. The details of these transactions are as follows:

Received	June 23, 1904	$883 65	Credited	Sept. 10, 1906
"	Oct. 18, 1905	849 08	"	"
"	Mar. 30, 1906	300	"	"
"	Mar. 14, 1907	200	"	Aug. 5, 1907
"	June 27, 1907	686 05	"	"

The total amount involved in these transactions is $2919.78.

It is also shown upon the record that part of these items was not credited by Mr Fisher on the treasurer's books until an investigation had been instituted by appellants into the accounts of the treasurer. It is further shown that during the time the treasurer held these sums and before crediting the same to the district three checks were issued in payment of district liabilities which went to protest because sufficient funds did not stand credited to the district to meet such checks. Had these funds been properly credited by the treasurer these checks would not have been dishonored.

This district is building a new schoolhouse. It had a building fund of $30,120 realized upon the sale of district bonds. This amount was deposited to the credit of Treasurer Fisher in the Mount Vernon Trust Co. about the 1st of January 1907. Within a few days after this fund was deposited to his credit he began to draw upon that fund without authority from or knowledge of the board of education. Mr Fisher drew from this fund nearly $4000 and deposited it to the credit of his personal account in the First National Bank of Mount Vernon. He did not draw this amount in one check but he drew it upon several checks payable to cash. It had been Fisher's custom to pay the salary of teachers and to pay other bills in cash. He kept on hand cash for this purpose. The reasonable presumption is that he drew this $4000 on several checks, instead of one check, payable to "cash" so that suspicion or undue attention would not be directed to the transaction.

It appears that the board of education had decided that this fund should not be credited to the treasurer but should be deposited in the name of Mr Jackson and Mr Jeffers, two members of such board. When these members of the board discovered that the fund had been deposited to the credit of Treasurer Fisher and that he had transferred nearly $4000 to his personal account in another bank, they made demand upon him for restitution of such funds. Fisher promptly complied with this demand and deposited to the credit of the building fund a sum sufficient to replace the amount he had improperly and unlawfully drawn from that fund. Fisher did not have the money to meet this demand, as he swears that he had used the money illegally credited to his personal account in his personal affairs, and was therefore compelled to borrow the necessary amount to restore the $4000 to the building fund.

The record further shows that the accounts and books of Fisher were referred to an auditing committee of the board of education in July 1907 for annual examination and audit. This examination of the treasurer's books and accounts showed that there should be in the treasury a balance of $10,453.15. There was actually to the credit of the district only $3905.65. There remained therefore $6547.50 of the district's funds unaccounted for, but which had been officially received by Fisher. Fisher acknowledged this shortage in his accounts. He offered to give the board of education a demand note indorsed by his wife and he also offered to deposit as security, deeds of two pieces of real property. The board declined to accept these propositions and insisted that Fisher should make good the deficiency by the payment of cash. The surety company on Fisher's bond was notified. On August 6th, the date of the annual school meeting and at which meeting the board of education was required by law to make a report, Fisher paid to the board of education in cash $6547.50, the amount of the shortage in his accounts.

On December 4, 1907, I gave a hearing in this proceeding and Appellant Dempsey and Respondent Fisher were examined at length by counsel and by the Commissioner of Education. The sworn testimony of Fisher at this examination revealed that Fisher made no pretense of keeping his personal funds and the official funds of the district separate and distinct. He swore that it was his custom to deposit the district funds to his personal account and that he frequently expended the district funds in his personal affairs. He also swore that the $4000 which he drew from the building fund on checks payable to "cash" and which he deposited in another bank to the credit of his personal account he also used in his personal affairs. He also used in his personal affairs the shortage of $6547.50 which was discovered in July. It was shown by Fisher's testimony upon this hearing that about the time he was endeavoring to adjust these shortages with the board of education he transferred the title of his property to a party who indorsed his paper, and that his mother also mortgaged her property. The reasonable presumption is that these transactions were for the purpose of raising funds to meet Fisher's shortage, although he denies it. Fisher swears that he loaned no part of these moneys.

In July when the auditing committee discovered a shortage in Fisher's accounts he presented his resignation to the board of education. The board declined to accept such resignation until the shortage in question was made good and his accounts properly audited. Because of a controversy over the election at the annual meeting the board of education did not elect a treasurer for the current year until October 15th. The manner by which the election was effected is entitled to consideration. The board of education consists of five members, namely, the two appellants, the father of respondent Fisher, and two others. It is shown that the father of Fisher is an elderly man and has been in poor health during the past year. He had not attended a board meeting in over one year. He was brought to the meeting on the evening of October 15th in a carriage and cast the deciding vote by which Fisher was made treas-

urer and the only conclusion which can be reached under all the circumstances is that Fisher was instrumental in having his father brought to this meeting to secure his own election.

It is not alleged that the meeting at which Fisher was elected was irregularly conducted in any way. It is not alleged that he has improperly used the funds of the district since his election in October last. It is not claimed that the district suffered a financial loss through Fisher's irregularities. It also appears that he is properly bonded by a surety company. There is therefore but one question in this proceeding and that is, was the official conduct of respondent Fisher during his previous term of office as treasurer in this district such as to disqualify him for reelection to such office? Could the board of education with full knowledge of Fisher's irregularities of official duty, his direct and constant violations of the statutes, his conversion of district funds to his personal use and his lack of competent and proper system of keeping his accounts and in the performance of his duties, legally elect him to the office of treasurer? This is an important question and it must be determined not only in relation to the taxpayers of this district but with reference to what shall be the general policy of the State in protecting the school moneys held by the treasurers of the 11,000 school districts of the State. Five million dollars of the State's money is apportioned annually by this Department to the several school districts and cities of this State and this money is held by the treasurers of districts and cities to be disbursed as the statutes direct. These officers are also the custodians of much larger sums of local funds in the aggregate and no person should be appointed to such office whose moral character and incompetency have been shown to disqualify him for performing the duties of such office. While it is true that Fisher made good his shortage it must be borne in mind that the $2032.74 paid to Fisher between June 23, 1904, and March 26, 1906, was not credited to the district until September 10, 1906. It was not credited then until the failure to credit it was discovered through the alertness of Mr Dempsey. For more than two years Fisher had part of this money in his possession and had used it illegally. During that time he never charged himself with any part of it and he made restitution only after his failure to properly credit it had been discovered. It is unnecessary to speculate as to whether or not it would have been paid to the district had it not been for the discovery of Mr Dempsey.

It is contended by the attorney for the respondent Fisher that there is no direct statutory prohibition of the mingling of the funds of a school district with his personal funds and that the only requirement of the law is that a treasurer shall be able to meet any orders drawn against the funds he holds and shall be able to pay upon demand any funds in his possession to his successor in office. In proof of this contention he cites section 36 of title 7 of the Consolidated School Law which defines the duty of a treasurer of a common school district. But this is not the section of law which governs the conduct of a treasurer of a union free school district. The law controlling in this matter is section 25, title 8 of the Consolidated School Law. The plain meaning of any stat-

ute which makes an officer the custodian of a fund is that such fund shall be held strictly for the purpose for which the fund is created and shall not be otherwise used. The literal meaning of this statute is that the funds held by the treasurer of the district shall always be kept a separate and distinct fund and that it shall never be mingled with other funds. This law is founded upon the moral obligation which prohibits all public officers from engaging in transactions which produce a conflict between official conduct and common honesty. Section 25 distinctly provides that no district fund in the possession of the treasurer shall be drawn except pursuant to a resolution of the board and on drafts signed by the president and countersigned by the clerk, payable to the order of the person entitled to receive such money. Such drafts must also state upon their face the purpose or service for which such moneys have been authorized. There can be no misunderstanding as to the intent of this law both as to the separateness of this fund from personal or other funds of the custodian and the purposes for which it might be used. It is crime for a custodian to use it otherwise than the statutes direct. Under the Penal Code this is a misdemeanor.

A portion of the moneys which Fisher received and used in his personal affairs but which he afterwards credited to the district was State money due the district under a supplementary apportionment of this Department. Under section 470 of the Penal Code it is a felony for an officer or any other person receiving moneys on account of the State or receiving any fund created by law and in which the State is directly or indirectly interested to appropriate the same to his own use or the use of others. The fact that the money thus appropriated is returned does not alter the situation nor is it necessary to show corrupt intention. The mere fact that the money is misappropriated constitutes a crime.

The board of education in electing a treasurer is given discretionary power. In the exercise of such discretion it must not be guilty of an abuse thereof. It stands as the representative of the district and the State to select a person morally and intellectually qualified to fill and truly perform the duties of such office. Fisher's conduct in this office had made him an unfit person to be elected to the office of treasurer in this district. His unfitness was conspicuous and fully known to every member of the board of education. The action of the board in electing him was an abuse of the discretion vested in that body and is therefore reviewable under title 14 of the Consolidated School Law by the Commissioner of Education.

It is not here determined that Fisher had any corrupt intention to convert the funds of the district but at the least he had a wholly unlawful conception of the proper management of his office and of the kind of care which the law requires that he shall give to public moneys. This of itself is sufficient to preclude his continuance in the office.

In the case of Conroy v. the Mayor, the Aldermen etc. reported in 6 Daly (N. Y.) 490 and affirmed by the Court of Appeals [67 N. Y. 610] the precise question before the court was not the same as the question in this case. The

language of the court in that opinion however expresses the court's views upon the question which is presented in this case. The justice of a New York court appointed as interpreter a person unable to speak a foreign language. Judge Daly in the opinion said, "The appointment of fit persons as interpreters was in the discretion of the justices of the courts and for any abuse of the power conferred upon them, they are responsible. . . . Had the officer who appointed him knowledge of the fact that he knew no foreign language, he would be bound to withhold the appointment and would have no discretion." It would therefore follow that if the appointing power possessed full knowledge of the facts disqualifying for any reason, it would be bound to withhold the appointment.

The action of the board must therefore be set aside and a fit person should be selected as treasurer. The board should require such treasurer to give a bond of sufficient sum to amply protect the district in the amount which shall be in the custody of such treasurer. The building fund improperly deposited to the credit of two members of the board should be transferred to the custody of the treasurer. All future drafts issued upon the treasurer should be in strict compliance with the provisions of section 25, title 8 of the Consolidated School Law.

The appeal herein is sustained.

It is ordered, That the action of the board of education of union free school district no. 1, town of Eastchester, Westchester county, at a meeting held on the 15th day of October 1907, in electing William J. Fisher treasurer of said district be and the same hereby is vacated, and that the said board of education shall without delay elect another and a fit person to the said office of treasurer.

It is further ordered, That upon the election and qualification of such treasurer the board of education shall turn over to him all funds of the district and such funds shall thereafter be held and paid by said treasurer in strict conformity to the provisions of section 25, title 8 of the Consolidated School Law.

4510

In the matter of the appeal of John Kreutz, Edward Engelskircher and Michael Farrell v. Christopher H. Stark, George W. Flood, C. Herbert Brown, Edward W. Hopkins, Daniel Meskil and Robert Altsheimer; and from proceedings of an alleged annual school meeting held August 4, 1896, in union free school district no. 2, town of Highlands, Orange county.

When at an annual school district meeting a motion is made to adjourn, and the chairman neglects or refuses to call for the noes upon such motion, and declares the motion adopted and the meeting adjourned and he leaves the chair and room, such meeting was not legally adjourned, and the qualified voters present may legally elect another chairman and proceed with the regular business of the meeting. In union free school

districts whose limits do not correspond to those of an incorporated village or city, no one can hold the office of treasurer or collector unless he or she is a taxable inhabitant of the district, and no taxable inhabitant can legally hold both offices. The clerk of the district can not legally hold either the office of treasurer or collector.

Decided November 12, 1896

M. H. Hirschberg, attorney for respondents

Skinner, *Superintendent*

The appellants in the above-entitled matter, three members of the board of education of union free school district no. 2, town of Highlands, Orange county, appeal from the proceedings of a school meeting held in said district on August 4, 1896, in the election of Moses F. Nelson as clerk of said district, and voting taxes for various purposes; and from the decision of said board in recognizing said Nelson as clerk of said district and refusing to recognize one E. C. Carpenter as said clerk; and in the appointment of said board of said Nelson as treasurer and collector of said district; and in neglecting to make and publish, at least twenty days before the annual meeting, a full and detailed account of all moneys received by the board or treasurer of said district for its account and use, and of all the money expended therefor, giving the items of expenditure in full. The respondents herein have filed an answer to the appeal, and to the answer the appellants have replied, and to the reply the respondents have made a rejoinder.

The only material fact upon which there appears to be any conflict in the proofs presented is, whether or not the annual school meeting, convened on August 4, 1896, and organized by the choice of Caleb Huse as chairman, and at which Frank R. Gump, the district clerk, acted as clerk, was legally adjourned to August 31, 1896.

It appears from the proofs herein that said school district is a union free school district whose limits do not correspond to those of an incorporated village or city, and the board of trustees or board of education of said district consists of nine members; that at 7.30 p. m., on August 4, 1896, certain of the qualified voters of the district assembled at the schoolhouse in said district for the purpose of holding the annual school meeting of said district, and that said meeting was called to order by Frank R. Gump, the clerk of the district, and one Calvin Huse was elected chairman of the meeting and said Gump acted as clerk; that after the organization of said meeting the chairman stated to said meeting that it could not proceed with its business as the board of education had not made or published a report of its receipts and disbursements for the year; whereupon a motion was made that the meeting adjourn until August 31, 1896, which motion the chairman declared adopted and immediately left the platform, and a portion of the persons present left the meeting; that those remaining elected one Joseph C. Miller as chairman, the said Gump continuing to act as clerk; that the report of the treasurer of the district for the previous school year of receipts and disbursements was presented and read by the clerk and was duly adopted; that the board of education presented to the meeting a detailed statement in writing of the

amount of money required for school purposes for the present school year, aggregating the sum of $6152, which statement was read to the meeting, and the question was taken upon voting the amount to be levied by tax upon the district and adopted by recording the ayes and noes of those present and voting; that a ballot was taken for a district clerk, which resulted as follows: Whole number of votes cast 38, of which Moses F. Nelson received 36 and Frank R. Gump 2, and thereupon the meeting adjourned sine die; that on August 5, 1896, a meeting for the annual election of the members of the board of education of said district was held, the polls being opened at 12 o'clock noon and closed at 4 o'clock in the afternoon, and the result of the ballot as announced was that the appellants herein, John Kreutz, Michael Farrell and Edward Engelskircher, each received a majority of the votes cast for trustee for the full term of three years; that on August 31, 1896, at 8 p. m., certain persons assembled at the schoolhouse of said district, claiming to meet in pursuance of the alleged adjournment of the annual school meeting, on August 4, 1896, said Calvin Huse acting as chairman, and electing one J. Denna as clerk; that said meeting voted a tax of $3775, with a sufficient amount to pay an outstanding bond of the district falling due and the interest upon the remaining bonds, and electing one E. C. Carpenter as district clerk; that said meeting also voted to add to the tax list the sum of $14.40 to pay to James Merritt a bill for printing; that a committee consisting of J. Denna, Townshend Drew and Calvin Huse, was appointed to examine all papers and letters pertaining to the affairs of the district and prepare and present to the district an itemized account of all moneys received and expended during the preceding school year, at the time to which the said meeting should be adjourned; and thereupon said meeting adjourned to September 14, 1896, at 8 o'clock p. m.; that on August 11, 1896, the annual meeting of the board of education was held, at which the following members were present, namely: Messrs Flood, Stark, Meskil, Hopkins, Brown, Altsheimer and Farrell, and Mr Flood was elected temporary chairman, and Mr Stark was chosen president of the board; that on the fourth ballot Moses F. Nelson was appointed district treasurer and collector; that on September 14, 1896, at 8 p. m., certain persons assembled at the schoolhouse in said district, claiming to meet in pursuance of the adjournment of the said meeting, on August 31, 1896, said Calvin Huse acting as chairman and J. Denna as clerk, and after correcting the minutes of the meeting of August 31, 1896, the committee to investigate the receipts and disbursements of the preceding school year presented a report which was read and ordered placed on file and entered in the records; that a resolution was adopted that the number of the members of the board of education of said district be reduced from nine to three, and thereupon the meeting adjourned sine die; that on September 1, 1896, at a regular monthly meeting of the board of education of said district E. C. Carpenter, who claimed to have been elected district clerk at said adjourned meeting, held on August 31, 1896, presented himself and offered to perform the duties of district clerk and demanded that the books and records of the district be delivered to him; that a motion was made on the part of the appellants that said Carpenter be

recognized as district clerk and the books and records of the district be delivered to him; but the president refused to entertain the motion, and upon an appeal from such decision the president was sustained; that on or about September 5, 1896, said board of education caused a tax list to be made, including therein the moneys voted at the meeting held August 4, 1896, at which said Miller was chairman, and attached its warrant thereto and delivered the same to the collector of said district, Moses F. Nelson; that said Moses F. Nelson is the clerk of the town of Highlands; that said board of education did not make and publish a full and detailed account of all moneys received by the board or the treasurer of the district for its account and use, and of all money expended therefor, giving the items of expenditure in full, required by section 18, article 4, title 8 of the Consolidated School Law of 1894.

The appellants herein allege that the annual school meeting that was held in said district on August 4, 1896, was duly and legally adjourned to August 31, 1896. In support of this the affidavits of many persons are filed, in which they state that after said meeting was organized it was stated that the board of education had not made or published a report of receipts and expenditures as required by law, and that the matter was discussed, and that a motion was made and seconded that said meeting be adjourned to August 31, 1896, at 8 o'clock p. m., and that said motion was put to vote by the chairman and was declared by him to have been adopted unanimously; that an opportunity was given by the chairman to anyone there present to object or question the correctness of the decision so made by him, but that no objection whatever was raised by any one present, and the meeting unanimously acquiesced in the decision of the chairman, declaring the meeting adjourned.

The respondents herein allege that at said meeting, when the action was put to vote by the chairman to adjourn to August 31, 1896, only a small number responded "aye," and that the chairman did not call for the vote of those opposed, or give any opportunity to those opposed to vote, although requested to do so, but declared the meeting adjourned and immediately left the chair and the school building. The affidavits of many persons are filed in support of such allegations. The chairman, Huse, in an affidavit made by him, states that "he did put the negative of the question to the meeting by saying plainly, contrary minded, 'no'; that there was no negative vote cast." The respondents have filed the affidavits of five persons that said Chairman Huse stated and admitted to them, or in their hearing, that he did not call for the negative vote upon said motion to adjourn said meeting to August 31, 1896. I am of the opinion, from the proofs, that Chairman Huse did not call for the negative vote on said motion to adjourn said meeting to August 31, 1896, and did not give an opportunity to those persons present who were opposed to such adjournment to vote against the motion, as it was his duty to do; that said annual meeting was not legally adjourned to August 31, 1896, nor to any time whatever, but continued to be the legal annual school meeting of said district, notwithstanding the declaration of Chairman Huse that the meeting was adjourned;

that Chairman House, having left the chair and meeting, the qualified voters of the district present had the legal authority to elect a chairman in place of said House, and to proceed to transact any and all business which said annual school meeting had the authority to transact under the provisions of the school law. That the meetings held in said district on August 31 and September 14, 1896, at which said House acted as chairman, were not, nor was either of them, a legal school meeting, and the proceedings had and taken thereat were and are without authority of law and void.

I am also of the opinion that the proceedings of said annual school meeting, after the same had elected said Joseph C. Miller as chairman thereof, in receiving and acting upon the reports of the treasurer of the district, and the statement of the board of education of the sums necessary to be raised by tax for school purposes for the school year of 1896–97, and in voting to raise by tax the aggregate sum of $6132, and in the election of Moses F. Nelson as district clerk, were, and each of them was, legal.

Under section 18, article 4, title 8, of the Consolidated School Law of 1894, it was the duty of the board of education of said district to cause to be published once in each year, and twenty days next before the annual meeting of the district, in at least one public newspaper printed in said district, a full and detailed account of all moneys received by the board or the treasurer of said district for its account and use, and of all the money expended therefor, giving the items of expenditure in full; should there be no paper published in said district said board shall publish such account by notice to the taxpayers, by posting copies thereof in five public places in said district. This duty was as mandatory upon said board as any other requirement of the school law. The failure of said board to perform such duty was not any reason for the adjournment of the annual school meeting, nor any reason why such meeting could not transact the business of such meeting, as under the school law said board were also required to make a report to said meeting of the moneys received and disbursed by it, or its treasurer, as well as a detailed statement in writing of the amount of money which would be required for the ensuing year for school purposes, exclusive of the public moneys, specifying the several purposes for which it would be required, and the amount for each. This report and statement, it appears, had been prepared for and were presented and read at said annual meeting and acted upon.

Under the provisions contained in section 7, article 1, title 8, of the Consolidated School Law of 1894, as amended by section 13, chapter 264, Laws of 1894, it is enacted that boards of education shall, at their annual meeting, elect one of their number president.

In every union free school district, other than those whose limits correspond to those of an incorporated village or city, the qualified voters shall elect a clerk of said district, who shall also act as clerk of the board of education of such district. Said board of education shall have power to appoint one of the taxable inhabitants of their district as treasurer and fix his compensation, and

another (that is, taxable inhabitant of the district) collector of the moneys to be raised within the same for school purposes, who shall severally hold such appointments during the pleasure of the board. Notwithstanding the plain provisions of the school law, that said board of education of said district, in the appointment of treasurer and collector, should appoint a taxable inhabitant as treasurer, and another taxable inhabitant as collector, showing clearly that one taxable inhabitant could not lawfully be appointed both treasurer and collector, said board, at its annual meeting, held on August 11 1896, appointed or attempted to appoint Moses F. Nelson as treasurer and collector. And what is more surprising is that said board appointed as such treasurer and collector said Nelson, who was then the district clerk of the district and thereby clerk of the board. The duties of Nelson as clerk of the district and of the board are incompatible with the duties of treasurer and collector, or treasurer or collector, even if the school law did not prohibit said board from appointing the same person as treasurer and collector; and the school law and the decisions of this Department are that no person can hold more than one school district office, at one and the same time. The appointment by said board of said Nelson as treasurer and collector was and is clearly illegal and void.

It appears that on or about September 5, 1896, said board of education delivered the tax list made by it, with its warrant, to said Nelson as collector. As said Nelson could not legally hold the office of collector or legally collect the tax contained in said tax list, it is the duty of said board to recall such tax list and warrant from the hands of said Nelson.

The appeal herein is sustained as to so much thereof as is taken from the appointment by said board of education of said Nelson as treasurer and collector of said district, and the delivery to said Nelson by the said board of the tax list and warrant made and issued by it; and as to all other matters it is dismissed.

It is ordered, That all proceedings had and taken at the annual school meeting held in said district on August 4, 1896, in relation to the motion to adjourn said meeting to August 31, 1896, at 8 o'clock p. m., including the declaration of the chairman, Calvin Huse, that said motion was adopted and said meeting adjourned, be, and the same are, and each of them is, vacated and set aside.

It is further ordered, That all proceedings had and taken at the meeting held in said district on August 31, 1896, and September 14, 1896, be, and the same are, and each of them is, vacated and set aside as illegal and void.

It is further ordered, That all proceedings had and taken by the said board of education of said district at its annual meeting held on August 11, 1896, in the election or appointment of Moses F. Nelson as treasurer and collector of said district be, and the same are, and each of them is, vacated and set aside as illegal and void.

It is further ordered, That the said board of education of said district forthwith recall from the hands of said Moses F. Nelson the tax list and warrant issued by said board and delivered to said Nelson on or about September 5, 1896.

4418

In the matter of the appeal of William Robinson from action of the board of education of union free school district no. 2, Middletown and Southfield, Richmond county, removing him as treasurer of said board.

In every union free school district other than such whose limits correspond with those of an incorporated village or city, the board of education has the legal authority to appoint one of the taxable inhabitants of such district treasurer and fix his compensation. Such treasurer shall hold such appointment during the pleasure of the board; there is no provision of law prohibiting such board, at the time of making such appointment, from exercising, expressing and defining its pleasure as to the term or time such appointee shall hold such office. Where a board, at the time of the appointment of a treasurer, fixes the term of the appointment for "the ensuing year," it thereby exercised and voiced its pleasure that the appointee should hold for the ensuing year, or balance of the then school year, and by such action the board was estopped from removing the appointee except for some cause other than that of the will or desire of the majority of the board.

Decided January 16, 1896

John Widdecombe, attorney for respondents

Skinner, *Superintendent*

At a regular monthly meeting of the board of education of union free school district no. 2, Middletown and Southfield, Richmond county, which board consists of nine members, held on September 3, 1895, all the members of said board being present except Felix O'Hanlon, the following resolution was adopted by a vote of 7 for and 1 against said resolution, namely, "Resolved, that Mr William Robinson be appointed treasurer for the ensuing year"; that at a subsequent regular monthly or adjourned meeting of said board, a quorum being present, the minutes of said meeting of September 3, 1895, of which minutes the resolution above quoted formed a part were read and approved; that said board did not fix the amount of the bond to be given by him or give him written notice of his appointment as treasurer; but said Robinson, as such treasurer, filed a bond in the sum of $30,000, with sureties, with said board, and at a meeting of said board, held subsequent to September 3, 1895, said bond was approved by said board as to the form and sufficiency thereof, and was accepted by said board, and the president of said board was authorized to indorse the approval of said board upon said bond, and the said bond was ordered filed as required by law. That at an adjourned monthly meeting of said board, held on November 19, 1895, a resolution was adopted by a vote of 5 in favor and 4 against, dispensing with the services of said Robinson as such treasurer from and after December 1, 1895, and that Mrs Anna W. Lowes was appointed treasurer of said board in place of said Robinson by a vote of 5 in favor to 4 against such appointment; that a resolution was adopted by a majority of said board fixing the bond of Mrs Lowes as such treasurer at $20,000, and ordering said Robinson to turn over all books, papers and

money belonging to said district to the newly elected treasurer; that a resolution was also adopted at said meeting that the action of the board, in removing said Robinson, was to be no reflection upon his character, nor upon the faithful diligence with which he performed the duties of his office; that at a meeting of said board, held on November 27, 1895, it appearing that December 1, 1895, would be Sunday, said board rescinded said resolutions adopted on November 19, 1895, dispensing with the services of said Robinson as treasurer from and after December 1, 1895, and appointing Mrs Lowes as treasurer, and then by a vote of 5 against 4 adopted resolutions dispensing with the services of said Robinson as treasurer, from and after December 3, 1895, and appointing Mrs Anna W. Lowes as treasurer from said date, fixing the amount of her bonds at $20,000, and directing the finance committee to audit the books and accounts of said Robinson; that on November 29, 1895, the bond of Mrs Lowes, as treasurer, was approved and ordered filed by a majority of said board, and said Robinson was directed to arrange to transfer the money in his possession as treasurer to Mrs Lowes as treasurer, and to deliver his books and papers to said board on December 3, 1895, at 8 o'clock p. m.

From said action of said board in removing him as treasurer of said board and appointing Mrs Lowes as treasurer to succeed him, the said Robinson has appealed to me.

An answer by five members of said board to said appeal has been filed, four members of said board refusing to join in said answer.

There is no contention between the appellant and respondents as to the facts as hereinbefore stated, except that three members of said board, namely, Messrs Flannigan, Blauth and Beinert, each states in an affidavit made and sworn to by each, that he voted for the resolution at the meeting of said board on September 3, 1895, appointing said Robinson treasurer in the belief that said resolution provided for the appointment of said Robinson as treasurer to hold during the pleasure of the board, and not otherwise.

In section 7, article 1, title 8 of the Consolidated School Law of 1894, it is enacted that boards of education in every union free school district, other than those whose limits correspond to those of an incorporated village or city, shall have power to appoint one of the taxable inhabitants of their district treasurer, and another collector of the moneys to be raised within the same for school purposes, who shall severally hold such appointments during the pleasure of the board.

The rule is well settled that where the power to remove at pleasure is conferred in general terms upon an official or board, such power may be exercised without a cause and without any notice to the incumbent. 1 Dillon Municipal Corporations, § 250; People ex rel. Sims v. Board of Commissioners of the City of New York, 73 N. Y. 437; People ex rel. Westray v. Mayor of the City of New York, 82 N. Y. 491; People ex rel. Gere v. Whitlock, 92 N. Y. 191; Dunavon v. Board of Education of Hornellsville, 47 Hun 13; Weidman v. Board of Education, 7 N. Y. Supplement 309.

The appellant, in substance, contends that by and under the said resolution of said board, passed September 3, 1895, appointing him treasurer for the ensuing year, a contract was made with him for the remainder of the school year; that there is nothing in said section 7, article 1, title 8 of the Consolidated School Law of 1894 which prohibits said board from appointing the appellant as treasurer for a definite term, that is, for one year or for the ensuing year, and that after said board has exercised its pleasure by designating the term of employment of the appellant it can not remove him from office during the term so designated without cause.

The contention of the respondents herein, in substance, is that the appellant, having been appointed treasurer in the year 1894 by the board of education then in office, held such office until his removal by the present board in November 1895, and the action of the said board in September 3, 1859, in appointing appellant as treasurer was illegal; that under said section 7, article 1, title 8 of the Consolidated School Law the dismissal of the appellant and the appointment of Mrs Lowes was legal; that the action of said board on September 3, 1895, in appointing the appellant was illegal in so far as it attempted to make the appointment for a definite period, the Legislature having limited the power of the board in that regard; that the treasurer being an employee of the board, rather than a district officer, the right of the board to dismiss at pleasure is absolute.

Under the Consolidated School Law of 1894 (see section 13, article 3, title 8, and section 7, article 1, title 8) it was the duty of the persons constituting the board of education of union free school district no. 2, Middletown and Southfield, for the school year 1894–95 and 1895–96, respectively, on the Tuesday next following the annual school district meeting held therein (in August), to hold the annual meeting of said board. That at said annual meetings said board should elect one of the members of said board as president thereof, and the person so elected shall, unless he resign the office or cease to be a member of said board, hold said office for the school year; that said board shall also, at such annual meetings, if the school district at its annual meeting for the election of officers did not elect a clerk of said district, under said section 7 above cited, appoint one of their number as clerk of said board, whose term of office will end at the date of the next annual school meeting of the district. That under said section 7 said board had the power to appoint one of the taxable inhabitants of said school district as treasurer of the board, to hold such appointment during the pleasure of said board, and whose term of office, if not sooner removed, would expire at the next annual school district meeting; but no member of said board could be appointed to the office of treasurer.

The appeal herein alleges that the appellant was appointed treasurer at the regular monthly meeting of said board held on September 3, 1895, but does not state whether any appointment of treasurer was made at the annual meeting of the board on the Tuesday next after the annual school meeting in 1895, and the answer alleges that the appellant, in 1894, was appointed treasurer of

the then existing board of education, but does not state whether or not such appointment was made at the annual meeting of said board which should have been held on the Tuesday next after the annual school meeting of the district in 1894. Admitting, however, that appellant was appointed such treasurer by the board for the school year of 1894–95, and was not removed by said board during its official life, his term of office expired, under such appointment, with that of the board that appointed him, and therefore the contention of the respondents that he continued to hold office during the pleasure of the board for 1895–96 until his removal by it on November 27, 1895, is not well taken. There is no contention that the appellant herein was not, in November 1895, a taxable inhabitant of said school district, nor that he has not been a taxable inhabitant of said district since the commencement of the school year of 1894–95. It is admitted that appellant executed and delivered to said board, after his appointment on September 3, 1895, a bond with sufficient penalty and sureties, which bond was duly approved and filed. It is also admitted that appellant performed the duties of treasurer with "faithful diligence."

The treasurer appointed by a board of education is the custodian of the moneys belonging to the district, and it is important that such treasurer should be a person of integrity and possessed of sufficient business ability to properly perform the duties of the office. It was doubtless the intention of the Legislature in providing that such officer should hold during the pleasure of the board to provide a summary method for the removal of a person who it was found was incompetent to perform the duties of the office or was not a safe and proper person as custodian of the school funds. It is clear that said board had the power to appoint the appellant as treasurer, and I am not aware of any provision of law prohibiting said board at the time of making such appointment from exercising, expressing, defining and stating its pleasure, that is, will, desire, choice as to the term or time the appellant should hold such appointment of treasurer, to wit, "for the ensuing year." Had said board, on September 3, 1895, resolved that Mr William Robinson be appointed treasurer, there can not be any doubt but that said board would have had legal authority at any subsequent meeting to have removed him as such treasurer and appointed some other person in his place; but having at such meeting resolved that he be appointed treasurer "for the ensuing year," it thereby exercised and voiced its pleasure, expressing, defining and stating its pleasure that the appellant should hold such appointment for the ensuing year (or balance of the present school year), and said board by such action was estopped from removing the appellant except for some cause other than that of the will or desire of a majority of said board.

The resolution presented to and adopted by said board appointing the appellant as treasurer was plain and concise, and I do not see how it could be misunderstood by any member of the board present at its meeting on September 3, 1895, or how any member could be misled as to its language and effect. At a subsequent meeting of said board the proceedings had and taken at said meeting on

September 3, 1895, were read and approved. There is nothing in the affidavits of Messrs Flannigan, Blauth and Beinert, annexed to the answer herein, that indicated that they misunderstood the terms of said resolution or were misled by it. Each of them says that he voted for said resolution in the belief that the resolution provided for the appointment of the appellant as treasurer to hold office during the pleasure of the board and not otherwise. That is just what the resolution did provide for, namely, the appointment of the appellant as treasurer, he to hold the office during the pleasure of the board, and that the board defined and expressed therein its pleasure, to wit, for the ensuing year.

I am of the opinion that the action and proceedings of said board had and taken at its meetings on November 27 and 29, 1895, dispensing with the services of the appellant herein as treasurer from and after December 3, 1895, and appointing Mrs Anna W. Lowes as treasurer from said December 3, 1895, fixing the bond of Mrs Lowes at $20,000, and directing the appellant to transfer the money in his possession as treasurer to said Mrs Lowes, and to turn over the books and papers in his possession to said board, are and each of them was without power or authority on the part of said board, and should be vacated and set aside. That said board restore to the appellant, as treasurer, all moneys in the hands of Mrs Lowes, belonging to said district, and all books and papers pertaining to the office of treasurer, turned over by said appellant to said board.

The appeal herein is sustained.

It is ordered, That the action and proceedings of the board of education of union free school district no. 2, Middletown and Southfield, Richmond county, had and taken at its meetings held on November 27 and 29, 1895, and each of said meetings, dispensing with the services of the appellant, William Robinson, as treasurer from and after December 3, 1895, and appointing Mrs Anna W. Lowes as treasurer from said December 3, 1895, fixing the bonds of Mrs Lowes at $20,000, and directing the said appellant, Robinson, to transfer the moneys in his possession as treasurer to said Mrs Lowes, and to turn over the books and papers in his possession to said board, be, and the same are, and each of them is, vacated and set aside.

It is further ordered, That said board, without unnecessary delay, reinstate the said appellant, William Robinson, as treasurer, in accordance with the terms of the resolution of said board appointing him treasurer, adopted by said board on September 3, 1895.

4271

In the matter of the appeal of Charles Lamoreaux and others, from proceedings of annual meeting held in district no. 7, town of Schoharie, Schoharie county, on August 7, 1894.

Where, at the annual meeting in the school districts of the State, the election of school district officers was not had in accordance with the provisions of section 14, article 1, title 7 of the Consolidated School Law of 1894, and an appeal is taken from the pro-

ceedings of such meeting relative to such election, such action and proceedings will be vacated and set aside and a special meeting ordered for the transaction of the business of the annual meeting of the district.

Decided October 5, 1894

Crooker, *Superintendent*

This appeal, taken from the proceedings of the annual school meeting, held on August 7, 1894, in district no 7, town of Schoharie, county of Schoharie. The principal irregularities related in the appeal are: that a suitable ballot box was not provided by the trustee; that in the election of district officers only one office, that of trustee, was elected by ballot; that the result of the vote for said trustee was not announced by the chairman of the meeting, but by one of the inspectors or tellers; that the ballots were defective in this, that said ballots contained only the name of the person voted for and not designating the office; that illegal votes were received, and that one person who was challenged was permitted to vote without making the declaration required by the school law, such challenge not having been withdrawn; that no poll list was kept; that the person who was elected collector of the district was also elected treasurer of the district, without any resolution having been adopted by the meeting to elect a treasurer; that the vote to raise money by tax, or making appropriations, was not taken as required by the school law. The appeal is verified, and a copy thereof duly served upon Daniel Waterbury, the person alleged to have been elected trustee of the district at said annual meeting. No answer has been made to the appeal, and I am in receipt of a letter written for said Waterbury, submitting the appeal to me for examination and decision.

The allegations contained in the appeal are deemed by me to be admitted by said Waterbury.

Subdivision 4 of section 14, article 1, title 7 of the Consolidated School Law of 1894, provides that all district officers shall be elected by ballot; that at elections of district officers the trustees shall provide a *suitable* ballot box; two inspectors of election shall be appointed in such manner as the meeting shall determine, who shall receive the votes cast, and canvass the same and announce the result of the ballot by the chairman; a poll list, containing the name of every person whose vote shall be received, shall be kept by the district clerk or the clerk for the time of the meeting; the ballots should be written or printed, or partly written and partly printed, containing the name of the person voted for, and designating the office for which each is voted for; the chairman shall declare to the meeting the result of each ballot, as announced to him by the inspectors, and the persons having a majority of votes, respectively, for the several offices, shall be elected.

By the provisions of law above cited, *a suitable ballot box* shall be provided by the trustee. The law does not describe the *kind* of ballot box which shall be used, but the same shall be *suitable* for the purpose. Such ballot box should be during the election of officers, in the possession of the inspectors of election, and each voter should deliver his or her ballot to such inspectors, or one of them,

and when the name of the voter is recorded upon the poll list by the clerk, and the vote *is not challenged,* should be deposited in the ballot box by the inspector. The ballot should be written or printed, or partly written and partly printed, containing the name of the person voted for and designating the office for which each is voted for. This latter provision has especial reference to where *all* the district officers are elected *upon one ballot.* When each district office is balloted for separately, the ballot will be valid, having thereon only the name of the person voted for, as each voter has knowledge of the office for which the ballot is being taken, and the ballot is for that office only.

Section 11, article 1, title 7 of the Consolidated School Law of 1894 specifies the qualifications which a resident of any school district of the State must possess to entitle such resident to vote in the district in which he or she resides. Any person to be entitled to vote must possess at least *one* of the qualifications specified in said section. Section 12, article 1, title 7 of said school law provides that any person offering to vote at any district meeting may be challenged by any qualified voter of such district, as unqualified, and when so challenged, such person shall be required by the chairman of the meeting to make the declaration specified in said section 12, and if said person makes such declaration he or she shall be permitted to vote; but if such person refuses to make such declaration his or her vote shall be rejected.

The treasurer of a common school district is a new officer provided for under the new Consolidated School Law of 1894. Under the provisions of subdivision 5 of section 14, article 1, title 7 of said law, at the annual meeting of any such district, or at any special meeting called for that purpose, the qualified voters therein are authorized to adopt a resolution by a majority of such voters present and voting, such vote to be ascertained by taking and recording the name of the voter and whether such voter votes aye or nay upon said resolution to elect a treasurer of said district. If said resolution *is adopted* the meeting shall thereupon elect by ballot a treasurer. No person shall be eligible to the office of treasurer unless he is a qualified voter in and a taxable inhabitant of said district. No district meeting can legally elect a treasurer of the district until a resolution shall be adopted to elect such treasurer in the manner above stated.

Under the school law no person can legally hold two district offices at one and the same time.

Under subdivision 18 of section 14, article 1, title 7 of the Consolidated School Law of 1894, it is enacted that in all propositions arising at said district meeting involving the expenditure of money or authorizing the levy of a tax or taxes, the vote thereon *shall be by ballot or ascertained by taking and recording the names of the voters and how each said voter votes, that is, either aye or no upon each proposition.*

Under section 86, article 7, title 7 of the Consolidated School Law of 1894 the collector of a district shall keep in his possession all moneys received or collected by him, and the same shall not be paid out by him except upon the written orders of a trustee or trustees, or a majority of said trustees; and any

moneys remaining in his hands when his successor in office shall be elected and shall have executed a bond, shall be paid by him to his successor. He shall report his receipts and disbursements in writing at the annual meeting.

Under section 55, article 6, title 7 of said Consolidated School Law of 1894 the trustee or trustees of a district shall, at the annual meeting, render a just, full and true account in writing under his or their hand or hands, of all moneys received for the use of the district, or raised or collected by tax the preceding year, and the manner in which the same has been expended, etc.

At an annual school meeting the order of business shall be as follows:

To appoint a chairman of the meeting, and if the district clerk is absent, to appoint a clerk for the meeting; the trustee or trustees should present to the meeting his or their report, which should then be acted upon by the meeting; then the report of the collector should be presented and acted upon; then the trustee should present a statement of the amount of money needed for payment of teachers' wages, fuel, repairs, insurance, furniture, books for school library, hiring janitor, etc., etc., and the items should be voted upon and taxes ordered to be assessed in the manner hereinbefore stated; the meeting should then proceed to elect its district officers in the manner hereinbefore stated. Every district officer must be a resident of his or her district and qualified to vote as its meetings, and no person shall be eligible to hold any district office who can not read and write; but a treasurer of a district must also be a taxable inhabitant of said district.

It is clear that the actions and proceedings at the annual meeting, held on August 7, 1894, in district no. 7, town of Schoharie, were not in accordance with the provisions of the school law. I have stated thus fully what can be legally done at an annual school meeting, in order that there should be no want of information as to what the action and proceedings which shall be taken at the special meeting which I shall direct to be called in said district, to transact the business of the annual meeting.

The appeal herein is sustained.

It is ordered, That the action and proceedings had and taken at the annual school meeting held on August 7, 1894, in district no. 7, town of Schoharie, county of Schoharie, be and the same hereby are, and each of them is, vacated and set aside.

It is further ordered, That Daniel Waterbury, a qualified voter of said district, is hereby authorized and directed to forthwith call a special meeting of the inhabitants of said school district no. 7, town of Schoharie, county of Schoharie, entitled to vote at school meetings in said district, in the manner prescribed in sections 2 and 6 of article 1, title 7 of the Consolidated School Law of 1894, for the purpose of transacting the business of the annual meeting; such business to be conducted in the manner provided in title 7 of the Consolidated School Law of 1894, and as stated in this decision; but no business shall be done or performed at such special meeting, other than that which, under said school law, could have been done or performed at said annual meeting on the first Tuedsay of August 1894.

4984

In the matter of the appeal of Byron Mansfield v. board of education of union free school district no. 10, New Baltimore, Greene county.

In every union free school district other than those whose limits correspond to those of an incorporated village or city, the board of education has the power to appoint one of the taxable inhabitants of their district, treasurer, and fix his compensation, and another (taxable inhabitant) collector of the moneys to be raised within the same for school purposes; but said boards of education can not legally appoint one of their number as treasurer or collector.

Decided December 30, 1901

Skinner, *Superintendent*

This is an appeal from the action of the board of education of union free school district 10, New Baltimore, Greene county, in the appointment of William H. Baldwin a member of said board of education as district treasurer.

No answer has been made by the board of education to the appeal herein and under the rules of practice established by this Department, regulating appeals to the State Superintendent of Public Instruction, where no answer has been made to an appeal, the material allegations in the appeal will be deemed admitted.

It appears that the board of education of union free school district 10, New Baltimore, Greene county, consists of three members, namely, J. D. Carhart, William H. Baldwin and Andrew Colvin; that at an adjourned annual meeting of such board, held on August 16, 1901, there were present Messrs Baldwin and Colvin; that in the absence of Mr Carhart, president of the board, Mr. Colvin was elected president pro tem.; that on motion of Mr Baldwin, Mr Carhart was elected president of the board for the ensuing year; that on a motion that William H. Baldwin be the treasurer of the board for the ensuing year, such motion was adopted; that one Albert Fackler was elected clerk for the ensuing year at a compensation of $25; that William Patterson was elected collector for the ensuing year; that Martin Fink was elected truant officer subject to his acceptance of the office; that it was voted that the collector's bond be fixed at $1000 and the treasurer's bond be fixed at $1500.

Section 7 of article 1, title 8 of the Consolidated School Law of 1894, as said section was amended by section 1, chapter 456 of the Laws of 1897, provides that boards of education shall have power to appoint one of the taxable inhabitants of their district treasurer and fix his compensation and another (taxable inhabitant) collector of the moneys to be raised within the same for school purposes, who shall severally hold such appointment during the pleasure of the board. Such treasurer and collector shall each, within ten days after notice in writing of his appointment, duly served upon him, and before entering upon the duties of his office, execute and deliver to said board of education a bond with such sufficient penalties and sureties as the board may require, conditioned for the faithful discharge of the duties of his office, and in case such bond shall not be given within the time specified, such office shall

thereby become vacant, and said board shall thereupon, by appointment, supply such vacancy.

This Department has uniformly held that the treasurer or collector of a union free school district can not be a member of the board of education. Deputy Superintendent Barr, on October 13, 1865, held that it is not legal for a board of education to appoint a member thereof as the treasurer of the board; that the treasurer of the board and collector must each execute and deliver to the board a bond conditioned for the faithful discharge of the duties of his office; that the law contemplates a treasurer and collector separate and distinct from the board; that it might become necessary for the board to sue the treasurer or collector and he being a member of the board could not unite with them in suing himself. Superintendent Weaver, on February 17, 1873, held that the board of education in a union free school district have no power to appoint a treasurer from their own number; that the appointment by a board of education of one of their own number to the office of treasurer is an unauthorized act and there is the same inconsistency in a trustee of a union free school district holding the office of treasurer that there is in a trustee of a common school district holding that of district collector, and that is expressly prohibited by the statute.

The appeal herein is sustained.

It is ordered that the proceedings of the board of education of union free school district 10, New Baltimore, Greene county, at the adjourned annual meeting of said board, held on August 16, 1901, in the election of William H. Baldwin, a member of said board as treasurer of the board in the district, are hereby vacated and set aside.

VOTERS

The taxable inhabitants of school district no. 10, in the town of Schodack, ex parte.

Colored persons may vote at school district meetings.
Decided December 27, 1836

Dix, *Superintendent*

This was an application for the opinion of the Superintendent by several of the taxable inhabitants of school district no. 10 in the town of Schodack, with regard to the right of colored persons, who had been assessed to pay highway taxes, to vote at school district meetings.

Colored persons have a right to vote at meetings in the school districts in which they reside, if they have the requisite qualifications of property, or if they have been assessed to pay highway taxes in the town during the year in which they vote, or the preceding year. The construction which has been given to the statute relating to the qualifications of voters in school districts, with respect to aliens, is considered equally applicable to this case. Indeed, colored persons are permitted to vote at popular elections under certain circumstances, and the construction referred to may, perhaps, be urged with greater force in their favor than in the case of aliens, who are not allowed in any case to vote at such elections.

An alien, though he has taken the incipient measures to be naturalized, is not qualified to vote at a school district meeting in the district where he resides, unless an affidavit of that fact be filed and recorded in the office of the Secretary of State.
Decided October 30, 1854

Rice, *Superintendent*

This is an appeal taken by five of the inhabitants from the proceedings of a special school district meeting, holden in district no. 6, in the town of Montague, Lewis county, in the early part of October 1854.

The appellants aver that persons not duly qualified to vote did vote at said meeting, and that their votes affected the result. It seems that the only material vote of the meeting was carried by two majority, whereas the right of three persons to vote, who voted with the majority, was doubtful. One of them was a man working for a resident of the district, but whether he was of legal age and possessed the other requisite qualifications is by no means certain.

The other two persons, Messrs Fuller and Boyd, are aliens, and only during the week that the meeting of May 1854, stood adjourned to, did they file their intentions of becoming citizens. An alien, though he has taken the incipient

measures to obtain naturalization, can not hold real property or be a qualified voter at a school district meeting in the district where he resides.

He is required to make a deposition or affirmation in writing, before an officer authorized to take the proofs of deeds to be recorded, that he is a resident of, and intends always to reside in the United States, and to become a citizen thereof as soon as he can be naturalized, and that he has taken such incipient measures as the laws of the United States require to enable him to obtain naturalization, which shall be certified by such officer, and be filed and recorded by the Secretary of State in a book to be kept by him for that purpose, and such certificate, or a certified copy of it, shall be evidence of the facts therein contained.

As Messrs Fuller and Boyd did not comply with the requirements of the statute, and therefore could not become owners of taxable property, the conclusion becomes a necessary sequence that the vote was void.

5392

In the matter of the appeal of Ebenezer J. Preston et al. from the action of the annual district meeting of union free school district no. 9, town of Amenia, Dutchess county.

Qualifications of voters; failure to deny allegations. Where the appellants allege on information and belief that certain persons are not qualified to vote, such allegations will be taken as true unless controverted by answer.

Idem; residence of wife. A wife whose husband lives outside of a school district is not a qualified elector of such district in the absence of proof that she is divorced from her husband or living separately from him.

Idem; leases made on day of meeting. A person may not qualify as a voter by hiring land on the day of the meeting for a nominal consideration. To qualify a person as a hirer of real property and make him eligible as a voter, the lease must have been made in good faith so as to give the tenant some actual and substantial interest in the district and its affairs. A lease made for the sole purpose of qualifying the tenant as a voter is ineffectual.

Idem; deeds to wife. A married woman does not become qualified as an elector by a deed from her husband executed a few days prior to the meeting but never recorded, conveying a joint interest in the home occupied by them, where it appears that such transaction was for the purpose of qualifying the wife as a voter.

Idem; joint lease to husband and wife. Where a few days before the meeting a joint lease was made to a husband and wife in place of a lease formerly held by the husband, the wife is not a hirer of real property within the meaning of the statute.

Idem; lodgers and boarders. To constitute a hiring under the statute the relation of landlord and tenant must exist. Such a relation does not exist between a boarding house keeper and a boarder or lodger, nor does it exist where the owner of a building permits a person to occupy a room as a lodger, the owner retaining the legal possession of the whole house.

Idem; ownership of reversion. The ownership of a reversionary interest in real property is not such a present ownership as qualifies a person as an elector.

Idem; **deeds and leases for the purpose of qualifying electors.** Whenever it appears that deeds and leases which, while colorably giving title, were made for the purpose of giving the grantees or tenants the apparent right to vote, they will be regarded by the Department as a fraud upon the statute, and will confer no right to vote at a school meeting.

Decided November 16, 1908

Allison Butts, attorney for appellants
James E. Carroll, attorney for respondents

Draper, *Commissioner*

The appellants, Ebenezer J. Preston, Lewis F. Eaton and Benjamin H. Fry, are taxpayers and duly qualified voters of union free school district no. 9, town of Amenia, and appeal from the action of the annual school meeting held in and for such district on the 4th day of August 1908, in respect to the following matters:

1 The adoption of a proposition to increase the number of trustees of said school district from three to five.

2 The election of James P. Monohan, John Q. Tobin and Michael O'Connor as trustees thereof.

It appears from the pleadings that 204 votes were cast in favor of the proposition, and 154 votes against it; and that 194 votes were cast for the above-named trustees and 137 votes were cast in favor of John R. Thompson, jr, Benjamin H. Fry and Dudley C. Culver for such offices. The ground of the appeal consists of the alleged disqualification of 88 persons who voted in favor of the above proposition, and 79 persons who voted for the successful candidates for trustees of such district. The respondents in their answer allege that of the 154 voters who voted against the proposition to increase the number of trustees from three to five, and of the 137 votes in favor of the unsuccessful candidates for trustees, 14 were not qualified voters of the district and were not entitled to vote on such proposition, or for such candidates.

The appellants have included in their petition two lists, schedules A and B, containing the names of the alleged disqualified voters who voted for such proposition and in favor of the successful candidates for trustees. Schedule A contains the names of 80 persons and states in what respect they were disqualified and alleges at the end thereof that they were all challenged before they voted. Schedule B contains the names of 8 persons but it appears that none of them were challenged. It also appears that of the 14 persons whom the respondents allege were not entitled to vote at the meeting 6 were not challenged before voting. It is a well established rule in appeals of this character that if a qualified voter be present at a meeting and permit a person, known to him to be unqualified for any cause, to vote without challenge, he will not thereafter be allowed to object to the proceedings of the meeting because such unqualified voter participated therein. This rule is here reaffirmed. Its justice is apparent, for it is obvious that if the right of challenge had been exercised by either of the appellants

the alleged unqualified voter might have refused to vote and there would then have been no cause for complaint so far as he was concerned. The application of such rule to the present case reduces the number of alleged unqualified voters who voted for the proposition from 88 to 80, and of those who voted against from 14 to 8.

It will first be proper to consider the alleged disqualifications of the 80 persons who voted in favor of the proposition to increase the number of trustees from three to five. Of this number 11 are named in schedule A of the appellants' petition and it is alleged in substance in respect to each that he or she neither owns nor hires real property nor is in possession of such property under a contract of purchase, nor owns any personal property assessed on the last preceding assessment roll of the town of Amenia. Five of these 11 are married but it is alleged that none of them has children of school age who attended school in the district for at least eight weeks during the year preceding the annual school meeting in question. These allegations were made on information and belief, but are sufficiently specific to indicate what constitutes the alleged disqualification. The respondents have not denied these allegations; the fact that they were on information and belief did not dispense with the necessity of setting up by opposing affidavits the facts on which the respondents rely for sustaining the qualifications of these voters. It is doubtless true that the burden is on the appellants to show that the persons named who voted at the meeting were not qualified voters, but it must be held that where allegations are made showing a want of legal qualifications they will be taken as true unless controverted in the answer of the respondents. By a failure to answer as to these 11 alleged disqualified voters the respondents have admitted their disqualifications, and they must therefore be eliminated from the count in favor of the proposition to increase the number of trustees from three to five.

The elimination of these 11 voters leaves for consideration the qualifications of 69 persons whose names appear in the appellants' schedule A. Two of these persons Marie E. Blot and Theresa Barhyte are clearly nonresidents. Both of these women are married, the former living with her husband near Williamsbridge, and the latter with her husband in the suburbs of New York. It does not appear that either is divorced or is living separately from her husband. There is nothing in the respondents' affidavits which overcomes the presumption that in each case the residence of the wife is that of her husband, and I must therefore hold that these two women are nonresidents and were not qualified to vote at such school meeting.

It is contended in respect to the other persons named by the appellants as being disqualified, that they neither own nor hire real property in the district liable to taxation. The statute provides that "every person of full age residing in any school district and who has resided therein for a period of thirty days next preceding any annual or special election held therein, and a citizen of the United States, *who owns or hires,* or is in the possession under a contract of purchase, of real property in such school district liable to taxation for school purposes . . .

is entitled to vote at any school meeting held in such district etc." It must be ascertained whether the persons named "own or hire" real property within the meaning of the statute.

Nineteen of the persons named by the appellants as disqualified base their claim to qualification upon subleases made to them on the day of the meeting. It appears from the respondents' affidavits that on August 4, 1908, John Flanagan leased from Margaret McEnroe a tract of land within the district for the annual rental of $10. The said Flanagan on the same day divided this land into 20 lots each 25 feet by 150 feet, and sublet the same to 20 persons for the sum of $1 per year. Each of these persons voted at the school meeting although challenged. It appears from the appellants' affidavits in reply that this land was worthless for agricultural or building purposes. The respondents' attorney does not deny that this transaction was entered into for the sole purpose of making the subtenants qualified voters at the school meeting to be held in the evening of the day on which such subleases were executed. It is contended by him that there can be no inquiry as to the motive of the hiring; that if the hiring was actual the persons were qualified as voters regardless of the value of the property or the time when the lease was executed. In other words, it is insisted that the language of the statute must be literally construed and applied without regard to its intent; if a person shows that he is the owner or hirer of taxable real property within the district at the time of the meeting, inquiry must stop, and the person be permitted to vote. This doctrine must be emphatically refuted. Its application would lead to a nullification of the statutory limitation on the right to vote at school meeting, and make it possible for any person for a nominal sum to clothe himself with the essential property qualifications. It is a familiar rule of statutory construction that the real intent of a statute, when ascertained, will always prevail over the literal sense of the language; because both the canons of the verbal criticism and the rules of grammatical construction must yield alike to the manifest spirit and intent of an enactment. The intent of the provision prescribing ownership or hiring of taxable real property as one of the qualifications of a voter at a school meeting where such voter is not the parent of a child of school age who has attended school for the required period of time during the preceding year, is to limit the right to vote to those who have some actual and substantial interest in the district and its affairs which may be affected by the failure to properly administer the affairs of the school. To permit a person to qualify by hiring land on the day of the meeting for a mere nominal consideration would result in the subversion of this legislative intent and render ridiculous and absurd a wise and appropriate statutory limitation. These 19 voters were not qualified and their votes should be eliminated from the count.

Closely allied in principle to the transaction last described is that of a joint lease of a tract of land for alleged gardening purposes to Jennie McEnroe, Mary McEnroe, and Carrie McEnroe on July 30, 1908, five days before the meeting. This land was leased for $12 per year, and was divided into three parcels each 15 feet by 6 feet; but little planting was done and no actual attempt was made to

do any gardening. The lessees were school teachers, home on their vacation. It is clear that this hiring was also for the purpose of qualifying the lessees as voters, and for the reasons stated above these women were not qualified voters and their votes should not have been counted.

In the case of Mary Tompkins, Victoria Ahern and Ida Flynn, it appeared that their respective husbands joined with them in the hiring of the premises where they had lived; that the alleged leases were executed August 1st, three days before the meeting, and that at and prior to such time the leases were in the names of the husbands. The alleged joint hiring was made for the sole purpose of qualifying these women as voters at this meeting. It was not such a hiring as the statute contemplates and their votes should not be counted. Mary Farley and Jane Foley claim to be qualified voters because of deeds executed by their husbands conveying to them a joint interest in their respective homes. These deeds were executed August 1st, and have never been recorded. No attempt has been made to rebut the presumption that the deeds were executed to qualify the wives as voters and were not therefore in good faith. These women were not qualified to vote at such meeting, and their votes must be eliminated.

Another class of persons attempted to qualify by asserting that the rooms occupied by them at the places where they boarded were hired by them at a stated price per month. From the affidavits of these persons it appears that they have hired the rooms occupied by them, but it appears also from the affidavits presented by the appellants that they board at the same places. To constitute a hiring within the statute the relation of landlord and tenant must exist. These persons are either boarders or lodgers, but they are not tenants. It is not shown in any case that the occupancy of the room hired was separate and independent from that of the rest of the house. In order to constitute a tenancy, or a hiring under the sections of the Consolidated School Law, prescribing the qualifications of voters at school meetings, there must be a putting of a lessee into the exclusive occupation of the apartment, and not a mere admission of a common lodger or inmate, the landlord retaining the legal possession of the whole house. To permit every person who lodges or boards at a certain place to assert that he hires the room occupied by him and is therefore qualified as a voter under this statute would subvert the very purpose of the statutory limitation. The limitation is an absurdity if every person who occupies a room as a lodger or boarder is a qualified voter, even though, as is claimed here in some cases, the hiring of the room is a transaction distinct from that of the agreement for board. Applying the principles here declared, I find that the following 13 persons who voted at such meeting were not qualified and their votes should not have been counted: William Thompson, Timothy Flanery, William Maloney, John Doyle, Jennie Cogan, Agnes Cogan, Margaret Cogan, Alexander de Manchi, James P. McEnroe, Patrick Ormond, Charles B. Sackett, Miles Linehan and John P. Riley

Another class consists of farm laborers and domestics who work for their employers for a specified wage, including board and room, and who claim to hire rooms in the district containing personal effects and maintained by the occupants

for their personal convenience. No formal leases are shown nor are any allegations made indicating that the relationship of landlord and tenant actually existed. The circumstances clearly show that, even if such relationship did exist it was created for the sole purpose of constituting these persons qualified voters. It must therefore be held that Sarah Folan, Edward Flanagan, Elizabeth Hines, Thomas Kenney, Lackey Burns and Margaret Murray (6 persons) are not qualified voters of such district and their votes should not have been counted.

James McEnroe shows by affidavit that he hires a room in the house of Catherine Hart for $5 a month and boards with his brother Thomas McEnroe. He is a lodger and not a tenant and should not have been allowed to vote.

Mary Wade in her affidavit alleges that she owns real property conveyed to her by her father by deed executed August 1, 1908, in which the grantor reserves a life interest. It thus appears that she had only a reversionary interest in the premises. It has been held by this Department that the ownership of a reversionary interest in real property is not such a present ownership as qualifies an elector at a school meeting [appeal of Wilcox, no. 3722 (1891)]. It must therefore be held that Mary Wade was not a qualified voter and her vote should not have been received.

The qualifications of 61 persons who voted at the annual school meeting of this district on August 4, 1908, for the proposition to increase the number of trustees from three to five have been considered and from the facts appearing in the affidavits presented by both parties to this appeal and for the reasons above stated I now hold that none of these persons were qualified electors on such date and they should not have been permitted to vote. The remaining 19 persons named in the appellants' schedule A may or may not have been qualified. It is only necessary for the purpose of determining this appeal to consider the qualifications of the others named. The boldness of the effort made to qualify a sufficient number of persons to safely control the meeting in question as evinced by the papers in this case, raises a presumption against the validity of the voters of all those remaining. But it will answer the purpose of this appeal to assume that this presumption has been met and admit that they legally voted for the proposition in question. Furthermore it is unnecessary to determine as to the legality of the 8 votes cast against such proposition by the persons named in schedule A as having been challenged at the meeting; for admitting that they were not qualified there still remain 146 valid votes cast against such proposition. Eliminating the votes cast in favor of such proposition by the persons who I have above decided were not qualified electors of the district, there remains a total of 143 votes. I therefore decide that the proposition for increasing the number of trustees of union free school district no. 9, town of Amenia, county of Dutchess, was not legally adopted, and that the election of James P. Monahan, John Q. Tobin and Michael O'Connor as trustees of said district was illegal and is hereby set aside.

In rendering this decision, I will state for the future guidance of this and every other school district in the State that whenever it appears that deeds and

leases which, while colorably giving title, were made for the purpose of giving the grantees or tenants the apparent right to vote, they will be regarded by this Department as a fraud upon the statute and will confer no right to vote at school meetings. The Department reserves the right to examine the good faith of every transaction tending to qualify a person as a voter. If it may be adduced from the evidence that the object of such transaction was to qualify a person as an elector, it will be rejected and its purpose frustrated if it lies within the power of the Department.

The appeal herein is sustained.

It is ordered, That the action of the annual school meeting held in and for union free school district no. 9, town of Amenia, county of Dutchess, in adopting a proposition to increase the number of trustees of said school district from three to five be, and the same is, hereby vacated and declared to be null and void.

That the election at such meeting of James P. Monahan, John Q. Tobin and Michael O'Connor as trustees of such district be, and the same is, hereby set aside.

3722

In the matter of the appeal of Stephen K. Wilcox v. school district no. 9, town of Smyrna, in the county of Chenango.

The fact that a woman is the wife of a man owning real estate in which she has a dower right is not sufficient to qualify her to vote at school meetings.

Ownership of a reversionary interest in real estate which is subject to an unexpired life estate is not such a present ownership of land as qualifies an elector at school meetings.

In a case where two ladies swore that they owned real estate at the time of a school meeting, but fail to disclose the location, or any other facts concerning the same, and the public records show no conveyance to them; *held,* that they were bound to supply such facts, and raises the presumption that such ownership is not bona fide, and was effected only to enable them to vote at the school meeting, and that their claim to do so could not be sustained.

Decided November 14, 1888

D. L. Atkyns, attorney for appellant
Stephen Holden, attorney for respondent

Draper, *Superintendent*

This in an appeal from the action of a special meeting held in district no. 9 of the town of Smyrna, Chenango county, held on the 13th day of August 1888, changing the schoolhouse site. The vote by which this action was taken stood 15 in the affirmative and 12 in the negative. The appellant claims that 8 of the 15 persons voting in the affirmative were not qualified electors of the district. The names of the 8 so challenged are as follows: Walter E. Scarritt, Addie Northrup, Sarah Northrup, Jessie Northrup, Nettie Dunham, Alice Northrup, Henry Scarritt and Harley Scarritt. It becomes necessary, therefore, to inquire into the qualifications of these voters.

Walter Scarritt, Henry Scarritt and Harley Scarritt severally swear that they are over 21 years of age, residents of the district, and entitled to hold lands in this State, and hire real estate taxable for school purposes. The appellant undertakes to throw doubt over the hiring of such real estate in good faith by these men, but I think not successfully. Their affidavits are clear, and, if true, they are entitled to vote at school meetings.

Alice Northrup is conceded by the appellant to be the wife of John B. Northrup, a citizen of the United States of full age, and the mother of two children of school age who attended school more than eight weeks during the preceding year. These facts constitute her a qualified voter at district school meetings.

Addie Northrup and Sarah Northrup are each resident citizens, of full age, and the owners of one undivided fourth interest in a farm in the district, but their rights in said land are subject to a life estate therein held by their father, Yale Northrup. There is no dispute about the facts, so far as they are concerned, and it is not claimed that they are qualified electors by reason of any other circumstances. I am unable to adopt the view of the respondent that they are electors. The statute provides that any person who is a resident and of full age and entitled to hold lands in the State, and who "owns or hires real property in such school district liable to taxation for school purposes," shall be qualified to vote. I am of the opinion that, in the instances under consideration, there is no such ownership of real estate liable to taxation as the statute contemplates. I have given the able argument of the respondent's counsel upon this point full consideration, but am clearly of the opinion that the interest which the Misses Northrup have in the land in question is not such a present ownership as will entitle them to vote at school meetings.

There is no serious claim that Nettie Dunham and Jessie Northrup were entitled to vote. They are wives of husbands owning real estate, but this would not make them voters, and no other reason is advanced to establish their qualications as electors.

If I am right in my reasoning, then, there were but 11 legal votes cast in favor of the change of site.

There were 12 votes cast against such change, but the respondents claim that two of them were illegal, namely, those of Sarah L. Wilcox and Delphina Wilcox. These two ladies swear that they owned real estate at the time of the meeting referred to. There is no conveyance to them on record. They fail to produce a deed or even to state where their possessions are located or their value or extent. This information could not be ascertained from other sources. There was no opportunity for cross-examination. I think they were bound to supply it, and their failure to do so raises presumptions that the alleged conveyance to them was made only for the purpose of enabling them to participate in the action from which this appeal is taken and not in good faith. It is true that they might be bona fide owners of real estate without the conveyance thereof being of record, but when the right to vote depends upon such owner-

ship, and is challenged, the fact that the conveyance is not recorded makes it necessary to show fully and clearly all the facts in reference to it. Their failure to do so leads to the necessity of holding that they were not qualified electors.

If I am right in this conclusion, then there were but 10 legal votes cast against the change of site, and there was a legal majority of 1 in favor thereof.

The appellant also claims that the proposed new site is not a desirable one and not convenient to the residents of the district. I have endeavored to read patiently all that has been said by the respective parties upon this point. The new site is not over 75 rods from the old one, so that, as to location, it can not be much more or less inconvenient to the residents than the old one. The burden is upon the appellant to show that it is unsuitable for school purposes, and he does not show it to my satisfaction.

In view of the foregoing considerations, I must dismiss the appeal.

4693

In the matter of the appeal of Joseph F. Russell and others from proceedings of annual school meeting, held on August 2, 1898, in district no. 6, Stephentown, Rensselaer county, in the election of trustee.

Where the resident of a school district hires a farm situate in the district under an agreement between him and the owner of the farm that for the use thereof he shall pay to the owner one-half of the produce of the farm and also pay one-half of all taxes assessed upon the farm; *held,* that under such agreement the relations created between the parties thereto, were that of master and servant; that the agreement entered into did not amount to a technical lease; that the relation of landlord and tenant was not created and the portion of the crops reserved to the owner is not *rent,* but compensation for the use of the land, while the other portion is compensation for the occupier for his work, labor and services; that the legal possession of the farm is in the owner, and the parties to the agreement are tenants in common of the crop raised; that the occupier of the farm did not hire real property situate in the district and liable to taxation for school purposes, and was not a qualified voter at the annual school meeting held in the district within the meaning of the Consolidated School Law.

Dated October 31, 1898

Nelson Webster, attorney for respondent

Skinner, *Superintendent*

This is an appeal from the annual meeting held August 2, 1898, in school district 6, Stephentown, Rensselaer county, in the election of a trustee of the district.

The ground upon which this appeal is brought is, as alleged by the appellants, that at such annual meeting in the final ballot for trustee, one Albert E. Provost cast his ballot for John Roach for said office. and that he (Albert E. Provost) was not, at that time, a qualified voter in such school district under the provisions of the school law.

John Roach, the person who was announced to have received a majority of the votes cast for trustee at such annual meeting, has answered the appeal, and to the answer a reply has been made by the appellants, and to such reply the respondent, Roach, has filed a rejoinder.

It is established by the proofs filed herein that at such annual meeting several ballots were taken for trustee, each of which resulted in no choice; that upon another ballot being taken it resulted as follows: whole number of ballots cast, 7; of which John Roach received 4 and Frank Gavett 3; that Messrs Carlton, Snell and Pease voted for Gavett, and Messrs Gavett, Roach, Albert E. Provost and Joseph E. Provost voted for Roach.

The main question presented for my decision is, whether or not Albert E. Provost, who voted at such meeting for Roach for trustee, was a qualified voter in such district.

The appellants allege that Albert E. Provost, August 2, 1898, did not own or hire, nor was he in possession under a contract of purchase, of real property situated within said district liable to taxation for school purposes therein; nor was he the parent of a child or children of school age; nor had he then residing with him, not being the parent of any child or children of school age, some one or more, of whom shall have attended the school in such district for a period of at least eight weeks within one year preceding such meeting; that he did not own any personal property assessed on the last preceding assessment roll of the town, exceeding $50 in value, exclusive of such as is exempt from execution.

Albert E. Provost, in his affidavit annexed to the answer of the respondent, Roach, does not deny the aforesaid allegations of the appellants, except the one that he does not hire real property subject to taxation in the district for school purposes. He avers in substance that at the time of the annual meeting he then, and for several years last past, had hired of his father, Joseph E. Provost, a farm of about 260 acres, owned by the father, and situate in said school district, and for the rent thereof he pays and yields to his father one-half of the produce of such farm, and pays one-half of all taxes assessed thereon. He also avers that he owns personal property exceeding $50 in value, exclusive of such as is exempt from execution, consisting of stock on such farm, but such property was assessed on the last preceding assessment roll of the town of Stephentown to his father.

Annexed to said answer is also an affidavit of Joseph E. Provost in which he avers that he is the father of Albert E. Provost, and that he has heard read the affidavit of said Albert, and that the facts stated in such affidavit are in all respects true.

The appellant, Russell, in his reply to the answer herein, alleges that such farm and personal property are assessed for all taxes, including highway and school taxes, to said Joseph E. Provost; that he further alleges to the best of his information and belief, that the direction of work upon such farm — the purchase of supplies therefor — the hiring and paying of farm hands employed thereon, have been done by Joseph E. Provost, and that he is respon-

sible for all accounts rendered for said purposes; that persons having business in any way materially connected with such farm transact the same with Joseph E. Provost, and that it has never been evident in any way or manner that said Joseph E. Provost is other than what he has been generally deemed to be, namely, the owner, manager and director of such farm, and of the work pertaining thereto.

In support of the contention on the part of the appellants, there is annexed to the reply the affidavit of George H. Carpenter, in which he states that he is roadmaster in that part of school district 6, Stephentown, in which is situated the farm of Joseph E. Provost and the highways bounding the same; that the road tax assessed is so assessed to Joseph E. Provost, and notice of warning requiring work upon such highway is served at his residence, and he appears with his teams and directs the work of such teams; that it has never been brought to his (Carpenter's) notice in any way that Albert E. Provost has any control or voice in the direction of said farm matters further than might be in the case of a trusted employee or grown-up son. Also, the affidavit of appellant Joseph P. Russell, in which he states that in the summer of 1896 he exchanged work with Joseph E. Provost in harvest time, and the arrangements for such exchange were made with Joseph E. Provost, and it did not come to his (Russell's) notice or understanding that Albert E. Provost was in any way connected with the control or management of the farm. Also, the affidavit of Henry A. Wylie, in which he states that he was hired by Joseph E. Provost to work on his farm and was paid therefor in ice by said Provost, and that to all external appearances the work of the farm was carried on and directed by said Provost. Also, the respective affidavits of George N. Southard and Loren M. Decker, in which each of them respectively states that he was employed by Joseph E. Provost to work on his farm and performed such work and was paid therefor by said Provost; that to all appearances the work of the farm was directed and carried on by said Provost. To such reply of the appellants the respondent has filed a rejoinder, consisting of the respective affidavits of Joseph E. and Albert E. Provost and the affidavit of one Elmer H. Thompson. Albert E. Provost in his affidavit states that he does not reside with his father, but has a family of his own, and occupies one part of the house on the farm, his father occupying the other part; that since the spring of 1896 he has worked said farm as stated in his former affidavit; that under his contract with his father relative to the working of the farm, he was to board the needed help hired on the farm, and has done so in all cases but one; that he personally hired George Southard to work at threshing and paid him; that Loren M. Decker worked on the farm but half a day since April 1, 1896, and was paid by him (Albert E.) personally for such work; that he and Henry A. Wylie exchanged work in threshing, and that there was a balance in favor of Wylie which was paid to him by permitting him to cut ice on a pond on the farm, permission to do so being given by Joseph E. Provost at the request of his son Albert E.; that in 1896 he exchanged work with the appellant Russell, personally working for Russell, and in return Rus-

sell, having been spoken to by Joseph E. Provost at the request of Albert E., worked at harvest upon the farm; that Carpenter, as overseer of highways, notified the deponent personally to work on the roads, and that deponent with his men and team worked out one-half of the highway tax assessed to his father Joseph E. Provost, and that his father worked out the other half; that his father by the contract is not obliged to work on said farm, but does so of his own choice when he pleases; and he consults with his father in regard to the conduct of the farm, and his father often directs how the work shall go on; that his father very often acts as his agent in the business connected with, and the carrying on of, said farm; that the services rendered by him on said farm are rendered for himself and that he does not in any way work for his father for hire.

Joseph E. Provost, in his affidavit, states that he has read the affidavit of Albert E. Provost, and that the facts, etc., stated therein are in all respects true. He also repeats the statements contained in his former affidavit relative to renting his said farm to his son Albert E.

There is an absence of proof as to whether the contract relative to the farm, as claimed by J. E. and A. E. Provost, was oral or written. It seems to be claimed that such contract became operative on April 1, 1896, but it is not shown for what term of time it is to continue. Assuming, for the purpose of argument only, that such contract was for the lease of the farm, if the leasing was for a longer period than one year, under the statute of frauds, it was void unless reduced to writing and subscribed by the party making the lease.

Albert E. Provost claims that on August 2, 1898, he being then a citizen of the United States, 21 years of age and upwards, and a resident of school district 6, Stephentown, Rensselaer county, for a period of thirty days next preceding such meeting; and then having real property in said district subject to taxation for school purposes, he was a qualified voter in said district, and entitled to vote at such annual meeting. He further claims that the real property hired by him is a certain farm situated in the district owned by his father, and that under a contract or agreement between him and his father, for the rent thereof he pays and yields to his father one-half of the produce of such farm, and pays one-half of all taxes assessed on such farm.

I am of the opinion that under the decisions of the courts of this State, the relation of landlord and tenant in any form, was not created by the contract or agreement itself, claimed to have been made relative to said farm between Albert E. Provost and his father, or in consequence of any occupancy of the farm under it by Albert E. Provost; that under such contract or agreement the relations created between the parties thereto was that of master and servant. (See Putnam v. Wise, 1 Hill 234; Taylor v. Bradley, 39 N. Y. 129; Reynolds v. Reynolds, 48 Hun 142; Unglish v. Marvin, 128 N. Y. 380.)

I am clearly of opinion that the contract or agreement alleged to have been entered into by the Provosts did not amount to a technical lease; that the relation of landlord and tenant is not created and the portion of the crops

reserved to the father is not rent, but compensation for the use of the land, while the other portion is compensation for the occupier, Albert E. Provost, for his work, labor and services, etc.; and that the legal possession of the farm is in the owner, and the two Provosts are tenants in common of the crop raised.

It appears, from the proofs herein, that at such annual school meeting in the final ballot taken for trustee, the whole number of votes cast was 7, of which John Roach received 4 and Frank Gavett 3, and that Albert E. Provost voted for John Roach.

I decide:

That Albert E. Provost was not, on August 2, 1898, a qualified voter in said school district, and hence his ballot for John Roach for trustee was an illegal ballot. Such illegal ballot must be deducted from the total ballots cast for trustee, which leave 6 legal ballots cast, a majority of which would be 4. That such illegal ballot must be deducted from the 4 cast for Roach, leaving but 3 legal ballots cast for him, and the ballot resulted in a tie. That no person having received a majority of the legal votes for trustee, John Roach was not legally elected trustee and the meeting failed to elect a trustee. That such annual meeting having adjourned without day, without electing a trustee for the district for the school year of 1898–99 under the provisions of the Consolidated School Law of 1894, section 24 of article 3, title 7, providing that every district officer shall hold his office unless removed during his term of office, until his successor shall be elected or appointed, the trustee of such school district for the school year of 1897–98 holds over, and that there is no vacancy in the office of trustee of such district, which a meeting of the district would have power to fill.

The appeal herein is sustained.

5334

In the matter of the appeal of William F. Allen from the proceedings of the annual meeting of school district no. 4, Scio, Allegany county.

Where the arrangement between father and son relative to the occupancy of real estate owned by the father but the transaction can not be regarded as constituting a technical lease but the relation created thereby is that of master and servant instead of landlord and tenant the son is not a qualified voter.

Decided September 13, 1907

Draper, *Commissioner*

The vote for trustee at the annual meeting of district no. 4, Scio, Allegany county, held on August 6, 1907, resulted in 5 ballots being cast for John Culbert and 4 for J. F. Dunnigan. Mr Culbert was declared elected. It is alleged in the moving papers that William Coyle and Philip Coyle each voted for said Culbert and that neither of such persons was legally qualified to vote at such

meeting. S. E. Smith, C. S. Stonham, J. F. Dunnigan and William Merry all swear that they are legal voters in such district, that they were at the annual meeting held in such district August 6, 1907, and that they voted for said J. F. Dunnigan for the office of trustee. Since Dunnigan received only 4 votes and since the 4 voters above named swear they voted for Dunnigan it must be held, in the absence of evidence to the contrary, that all the other voters voted for Culbert.

It appears that William Coyle and Philip Coyle are young men living with their father and working their father's farm on shares. They have no written lease of the property. They swear that they are entitled to a portion of the produce and proceeds from said farm and that their father receives a portion of the proceeds of said farm as rental therefor. Respondent alleges that this claim establishes the relation of landlord and tenant between the father and the sons and that the sons are therefore renters of real property and legal voters of the school district. This contention is not sound. Under these conditions the relation of master and servant is established and not the relation of landlord and tenant. The transaction can not be regarded as constituting a technical lease (see 128 N. Y. 380 and cases therein cited). It must therefore be held that the two Coyles were not legal voters and that by voting at the meeting in question a result was reached which was different from that which would have been reached had they not voted.

The appeal herein is sustained.

It is ordered, That the action of the annual meeting of school district no. 4, town of Scio, Allegany county, held on the 6th day of August 1907, in electing John Culbert trustee, be, and the same hereby is, vacated.

It is also ordered, That the clerk of said district no. 4, Scio, shall without unnecessary delay call a special meeting of the district for the purpose of electing a trustee for the remainder of the current school year.

3781

In the matter of the appeal of Harvey C. Gott v. Christopher Wheeler, trustee of school district no. 6, of the town of Austerlitz, county of Columbia.

Ownership of personal property which does not appear on the assessment rolls not sufficient ground to qualify a voter at school meetings.

The office of trustee, held by a person who owns personal property which has not been taxed and possessed no other qualification for a voter, declared vacant.

Decided April 16, 1889

Draper, *Superintendent*

This is an appeal by a resident of district no. 6, of the town of Austerlitz, county of Columbia, versus the trustee of said district, who was chosen at the annual meeting, on the ground that since such election, and at the time of taking

the appeal, it has been discovered that the respondent is ineligible to hold the office of trustee, not possessing any of the qualifications of a voter at school meetings.

The respondent answers and alleges as a qualification for the office, that he is liable to taxation for personal property to the amount of $200, which fact is well known to the appellant.

As the liability to taxation for personal property does not qualify a person, the statute requiring that such person shall have been assessed for over fifty dollars of personal property in order to qualify him to vote, I must sustain the appeal and declare the office of trustee vacant. The district clerk is hereby directed to forthwith call a special meeting of the inhabitants of the district to be held within fifteen days from this date to select a person to fill the vacancy.

4373

In the matter of the appeal of Silas B. Tarbell from proceedings of annual school meeting held on August 6, 1895, in district no. 2, town of Groton, Tompkins county, in the election of trustee.

Any person who is a citizen of the United States, 21 years of age, and who has resided in the school district for a period of thirty days next preceding any annual or special meeting held therein, and who hires any real property in said school district liable to taxation for school purposes, is a qualified voter of said district whether he or she pays the rent of said premises so hired in money or labor, and as such qualified voter is eligible to hold any school district office, provided he or she can read and write.

Decided September 27, 1895

Skinner, *Superintendent*

At the annual school meeting held on August 6, 1895, in district no. 2, town of Groton, Tompkins county, the same was duly organized and two inspectors of election chosen; that Albert Gould and E. A. Fish were candidates for the office of trustee of said district; that three ballots were had for trustee, two of which resulted in no choice, and on the third ballot, 33 votes were cast, of which Albert Gould received 17 and E. A. Fish 16.

On August 26, 1895, the above-named appellant filed in this Department an appeal or petition asking that said Albert Gould be declared ineligible to hold said office of trustee and that he be removed from office.

The grounds upon which the petitioner asks to have said Gould declared ineligible to hold said office, as alleged in said petition is that said Gould is not a qualified voter of said district, as he "leases no real estate for a money rent"; that he resides on a farm situate in said district, owned by one Moe and works the farm upon shares.

Any person who is a citizen of the United States, 21 years of age and who has resided in a school district for a period of thirty days next preceding any annual or special meeting held therein, and who hires any real property in

said school district, liable to taxation for school purposes, is a qualified voter of said district whether he or she pay the rent of said premises so hired in money or labor.

The petitioner alleges that said Albert Gould did not receive a majority of the votes cast on said ballot for trustee, but that upon said ballot a Mrs Malley and a Miss Malley each voted for said Gould for trustee and that neither of said persons was a qualified voter of said district.

It appears from the papers presented herein that neither Mrs Malley nor Miss Malley was challenged at said meeting, but voted at each of said three ballots for trustee unchallenged. A party knowing a person to be unqualified and permitting such person to vote without challenge, will not be allowed to object to the proceedings of the meeting because such unqualified person participated in them.

Where a petition or appeal is made for the removal of an officer upon the ground of illegal votes having been cast, it is incumbent upon the moving party not only to allege the illegal voting or the disqualification of certain persons, but to show by evidence the lack of qualifications in such terms as necessarily to exclude every presumption that the voter or voters could be qualified under the provisions of the school law. This the petitioner herein has failed to do.

I find and decide that Albert Gould, at the time of the annual meeting held on August 6, 1895, in said district no. 2, town of Groton, Tompkins county, was a qualified voter of said district and as such eligible to hold the office of trustee of such district; that at said annual meeting said Albert Gould was duly and legally elected as trustee of said district.

The appeal and petition herein are dismissed.

4498

In the matter of the appeal of Cyrus Cudney v. Michael McDermott as trustee of school district no. 4, town of Olive, Ulster county.

When at an annual school meeting in any school district a resident of the district, but not a citizen of the United States, is chosen to any district office, such person is not a qualified voter of the district and is not eligible to hold any district office.

Decided October 23, 1896

F. Arthur Westbrook, attorney for appellant

Skinner, *Superintendent*

The appellant in the above-entitled matter appeals from the election of Michael McDermott as trustee of school district no. 4, town of Olive, Ulster county, at the annual school meeting held in said district on August 4, 1896, upon the ground that said McDermott was not a qualified voter of said district on said date, not then being a citizen of the United States, hence, not eligible to hold the office of trustee under the provisions of the school law.

The appellant alleges in his appeal that said McDermott did not become a citizen of the United States until September 7, 1896.

The appeal herein was not brought until October 13, 1896, but the appellant alleges he did not know of the fact that McDermott was not a citizen of the United States until August 14, 1896, and that since that date two appeals have been sent to this Department, both of which were returned as not being in conformity with the rules of this Department.

The respondent McDermott has filed an answer to said appeal in which he admits that he did not become a citizen of the United States until September 7, 1896. He alleges that the appellant knew by general report, if not as a fact, before August 14, 1896, that he (McDermott) was not such a citizen, and asks as the appellant has not been injured in any of his rights by any act of the respondent as trustee, that the appeal be dismissed.

Under the provisions of section 11, article 1, title 7, of the Consolidated School Law of 1894, a person to be a qualified voter in any school district must be of full age, a resident of the school district and must have resided therein for a period of thirty days next preceding any annual or special meeting held therein, and a citizen of the United States, and must possess one or more of the other qualifications mentioned in said sections.

In section 23, article 3, title 7 of said Consolidated School Law it is enacted that "every district officer must be a resident of his school district, and qualified to vote at its meetings."

It is conceded by the respondent McDermott, that on August 4, 1896, he was not a citizen of the United States. Under the school law he was not a qualified voter of said school district no. 4, Olive, Ulster county, and not eligible to hold any district office.

The appeal herein is sustained.

It is ordered, That the election of Michael McDermott as trustee of school district no. 4, town of Olive, Ulster county, at the annual meeting held on August 4, 1896, be, and the same is, hereby vacated and set aside as illegal and void.

It is further ordered, That the clerk of school district no. 4, town of Olive, Ulster county, without unnecessary delay, call a special meeting of the inhabitants of said district qualified to vote at school meetings therein, for the purpose of electing a trustee of said district for the present school year.

3664

In the matter of the appeal of Charles B. Gregory from the proceedings of the annual school meeting, held in district no. 9, town of Carmel, Putnam county.

A chairman of a district meeting has no right to determine a voter's qualification.

The statute prescribes that when a challenge is interposed, it is the duty of the presiding officer to require the person offering to vote to make a certain declaration.

If the declaration is made the vote must be accepted. If the declaration is not made the vote must be rejected.

When a ballot has been deposited, neither the chairman nor any other person has a right to withdraw the ballot, even though it appear that an illegal vote has been cast.

The law provides the penalty for making either a false declaration or the casting of an illegal vote.

Decided January 27, 1888

Draper, *Superintendent*

The appellant herein alleges that at the annual school meeting held in district no. 9, town of Carmel, Putnam county, August 30th last, two persons when offering their votes were challenged and that the chairman disregarded the challenge and permitted the persons challenged to vote without administering the oath and requiring the declaration required by statute. That the right of one person who had voted, to vote, was questioned and the chairman took from the votes cast, one ballot. That thereupon the vote was announced as follows: 13 votes for James Curry for trustee and 12 votes for Elbert Sloat for trustee and the chairman announced thereupon the election of James Curry as trustee.

It is alleged that the two persons challenged as aforesaid, were partisans of James Curry, and the person whose right to vote was questioned after depositing his ballot was a supporter of Elbert Sloat.

James Curry, as respondent, answers the appeal and supplies evidence to establish the right of the persons challenged to vote and that the person for whom a ballot was withdrawn was not a legal voter.

The only question in this case which it is necessary for me to consider is the action of the chairman and his action must be governed by the following rulings:

1 A chairman at a district meeting has no right to determine a voter's qualification. The statute prescribes that when a challenge is interposed, it is the duty of the presiding officer to require the person offering to vote to make the following declaration:

"I do declare and affirm that I am an actual resident of this school district, and that I am qualified to vote at this meeting."

When this declaration is made, the person must be permitted to vote. If he refuses, his vote must be rejected.

2 When a vote has been cast, neither the chairman, nor any other person has a right to withdraw a ballot, even though it is made to appear that an illegal vote has been cast.

The law provides a penalty for making either a false declaration or casting of an illegal ballot.

From the pleadings, it appears to me that the ballot taken from the votes cast was a ballot for Elbert Sloat for trustee. Had this ballot been counted the result would have been a tie and no election.

I have reached the conclusion that there was no election and that a vacancy exists in the office of trustee.

I therefore order and direct the remaining trustee to order a special meeting to choose a trustee for the unexpired term, to be held within twenty days from the date of this decision.

4007

In the matter of the appeal of James McGiffen v. Joseph H. Stevens of school district no. 1, of the town of Oswegatchie, county of St Lawrence.

Upon the challenge of a person offering to vote, it is the duty of the chairman of the meeting to administer the oath prescribed by statute, and if the oath is taken by the person the vote must be received.

It is not the province of the chairman to determine who are and who are not legal voters.

On appeal, it appearing that respondent was the choice of the majority who voted for trustee at the annual meeting, the appeal is overruled.

Decided September 19, 1891

Draper, *Superintendent*

At the annual school district meeting held in district no. 1, Oswegatchie, St Lawrence county, August 4, 1891, a dispute arose over the election of trustee. The appellant alleges that one Henry F. Niven was chosen; the respondent claims that he himself was chosen. The material facts as I find them from the evidence presented, are as follows:

The meeting was properly organized with the respondent in the chair. Nine persons claiming the right to vote were present. The respondent was nominated for trustee, whereupon respondent as chairman, declined to put the motion, but directed the clerk to do so, which, after some confusion, the clerk did, calling for a vote by acclamation. When the vote had been taken by ayes and noes, the chairman declared himself elected, but the clerk declared the result to be, for respondent 3, against 5, and so announced and recorded the result in the minutes. Thereupon, Henry F. Niven was nominated for trustee and upon the chairman declining to put the vote, the clerk did, when 6 votes were cast for the motion and none against it, and Niven was declared elected. During the wrangle which naturally occurred, the right of several to vote was questioned, and the chairman was requested to put the oath to the questioned voters, which he did not do, but assumed to declare who were and who were not voters.

The respondent does not, in his answer, fairly or squarely meet the facts as found, except that he alleges that there were three votes against his election, one of which he decided was not given by a legal voter. He also alleges that, immediately after his (alleged) election, Henry F. Niven was chosen district clerk, and has not declined to serve, and can not therefore hold the office of trustee. The respondent does not meet the issue, but would seek to retain the office upon the plea that his opponent is ineligible thereto.

The respondent, as chairman, assumed powers which he did not possess. After refusing to put a motion to a vote and directing the clerk to do so, he

should not have attempted to declare a result in his own favor, which at best was lost by the vote which was a tie.

If he or any other voter questioned the right of any other person to vote, a challenge should have been interposed and the oath administered by the chairman. If the person took the oath, his vote should have been received, otherwise rejected.

If such person voted illegally, he could be prosecuted both for perjury and for illegal voting, and if the result is affected by such vote, an appeal would be entertained. The right to vote at school meetings does not rest upon the chairman's declaration.

I believe the motion to choose respondent trustee was lost, and that the motion to elect Henry F. Niven trustee was carried.

I therefore sustain the appeal, and declare Henry F. Niven, and not the respondent herein, to have been elected trustee of school district no. 1, Oswegatchie, St Lawrence county, at the last annual meeting.

5429

In the matter of the appeal of Horace W. Provost from the proceedings and decisions of a special meeting of school district no. 6, Stephentown, Rensselaer county.

Effect of resignation. Where a person elected as trustee at an annual meeting resigns his office after an appeal has been brought from his election on the ground that he did not possess the necessary property qualifications, and thereafter a special meeting was called to fill the vacancy, such resignation is, in effect, an admission that he was not qualified to hold the office to which he was elected.

Resignation does not affect the validity of annual meeting. Where an appeal is brought from the election of trustee at an annual meeting, and it appears that illegal votes were cast for the candidate who was declared elected, and that if such votes had not been counted his competitor would have been legally elected, it must be held on appeal that the election was illegal, notwithstanding the subsequent resignation of the trustee who was declared elected.

Qualifications of voters. Where an assessment roll is not completed prior to the holding of the annual meeting, it can not be used to determine the property qualifications of voters at such meeting. The fact that a person who voted at such meeting was assessed on the assessment roll for the year in which the annual meeting was held, for personal property valued at $55 does not qualify such person as an elector if his name was not included on the assessment roll of the preceding year, which was the only roll completed at the time of holding such annual meeting.

Decided December 28, 1909

C. E. Bennett, attorney for appellant
D. E. Miller, attorney for respondent

Draper, *Commissioner*

This appeal involves the validity of the election of a trustee in school district no. 6, town of Stephentown, county of Rensselaer. The appellant, Horace

W. Provost, has in fact brought two appeals, one from the election of the respondent, Burton P. Hatch, as trustee at the annual meeting held August 3, 1909, and another from a subsequent election of the said Hatch at a special meeting called to fill a vacancy in the office of trustee caused by Mr Hatch's resignation. It appears that the appellant in his first appeal, which was received at this Department August 27, 1909, insisted that Mr Hatch was not a qualified elector of the district and was not, therefore, qualified to hold the office of trustee, and that he did not receive a majority of the votes of the qualified electors present and voting at the meeting. Mr Hatch did not answer the petition on this appeal, but submitted his resignation to the school commissioner and the same was accepted. He notified the Department of his resignation in writing, and stated that the reason for his resignation was that he wished to avoid the trouble and expense of answering the petition of the appellant. Subsequent to the acceptance and filing of his resignation he went before the town assessors at their meeting for the hearing of grievances, and asked that his personal property assessment be raised from fifty to fifty-five dollars, for the apparent purpose of qualifying him to hold the office of trustee. This must be deemed to be an admission that he was not qualified to hold the office.

It further appears that, upon the acceptance of such resignation the district clerk called a special meeting to fill the vacancy caused thereby, which was held September 10, 1909. Mr Hatch was again presented as a candidate for trustee, apparently upon the assumption that he had become qualified to hold such office since the annual meeting. He was declared elected trustee and now holds the office. The legality of this meeting depends upon whether or not the respondent Hatch was legally elected as trustee at the annual meeting, independently of the question of his eligibility.

The appeal from the action of the annual meeting is pending and clearly raises this question. If it is decided that persons who were not qualified as electors, voted for Mr Hatch at the annual meeting, their votes must be thrown out, and if there was a sufficient number of these illegal votes to place him in the minority, it must be held that his opponent was elected. In this event the resignation of the respondent Hatch was ineffectual to create a vacancy, and there was no occasion for the holding of a special meeting.

It is alleged by the appellant that 33 votes were cast for candidates for the office of trustee at the annual meeting, of which the respondent Hatch received 18 and Charles H. Pease received 15. Four of the 18 voters who voted for Hatch were challenged by the appellant, but each of them made the declaration required by law and their votes were received. The four persons so challenged were Burton P. Hatch, Nellie Hatch, Elizabeth Russell and Marguerite Russell, and the petition states that neither of them had any of the qualifications prescribed by statute for qualified electors at school meetings. For the purpose of determining whether these persons were legal voters it is proper to refer to all the affidavits submitted on both appeals. It seems established thereby that Nellie Hatch, Elizabeth Russell and Marguerite Russell depended for their right to vote

at the annual meeting upon the assessment made against them on the town assessment roll of 1909 in the amount of $50. This roll was not completed at the date of the annual meeting, since the day appointed by the assessors for the hearing of grievances was August 18th, some two weeks after the annual meeting. It is alleged by the appellant that these persons were not assessed on the town assessment roll of 1908, which was the last completed assessment roll prior to the annual meeting of 1909, and must determine the qualifications of these voters who claimed the right to vote because of the ownership of personal property, "assessed on the last preceding assessment roll of the town, exceeding $50 in value exclusive of such as is exempt from execution" (Education Law, § 93, subd. 3). These voters were challenged at the special meeting held September 10th, and in the petition on the appeal from the actions of this meeting, the same question was raised as to their qualification. The respondent based his claim that they were qualified upon the fact that they were each assessed for personal property valued at $55 on the assessment roll of 1909. He does not claim that they had any of the other necessary qualifications. Nellie Hatch, Elizabeth Russell and Marguerite Russell were not assessed for personal property on the town assessment roll of 1908, and they were not entitled to vote at the annual meeting of 1909, on the strength of their assessment on the assessment roll of 1909. Their votes must therefore be thrown out, which reduces the number of votes for Burton P. Hatch to 15.

The vote of Burton P. Hatch was challenged at the annual meeting. It was insisted on the original appeal that he could not legally hold the office of trustee because he was not a qualified elector of the district. As already stated he practically admitted such disqualification by resigning the office to which he was declared elected, and subsequently qualified by requesting the town assessors to assess him for personal property of the value of $55. It is alleged that he voted for himself for trustee at the annual meeting, as he had a right to do if he was a qualified elector. But not being a qualified elector his vote must be deducted from the total number of votes cast for him. Other voters are named in the original petition who are claimed to be without the necessary qualifications. It does not appear that these voters were challenged by the appellant at the annual meeting. The question of the legality of their votes will not therefore be considered.

After deducting the four illegal votes cast at the annual meeting as above indicated, the result of the vote for trustee at such meeting would be for Charles H. Pease, 15, and for Burton P. Hatch, 14. Charles H. Pease was therefore the legally elected trustee of this district. The resignation of Burton P. Hatch did not create a vacancy in the office of trustee so as to permit the calling of a special district meeting for the purpose of filling such vacancy. The election of Burton P. Hatch to fill such vacancy at the special meeting held September 10, 1909, was illegal. But pending the determination of this appeal the official acts of said Hatch both prior to his resignation after the annual meeting, and subsequent to his alleged election at the special meeting, are valid and binding upon the district.

The appeal herein is sustained.

It is hereby ordered, That on and after the date of the filing of this decision in the office of the district clerk of school district no. 6, town of Stephentown, county of Rensselaer, Charles H. Pease be declared to be the duly elected trustee of such district, and that Burton P. Hatch shall forthwith deliver to the said Pease all the books, papers, money and other property belonging to said district, in his possession or under his control at said date.

It is hereby further ordered, That the official acts of the said Burton P. Hatch performed by him as trustee of said district since the annual meeting held August 3, 1909, and prior to the acceptance of his resignation, and also the official acts performed by him as such trustee subsequent to the special meeting held in said district September 10, 1909, and prior to the date of the filing of this decision in the office of the district clerk of said district, are hereby declared to be valid and binding upon said district, so far as they may have been affected by the illegality of his election as such trustee.

5418

In the matter of the appeal of Abner Curtis and Charles R. Freeborn from the proceedings of annual school meeting in district no. 7, Middleburg and Fulton, Schoharie county.

Disqualification of alleged illegal voter must be shown. In the absence of allegations of material facts tending to show the disqualification of an alleged illegal voter, it must be held that such voter was qualified.

Adjournment of annual meeting. The vote for trustee at an annual meeting resulted in a tie. The respondent who was a candidate for the office, alleges that he made a motion directing that a special meeting be called for a specified date; the appellants allege that his motion was a motion to adjourn; neither party produced the minutes of the meeting; held that the presumption is that the meeting voted to adjourn, since it had such power, but had no power to call a special meeting.

Decided October 18, 1909

Draper, *Commissioner*

The appellants appeal from the act of the respondent, Charles H. Wilson, in retaining in the office of trustee of school district no. 7, towns of Middleburg and Fulton, county of Schoharie, and in refusing to deliver to his successor in office the books, papers and property of the district. The one question to be determined is whether the appellant, Abner Curtis, has been legally elected trustee of such district, thus terminating the office of his predecessor, Charles H. Wilson. At the annual meeting, held August 3d, there were 14 votes cast for the office of trustee, 7 of which were for Curtis and 7 for Wilson. The respondent alleges in his answer that one of the persons voting for Curtis was not a qualified elector of the district, and that he, the respondent, was legally elected trustee at the annual meeting. The voter was challenged but he swore that he was a qualified elector, and his vote was received. The respondent does not name the

alleged illegal voter, and does not state the facts upon which he bases his conclusions that such voter was disqualified. It is obviously improper to consider an objection to the qualifications of a voter in the absence of allegations of material facts tending to show the disqualification of such voter. It must therefore be held that the vote for trustee at the annual meeting was a tie.

The annual meeting proceeded to elect the other district officers. A second ballot for the office of trustee was not taken. It was evidently determined by the voters present that the question of the election of a trustee should be decided at a subsequent meeting. The appellants both swear that the respondent himself made a motion to adjourn the meeting to August 10th and that such motion was carried. The respondent claims that his motion was that a special meeting be called in said district for August 10th. He insists in his answer that the annual meeting did not adjourn to August 10th, but that it directed that a special meeting be called for that date and that since a special meeting was not called and the qualified electors were not notified to attend as provided in the Education Law, the meeting held on that day was not legal. Neither party produces the minutes of the annual meeting to show what this motion was.

A considerable number of the qualified electors of the district met at the schoolhouse on the evening of August 10th in accordance with the alleged motion to adjourn. The respondent, who was holding over as trustee and had the key to the schoolhouse, did not attend, and refused to permit the building to be opened. The qualified electors present at the schoolhouse secured an entrance therein and organized a meeting and elected the appellant, Abner Curtis, as trustee.

If this meeting was an adjourned annual meeting it was legally held and the trustee elected thereat was legally elected. An annual meeting may adjourn from time to time. Such a meeting has no power to call a special meeting to be held at a specified time. The presumption is that the annual meeting sought to do what it had power to do. The respondent Wilson made the motion. He was a candidate for the office of trustee and because of a tie there was no election. It was his apparent desire that the question of the election of his successor be postponed to the date named by him in his motion. The only way in which this could lawfully be done was by a motion to adjourn. It must be assumed that this was the intent of the meeting, and where there is conflict as to the form and contents of a motion adopted at a district meeting, the intent of the meeting as ascertained from apparent facts should control its meaning. Whatever may have been the form of the motion, it seems clear that the motion was for an adjournment of the annual meeting to the date therein specified and such motion must be so construed.

The adjourned annual meeting held August 10th was a legal meeting and the trustee elected at such meeting is the legal trustee of the district. This appeal is therefore sustained.

It is ordered, That the adjourned annual meeting held in district no. 7, towns of Middleburg and Fulton, county of Schoharie, on the 10th day of August 1909, and the election of Abner Curtis at such meeting as trustee of such district, be and the same hereby are ratified and declared to be legal.

It is hereby further ordered, That on and after the filing of this decision, the said Abner Curtis shall be the trustee of such district and that Charles H. Wilson shall forthwith surrender and deliver to the said Curtis all books, papers and property, in his possession belonging to such district.

4257

In the matter of the appeal of John C. L. Hamilton v. the proceedings of an annual school meeting held on August 2, 1892, in district no. 9, town of Greenburgh, Westchester county; and from acts, proceedings and decisions of Gustave A. T. Goebel and George L. Miles, as trustees of said district.

Where a clergyman, who is the pastor of a church, residing in a dwelling owned by such church, he alleging that he pays rent for such house, such house being exempt from taxation for school purposes in the school district in which the same is located, and such clergyman not owning any real estate subject to taxation in the district for school purposes or hiring any other real estate subject to such taxation, is not a qualified voter in the district, and hence is not eligible to hold the office of trustee. Where it is established to the satisfaction of the Superintendent of Public Instruction that trustees of a school district have been guilty of any wilful violation or neglect of duty, under the school law, such trustees should be removed from office.

Decided July 13, 1894

W. H. H. Ely, attorney for appellant
E. T. Lovatt, attorney for respondents

Crooker, *Superintendent*

This appeal is brought from the proceedings of an annual meeting held in school district no. 9, town of Greenburgh, Westchester county, in the election of Gustave A. T. Goebel as a trustee of said district, and asks for the removal of said Goebel and one Miles, as trustees of said district, for wilful violation and neglect of duty.

The principal grounds for removal of said Goebel and Miles, as alleged in said appeal, are that said Goebel at the time of his election to the office of trustee and the time of bringing this appeal, was not eligible to the office of trustee by reason of not being a qualified voter in said school district; that said Goebel and Miles, without authority of law, drew an order upon the collector of said district for $75 to pay a lawyer as a retainer and for services in defending them in a suit brought against them in the courts; that said Goebel and Miles ignored the appointment by the school commissioner of the commissioner district in which said school district was situate, of one Heady, as a trustee of said district, to fill a vacancy in said office caused by the resignation of one Dressler, and did not notify said Heady of the meetings of said board of trustees and refused to permit said Heady or the appellant to examine the records of the proceedings of said board.

The allegations in the appeal are supported by the affidavits of the appellant and others.

Messrs Goebel and Miles answer the appeal, alleging that said Goebel was, at the time of his election as trustee and when this appeal was brought, eligible to hold said office. It admits the drawing of the order upon the collector of $75 in payment of the retainer and services of an attorney in the defense of the action brought against them in the court, and the offer to restore the money, and puts in issue some of the allegations in such appeal relative to their proceedings as a board of trustees, and the ignoring of Mr Heady as a member of said board. The allegations in the answer are supported by the affidavits of Goebel, Miles and others. A large number of affidavits have been presented by Goebel and Miles as to matters not relevant to the issue in this appeal.

From a careful examination and consideration of the papers presented it appears that school district no. 9, town of Greenburgh, Westchester county, is a common school district organized under the general school law of the State, and having a board consisting of three trustees; that at the annual school meeting in said district held in August 1892, one Gustave A. T. Goebel was elected a trustee for said district; that said Goebel was at the time of such election, and at the time the appeal herein was brought, a clergyman and the pastor of the Greenburgh Reformed Church at Elmsford in the town of Greenburgh, Westchester county, and within the boundaries of said school district no. 9; that said church or society owned a church edifice and a parsonage; that said Goebel resided with his family in said parsonage; that in the contract with said Goebel, relative to his salary as such pastor, the use or rental by him of said parsonage was taken and valued at the sum of $200 per annum; that said Goebel has not, at least for the three years passed, been assessed upon the assessment rolls of the town of Greenburgh, nor upon the assessment rolls and tax list of said school district for either personal property or real estate; that said Goebel has not, for the three years last past, owned any real estate situate in said school district liable to taxation for school purposes, nor has he been within said time the parent of a child or children of school age, nor not being the parent of a child or children of school age has he had residing with him such child or children; that the said Greenburgh Reformed Church was not in the year 1892, nor since, assessed upon the assessment rolls of the town of Greenburgh for its parsonage, nor for any other property, real or personal, nor has it been assessed for any property, real or personal, upon the tax lists and assessments made and issued by the trustees of said school district no. 9 for the past three years; that the annual school meeting of said district held in August 1893, elected the respondent, George L.Miles. as trustee of said district and one G. A. Arnoux, district clerk and collector.

It also appears that at some time after said annual meeting in August 1893, and before February 15, 1894, John Dressler, a trustee of said district, resigned, but no action was taken by said Goebel and Miles, his associates, to supply said vacancy; that said district had voted to build a new schoolhouse at a cost of $8000, said sum to be raised in instalments, and bonds of the district for said

sum to be issued; that said Goebel and Miles on or about February 15, 1894, published a notice in the Tarrytown Argus that they would on February 28, 1894, receive bids for the purchase of said bonds, and on February 16, 1894, also published a notice that they would, until March 1, 1894, noon, receive bids at the store of said Miles in Elmsford, where plans and specifications may be had for the erection of a schoolhouse in said district; that on February 21, 1894, the vacancy in the office of a trustee of said district, caused by the resignation of said Dressler, not having been supplied by a district meeting within one month after such vacancy occurred. School Commissioner Farrington M. Thompson of the second commissioner district of Westchester county, in which commissioner district said school district is situate, appointed one William E. Heady as trustee of said school district to fill the vacancy created by the resignation of said Dressler, and such appointment was immediately filed with G. A. Arnoux who was elected clerk of said district at the annual meeting of said district in August 1893, and said Goebel and Miles were personally notified of such appointment; that on March 3, 1894, said Goebel and Miles sent a written communication to said Heady in which they stated that they had received from Heady a communication that he (Heady) had been appointed trustee by Commissioner Thompson, and notified Heady that a special meeting of the board of trustees of the district would be held at the schoolhouse on Tuesday, March 13, 1894, at 4 p. m., at which time they proposed to award the contract for the school building, etc., and requested the personal attendance of Heady; that on said March 13, 1894, a meeting of said board of trustees of said district was held at which all three of said trustees were present; that at said meeting on March 13, 1894, the reading of the minutes of the meeting on March 1, 1894, of said Goebel and Miles was, by motion of said Goebel, dispensed with, and said trustee Heady was not permitted to inspect said minutes and said meeting was adjourned; that on or about March 13, 1894, an action was commenced in the Supreme Court by one Ollie A. Green against said Goebel, Miles and Heady as trustees of said school district no. 9, and the said Goebel and Miles, without any meeting of the voters of the school district or any meeting of the trustees of said district, and without any consultation with their associate Heady, employed counsel to defend them in said action, and drew an order upon the collector or treasurer of said district for the sum of $75 and received the money therefor, and paid the same to the counsel so employed by them.

Section 12 of title 7 of the Consolidated School Act of 1864, and the amendments thereof, prescribes who are entitled to vote at common school district meetings, and section 24 of title 7 of said act enacts that every district officer must be a resident of his district, and qualified to vote at its meetings. The respondent, Goebel, claims to have been a qualified voter in said district no. 9 at the time of his election in August 1892, and at the time this appeal was brought, and therefore eligible to hold the office of a trustee of such district, upon the ground that he hired real property in said district liable to taxation for school purposes. He was the pastor of the German Reformed Church in Elmsford in

said school district, and resided with his family in a dwelling house owned by such church. He alleges that he pays $200 per year rent for such house. The terms of the contract or agreement between Goebel and such church officers is not stated in the papers; but assuming for the purpose of argument that he pays rent for said house, it appears by the proofs presented herein, that such house and grounds are *not* liable to taxation for school purposes in said district. For three years and more said house and grounds have not been assessed or taxed upon the town assessment rolls of the town of Greenburgh, nor have they been assessed upon the tax lists and assessments made by the trustees of said school district for school purposes for the period of three years or more, and during a portion of the time said Goebel has been acting as one of the trustees of said district. Under the provisions of the seventh article of title 7 of the school law of 1864, section 66, trustees are required to assess all real estate within the boundaries of their district, not exempt by law from taxation, and if the assessors of the town have omitted any such real estate from the town rolls it is the duty of such trustees to assess it upon the district assessments. From the action and decision of the town assessors and the trustees of said district I must hold in this appeal that said house and land, occupied by said Goebel, are not liable to taxation for school purposes in such school district, and hence said Goebel was not a qualified voter in such school district and not eligible to hold any district office in such district.

Under the provisions of subdivision 4 of section 16 of title 7 of the school law of 1864 and its amendments, the inhabitants entitled to vote in each school district have power to choose one or three trustees as thereinafter provided, a district clerk, collector, etc., and so often as such offices become vacated, except as thereinafter provided. It is provided by section 30 of title 7 of said act, that in case of vacancy in the office of a trustee, and the vacancy is not supplied by a district meeting within one month thereafter the school commissioner of the commissioner district in which such school district is situate may appoint a suitable person to fill such vacancy. School district no. 9, Greenburgh, had three trustees. The district had voted to build a new schoolhouse at a cost of $8000, and the qualified voters of the district had a right to have a full board of trustees of their own selection to conduct the business of the district. It appears that a vacancy occurred in said board of trustees by the resignation of one Dressler. Although under section 48 of title 7 of said act of 1864, the two trustees remaining in said board possessed the powers and were subject to all the duties and liabilities of the three, the first act of Goebel and Miles should have been, after such a vacancy in said district, and it was their duty, to call a special meeting of the inhabitants of said district qualified to vote, to elect a trustee to fill such vacancy. Notwithstanding the fact of the important duties devolving upon the members of said board in the adoption of plans and specifications for the new schoolhouse, the execution of a contract for its construction, and the execution and sale of the bonds of the district, said Goebel and Miles, as such trustees, were guilty of a violation and neglect of duty in failing to call such

a meeting of said district to elect a trustee to fill such vacancy, and on February 15, 1894, the school commissioner of the commissioner district in which said school district is situated appointed Mr Heady as trustee to fill such vacancy. Said Goebel and Miles had personal knowledge of such appointment of Mr Heady as early as March 3, 1894; but it was not until March 13, 1894, that he attended any meeting of the board of trustees.

By subdivision 14 of section 16 or title 7 of the school act of 1864, a school district meeting has the power to vote a tax to pay the reasonable expenses incurred by district officers in defending suits or appeals brought against them for their official acts.

By section 7 of title 13 of said act, whenever the trustees of any school district *shall have been instructed by a resolution of the district* to defend any action brought against them, all their costs and reasonable expenses shall be a district charge and shall be levied by tax, and if the amount claimed by them shall be disputed it shall be adjusted by the county judge.

By section 8 of title 13, whenever such trustees shall have defended any such action *without any such resolution,* they shall present to any regular meeting of the district an account in writing of all the costs, etc., paid by them, and a majority of the voters may direct that the same be paid and the money therefor assessed against the district.

By section 9 of title 13, when said meeting shall refuse to allow such account, the trustees may give public notice that they will appeal to the county judge.

On March 13, 1894, an action was commenced in the Supreme Court against the three trustees of the district, and without any meeting of the district or of the board of trustees being called or held, the said Goebel and Miles, without any consultation with their associate trustee, Heady, employed counsel to defend them in said action, and drew an order on the collector of said district for $75, received the money and paid the same to counsel. This was a clear violation of duty on the part of said Goebel and Miles. In performing their duties a board of three trustees must meet as a board, and there was no meeting of the board to take action in relation to defending said action, and they could not make any contract in the employment of counsel that would bind the district. But had there been a legal meeting of the board and a legal employment of counsel, said Goebel and Miles, nor the three trustees together, had no legal right or authority to use any moneys belonging to the district to pay said counsel until a district meeting had authorized such payment. The moneys in the hand of the collector of said district were raised by tax for specific purposes, and said Goebel and Miles had no right to use said moneys for any purpose other than that for which it was raised.

Under the provisions of title 7 of the school act of 1864 and the amendments thereof, the qualified voters of school districts have the power to elect a district clerk and a district collector; that no person can hold two district offices, *and no trustee can hold the office of district clerk or collector;* that the district clerk must keep a record of the proceedings of all district meetings and is the clerk of the board of trustees of his district and should attend all meetings of the board and

keep a record of the proceedings of the board; that such records are the property of the district and open for inspection to any qualified voter of the district at all reasonable hours. When any vacancy occurs in the office of district clerk or collector it is the duty of the trustees of the district to supply such vacancy by appointing some qualified voter of the district to fill it.

It appears from the proofs presented in this appeal that at the annual meeting of the district held in August 1893, one C. A. Arnoux was elected district clerk. It further appears by the affidavits of Goebel and Miles that said Arnoux at some time resigned as such district clerk. There is no proof that said Goebel and Miles appointed any person as district clerk to fill such vacancy; but, on the contrary, it appears that said Goebel claimed to act as district clerk. In the letter of said Goebel and Miles to Mr Heady, under date of March 3, 1894, informing Mr Heady that the notification of his appointment as trustee had not come to them in the channel designated by law, etc., they state that they would be pleased to have him file his original appointment "with the clerk of our board, Mr Goebel," "there being no district clerk, the proper place for the filing of your official appointment is with the clerk of the board, Mr Goebel." The school law does not recognize any such officer as clerk of the board of trustees of a common school district other than the district clerk of the district, who is the lawful clerk of said board of trustees, and the school law *prohibits* a trustee from holding the office of a district clerk. Mr Heady sent notice of his appointment to the person who was elected district clerk, with whom the school law requires such notice to be filed. It is true that the school law provides that every appointment to fill a vacancy shall be filed by the commissioner or trustee in the office of the district clerk, who shall immediately give notice of the appointment to the person appointed; but an omission on the part of the commissioner to file such appointment would not invalidate such appointment. Mr Heady as trustee, the appellant herein, or any qualified voter of said district, had the right at all reasonable hours to inspect the records of the proceedings of said board of trustees of said district, and the refusal of said Goebel and Miles to permit such inspection of such minutes was a neglect and violation of duty on their part as trustees of said district. It was a neglect of duty on the part of Goebel and Miles when a vacancy occurred in the office of district clerk not to have immediately appointed some qualified voter of the district as district clerk.

Section 18 of title 1 of the school act of 1864 provides that wherever it shall be proven to the satisfaction of the Superintendent of Public Instruction that any school commissioner or other school officer has been guilty of any wilful violation or neglect of duty, said Superintendent may, by an order, remove such officer.

The courts of this State have held that "wilful" in said statute means "intentional," that is, that the school officer knew what his duty was and refused or neglected to perform it.

Messrs Goebel and Miles are intelligent men, Mr Goebel being a clergyman. It must be assumed that they were familiar with the school law of the State; that they, as trustees of their school district, were statutory officers, and that their

powers and duties and liabilities were clearly defined by such statutes, and it must be held that the violations and neglect of duty under the school law, upon their part as hereinbefore stated, were *wilful* and not the result of mere misapprehension or inadvertence on their part.

I do find and decide, That Gustave A. T. Goebel was not at the time of the annual meeting in school district no. 7, town of Greenburgh, Westchester county, held in August 1892, nor at the time the appeal herein was brought, nor is he now, a qualified voter in said district, and was not and is not eligible to hold the office of a trustee of said district.

That said Gustave A. T. Goebel and George L. Miles, as such trustees of said school district, are, and each of them is, guilty of wilful violation and neglect of duty.

That the appeal herein should be sustained.

Appeal sustained.

It is ordered, That said Gustave A. T. Goebel and George L. Miles be, and each of them is, hereby removed from the office of a trustee of school district no. 9, town of Greenburgh, Westchester county, for wilful violation and neglect of duty on their part, and on the part of each of them, as a trustee of said school district.

3300

Constitutionality of the act conferring upon women the right to vote at school meetings. Decided December 11, 1883

Ruggles, *Superintendent*

A more serious question is raised by the last ground of appeal, namely, as to the constitutionality of the statute conferring upon women the right to vote at school meetings. I am not aware that this question has been judicially passed upon by any of our courts; and I do not find that it has ever been brought in issue or decided on an appeal to the Superintendent of Public Instruction.

It is squarely an issue upon this appeal, and the result of the appeal must depend upon the decision of this point, inasmuch as, if all the 262 votes cast by women are rejected from the count, the majority for the resolutions would be changed into a minority. Bearing in mind that the power of the Legislature in the enactment of laws is supreme, except as it is restricted by constitutional limitations, let us look briefly into the alleged conflict between the acts of the Legislature and the organic law.

Article 2, section 1 of the State Constitution, so far as it affects the question, provides as follows:

"Every male citizen of the age of 21 years who shall have been a citizen for ten days and an inhabitant of this State one year next preceding an election, and for the last four months a resident of the county, and for the last thirty days a resident of the election district in which he may offer his vote, shall be entitled to vote at such election in the election district of which he shall, at the time, be a

resident, and not elsewhere, for all officers that now are or hereafter may be elective by the people, and upon all questions which may be submitted to the vote of the people." The courts have uniformly held that this article and similar articles in the constitutions of other states are to be taken as definitions of the qualifications of electors and limit the elective franchise to persons having the specified qualifications. (People v. Susan B. Anthony, 11 Blatch. 200; 9 Phil. (Pa.) 241; 53 Missouri 58.)

The act of the Legislature, chapter 9, laws of 1880, entitled "An act to declare women eligible as school trustees," provides as follows:

"No person shall be deemed to be ineligible to serve as any school officer, or to vote at any school meeting, by reason of sex, who has the other qualifications now required by law."

In 1881 another statute was passed on the same subject, chapter 492 of the laws of that year. This was in the shape of an amendment to section 12, article 1, title 7 of the Consolidated School Law of 1864. This article 1 is entitled "of school districts and neighborhood meetings, the voters and their powers generally," and section 12 of said article, as amended in 1881, was made to read as follows:

"Every person of full age residing in any neighborhood or school district and entitled to hold lands in this State, who owns or hires real property in such neighborhood, or school district liable to taxation for school purposes, and every resident of such neighborhood or district who is a citizen of the United States, above the age of 21 years, and who has permanently residing with him or her a child or children of school age, some one or more of whom shall have attended the district school for a period of at least eight weeks within one year preceding, and every such resident and citizen as aforesaid, who owns any personal property assessed on the last preceding assessment roll of the town, exceeding fifty dollars in value, exclusive of such as is exempt from execution, and no other, shall be entitled to vote at any school meeting held in such neighborhood or school district."

The material changes thus made consist in dropping out from the section the word "male," which before preceded the word "person," and also omitting a clause requiring the voter to be entitled to vote at town meetings of the town in which the district is situated.

With the exception of these changes and the substitution, some years ago, of the clause relating to the attendance at the district school of a child or children for eight weeks in place of a clause requiring the payment of a rate bill, the above statutory provisions, as to qualifications of voters at school meetings, have been in operation ever since the adoption of the Constitution of 1846. And the constitutional provisions, cited above, have been substantially as they are now, during the same period, except that in the year 1874 the words "and upon all questions which may be submitted to the vote of the people" were inserted by amendment.

It will be observed by comparing the statutory requirements as to qualifications of voters at school meetings with the constitutional definition of the qualifi-

cations of electors, that they differ materially in several important particulars, aside from the matter of sex.

For instance, the Constitution requires of the electors citizenship for ten days, inhabitancy in the State one year, residence in the county four months and in the election district thirty days. None of these conditions are essential under the statute. Under its provisions, in one of the contingencies specified, a person may be a voter at school meetings without citizenship, and without inhabitancy or residence other than at the time of voting.

In certain contingencies named the statute imposes a property qualification which the Constitution does not. In another it formerly required payment of a rate bill, and now certain attendance at school, as to which the Constitution is silent. If the statute is unconstitutional for the reason that it conflicts with that instrument in respect to the qualifications as to sex, by the same argument it has been unconstitutional for the last thirty-seven years, by reason of the conflict with the Constitution in the several other particulars above referred to. And, in fact, there has been no time since the adoption of the first Constitution, in the year 1777, when the statutory provision prescribing the qualifications of voters at school meetings did not differ materially from the provisions of the existing Constitution prescribing the qualifications of voters at elections.

Of course this line of argument is by no means conclusive, but it is a circumstance of some weight, in the consideration of the question in hand, that while for more than half a century, at least, the State has been divided into school districts numbering from seven to twelve thousand, with usually one annual and several school meetings in each district each year, at which the voting for school officers and upon measures involving local taxation as well as upon a great variety of other measures of interest to the district inhabitants, has been proceeding under the regulation as to qualifications of voters prescribed by those school statutes, and while the multitude of school district dissensions arising out of the proceedings of such meetings have resulted in numerous litigations in which the courts have often been called upon to interpret these statutes, yet no case appears upon the records of the courts upon which the question of the unconstitutionality of these statutory provisions by reason of these divergences from the constitutional provisions has been distinctly raised and judicially decided.

It is regarded as appropriate and as a matter entitled to careful consideration, in construing the words of the Constitution, to look back at the situation of the country and its existing institutions and systems at the time and anterior to the time of its adoption. (Potter's Dwarris, 657.)

At the time of the adoption of the Constitution of 1846, and for years anterior thereto, there had been in existence in the State, a general common school system, under which the State was divided into thousands of school districts, each of which had various well-defined powers exercised through the medium of district school meetings, and needful for the proper care and maintenance of the local schools and for the harmonious working of the system.

The qualifications of voters prescribed by the statute were such as were

considered best adapted for the peculiar character and needs of the system, and as before stated, varied essentially from the qualifications prescribed by the existing Constitution, for electors at ordinary elections.

At the same time, another system was and long had been in existence — the system of popular elections. Under this system and as an essential part of its machinery, the State had been divided into many thousands of election districts, at which the popular will was exercised, through the elective franchise, in the maintenance of civil government. The qualifications of electors were here also such as were deemed best adapted to the character, necessities and successful operation of the particular system.

These two systems with their dissimilar provisions as to the qualifications of voters, had for years been moving along together, *pari passu,* without jar or discord.

Referring again to the section of the Constitution in question, we find that the male citizen, having the other specified qualifications, and having been " for the last thirty days a resident of the election district in which he may offer his vote, shall be entitled to vote at such election in the election district of which he shall at the time be a resident, and not elsewhere."

The foregoing considerations induce me to the conclusion that the framers of the Constitution in the use here made of the words " election district," intended to refer solely to the election districts which had long been established throughout the State, under that designation, as an integral part of the machinery of popular elections, and that it has no reference or application to the established method of choosing school district officers or of voting upon other matters at school district meetings.

The objection to the constitutionality of the statutes, under the provisions of which women voted at the school meeting in question, must, therefore, be overruled.

3513

If the uniform ballot act does apply to school districts, and if the law had required that the vote in the present case should have been taken by ballot, and if said law as to uniformity of ballots had not been observed, the result would not, on that account, have been rendered void.

Any person who knowingly or wilfully violates, or attempts to violate, the statute relating to the uniformity of ballots, would be subject to a fine or imprisonment, but there is nothing in the law which would have set aside the results of an election held in violation of its provisions.

Decided August 4, 1886

Draper, *Superintendent*

This district, no. 3, town of Flushing, is operated under a special act. A special district meeting was called and held, at which it was voted to appropriate the sum of $7500 for the enlargement of the school building.

One of the appellants' objections to the regularity of this meeting, or its

proceedings, is to the ballot, on the ground that the provisions of chapter 367 of the Laws of 1880, commonly known as the "uniform ballot act," were not observed. The first section of this act is as follows:

Section 1 At all elections hereafter held within the limits of this State, for the purpose of enabling electors to choose by ballot any officer or officers under the laws of this State, or of the United States, or to pass upon any amendments, law or public act or proposition submitted to the electors to vote by ballot under any law, each and all ballots used at any such election shall be upon plain, white printing paper, and without any impression, device, mark or other peculiarity whatsoever upon or about them to distinguish one ballot from another in appearance, except the names of the several candidates, and they shall be printed in plain black ink.

It is conceded by the respondents that the ballots used were not in compliance with the provisions of this act. They varied in color, in size; they were without the prescribed captions and they were not printed in the prescribed size of type.

Whether or not it was the intention of the Legislature that the provisions of the uniform ballot act should apply at elections held at school meetings, is a question which is by no means free from doubt. It is not necessary to determine that question, however, in order to dispose of the present case. Section 1 of the uniform ballot act, above set forth, limits the operation of that act to cases where an officer is to be elected or an act or a proposition to be determined is "submitted to the electors to vote by ballot *under any law.*" There is nothing in the provisions of the statutes governing this meeting which requires that the question at issue should be determined by ballot. It was only required by the board of education that they "shall submit the same to the electors of said district at an annual or at a special meeting to be called for that purpose." It is true that section 3 of the special act, as amended, does provide that "all elections shall be by ballot," but this unquestionably refers to elections for members of the board of education, and I can see no requirement of the statute which necessitated the taking of the vote in this instance by ballot, however proper and perhaps desirable that it should be done in that way. Furthermore, if the uniform ballot act does apply to school districts, and if the law had required that the vote in the present case should have been taken by ballot, and if said law as to uniformity of ballots had not been observed the result would not on that account have been rendered void. Any person who knowingly or wilfully violates, or attempts to violate, the statute relating to the uniformity of ballots would be subject to a fine or imprisonment, but there is nothing in the law which would have set aside the results of an election held in violation of its provisions.

The objection that the result of the balloting was not announced by the inspectors, but rather by the president of the board of education, has no force. They canvassed the vote and made and signed a certificate of the result and

passed it to the president of the board, who announced the result in their presence and at the proper time, and the act must be deemed to have been their own act.

The fifth objection, that the question is not within the jurisdiction of the Superintendent of Public Instruction, can not be sustained. It was undoubtedly the intention of the Legislature to permit this district to operate its schools upon a system peculiarly its own; but to concede that it was thereby removed from the supervision of the State authorities would be destructive of the educational system of the State. The action appealed from affirmed.

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If a schoolhouse has been condemned by a school commissioner and no appeal has been taken from his action, the building is no longer a schoolhouse within the meaning of that term as used in the Consolidated School Law (5076, 5074) 858, 861

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Where the use of a schoolhouse is for any other purposes than a school, or for holding school meetings, and where such use interferes with the use of the building for school purposes, or where the property is injured, or where difference of opinion among the qualified voters of the district as to such use exists, it is the duty of the State Superintendent to observe and enforce the law strictly in relation thereto (4653).... 880

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The action of a district meeting in designating a site will not be set aside on the mere allegation that the purchase price of such site is excessive. A site is worth as much for school purposes as it would be worth for manufacturing or other purposes (5209) 911

A site is not legally designated unless a resolution is adopted describing the boundaries of such site in metes and bounds and the vote is taken by recording the ayes and noes (5189) 914

The action of a meeting in designating a site so far from the center of the district as to operate as a hardship to a portion of the children and to interfere with their regular attendance, will be vacated (5270) 915

The site for a schoolhouse in a populous district rapidily developing and increasing in population should be selected so as to equalize, so far as possible, the distance which pupils residing in all sections of the district will be required to travel (5234) 917

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School authorities are required to provide school buildings erected to meet the sanitary requirements so that the health of children shall not be in danger. They must be governed by the same principle in selecting sites. If the site selected subjects children to undue risks, it is an improper one and the district should not erect a new building thereon (5186) 921

An appeal in which the law relating to the designation of sites is generally determined, including the accessibility of site, notice of meeting, consent of school commissioner, description of, etc. (5455) 923

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An appeal which describes fully the notice of meetings called for the purpose of designating a site and the form of resolution which must be adopted thereat (5073½) 928

The Department will not enjoin trustees from proceeding to erect a new building upon an old site in order to afford time to work up sentiment for a change of site (3525) 232

When trustees purchase a site designated by the district, an appeal from their action will not lie. Such appeal should have been brought from the action of the district meeting 933

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Until a new site has been designated, a supervisor or school commissioner is not bound to consent to a change of site. A mere resolution in favor of the purchase of a site is insufficient (3681) 935

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An appeal in which it was held that a notice which did not specify the amount which would be raised for the purchase of a site and the amount for the schoolhouse in separate items was sufficient (3639) 949

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The action of a district meeting in selecting a site will be vacated when it clearly appears that a majority of the inhabitants present and voting against the selection of the site and when it further appears that the site was not sufficiently described (3779) 957

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The Department will not be justified in vacating the action of a large majority of the voters of a district in designating a site, unless it appears clear that such majority acted contrary to the interests of the district. In rural school districts some of the children must be farther from the schoolhouse than others and thus be inconvenienced by the longer distance (4319) 961

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